VOTING RIGHTS ACT: THE CONTINUING NEED FOR SECTION 5

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BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

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VOTING RIGHTS ACT: THE CONTINUING NEED FOR SECTION 5

TUESDAY, OCTOBER 25, 2005

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:00 p.m., in Room 2141, Rayburn House Office Building, the Honorable Steve Chabot (Chair of the Subcommittee) presiding.

Mr. CHABOT. The Committee will come to order. I want to thank everyone for being here this afternoon. This is the Subcommittee on the Constitution and it is the fourth in a series of hearings this Committee has been holding examining the impact and the effectiveness of the Voting Rights Act over recent years. This afternoon, the Committee will continue its examination of section 5 and the preclearance requirements it imposes on covered jurisdictions.

Again, I would like to thank all of my colleagues for taking the time to give our oversight responsibilities the time and effort that they deserve.

I might note that we did have two additional hearings scheduled for Thursday. It has come to my attention as a result of some scheduling conflicts and changes and difficulties, that those two hearings will not occur on Thursday and will in all likelihood be rescheduled for next week. And we will give further information as that becomes available.

This afternoon we will focus on the Supreme Court's interpretation of section 5's preclearance requirements and the retrogressive standard for whether a change submitted by a covered jurisdiction, quote, "has the purpose or effect of denying or abridging a citizen's right to vote on account of race, color, or language minority status," unquote.

In 1976, the Supreme Court in the case of *Beer v. United States* set forth the standard for evaluating section 5 preclearance submissions. Recognizing that Congress intended section 5 to ensure that the ability of minority groups to elect candidates of choice and to participate in the political process did not backslide, the Court held that only those changes that would not lead to a retrogression in the positioning of racial minorities with respect to their effective exercise of the electoral franchise could be precleared.

Subsequent decisions and enforcement actions conducted by the Department of Justice over the years have further defined retrogression, in the context of section 5, as quote, "a change in election law that results in an adverse effect on opportunities for a racial

group to participate in the political process," unquote. Such had been the standard until 2003, when the Supreme Court in *Georgia v. Ashcroft* deviated from this approach.

The *Georgia* decision, which we will discuss later in the week, is unclear when defining what changes are retrogressive under section 5. It is clear that minority voters have progressed in the political process under the protection of the Voting Rights Act. However, Congress, in enacting section 5, intended not only to enable minority voters to register and cast ballots but to see their candidates of choice elected.

During this hearing we will hear from our witnesses how minorities have made significant strides in the political process but yet how certain election or voting mechanisms that are submitted for preclearance under section 5 may dilute the full weight of the minority vote such to keep minorities from experiencing the full guarantee of the 15th amendment.

And, again, we look very much forward to hearing our distinguished panel this afternoon. I will yield back the balance of my time and I will at this point recognize the gentleman from New York, the Ranking Member of this Subcommittee, Mr. Nadler, for the purpose of making an opening statement.

Mr. NADLER. Thank you. I will be very brief in the opening statement. This is a continuation really of the hearing we started this morning on the continuing necessity for the section 5 preclearance requirements. We have heard this morning about some of the necessity. I assume we'll hear more from our witnesses now. And I look forward to hearing from those witnesses and to hearing a discussion of the effects on section 5 on some of these recent Supreme Court decisions and whether any action should be taken by——

Mr. CONYERS. Would the gentleman yield to me?

Mr. NADLER. Yes, I will.

Mr. CONYERS. And that will save me from trying to get 5 minutes. I wanted to associate myself with the remarks of the Chairman of the Subcommittee. I think he described this, as you did, quite appropriately.

And I also wanted to thank the Chairman and you for observing the moment of silence for the late Rosa Louise Parks, our Civil Rights leader, the mother of the Civil Rights movement, with whom I had the honor of being associated with for several decades.

And then I would put my statement in the record and thank the gentlemen for yielding to me.

Mr. NADLER. I thank the gentlemen. And now I will simply conclude by saying I look forward to hearing the testimony of the witnesses. And I yield back.

Mr. CHABOT. Thank you. And, without objection, the statement will be entered into the record.

Mr. CHABOT. Do any other Members of the Committee wish to make an opening statement this afternoon? If not, we will then proceed to the introduction of our witnesses. And again we want to thank all of you for being here this afternoon. And I might note that, without objection, all Members will have 5 legislative days to submit additional materials for the record.

Our first witness, will be Mr. Laughlin McDonald. Mr. McDonald has a long and distinguished career in voting rights litigation. He

is the Director of the ACLU's Voting Rights Project, and in this capacity Mr. McDonald has played a leading role in eradicating discriminatory election practices since the original Voting Rights Act was passed back in 1965.

Mr. McDonald also serves as the Executive Director of the Southern Regional Office of the ACLU, a position he has held since 1972. While at the Southern Regional Office, Mr. McDonald has won some of the most precedent-setting cases, including those that secured the principle of one person/one vote, ended the use of discriminatory at-large elections, and establishing the right of women to serve on juries.

Mr. McDonald's prior employment included membership on the faculty of the University of North Carolina. And he also practiced in a private law practice. We are honored to have you here with us this afternoon, Mr. McDonald.

Our second witness will be Mr. Robert Hunter, Junior. Mr. Hunter is a former chairman of the North Carolina Board of Elections and a partner in the law firm of Hunter, Higgins, Miles, Elam and Benjamin located in Greensboro, North Carolina.

Mr. Hunter has litigated a number of redistricting and voting rights cases, including serving as the original attorney for the intervenors in one of the landmark section 2 voting rights cases, *Gingles v. Thornburg.* We welcome you here, Mr. Hunter.

And I might like to very briefly recognize one of the other chairmen of the Judiciary Subcommittees, one of the strongest Members of the Judiciary Committee, Mr. Howard Coble. And Howard, I know that you have a long and distinguished association with Mr. Hunter. I don't know if you want to mention anything relative to that.

Mr. COBLE. Thank you, Mr. Chairman. And I will be very brief. What I am about to say may diminish Mr. Hunter's stature in the eyes of some of my colleagues. It was probably he, more than any other person, who convinced me to become a congressional candidate back in the dark ages. But it is good to be here, Mr. Chairman.

Mr. CHABOT. Without objection, the record will note the groans from the dias, all in good spirit I am sure.

Thank you, Mr. Chairman. We appreciate your kind words.

Our third witness will be Professor Ronald Keith Gaddie. Professor Gaddie is currently a professor of political science at the University of Oklahoma where he teaches research methods, southern politics, and electoral politics. In addition to teaching, Professor Gaddie serves as a litigation consultant in voting rights and redistricting cases, including those in Alabama, Georgia, Illinois, New Mexico, Oklahoma, South Dakota, Texas, Virginia, and Wisconsin. Professor Gaddie has written extensively on political reform, Southern politics, and voting. He is in the process of working on two books. And we welcome you here, Professor Gaddie.

Our fourth and final witness will be Dr. Richard Engstrom. Dr. Engstrom is a noted speaker in election systems and minority rights and has testified extensively in voting rights cases since the 1970's. He currently is a resource professor of political science and endowed professor of African Studies at the University of New Orleans. As I said to the former Mayor Marc Morial when he testified

before this Committee last week, our thoughts and prayers are with you and the other citizens of New Orleans in the trying times that you have had of late. And we thank you very much for being here and testifying today.

As I said, we have a very distinguished panel here this afternoon, and as I explained to the previous panel this morning, we have a lighting system here that helps us keep on track relative to how long you testify. We have what is called the 5-minute rule and the clocks will keep you on time there. It will be on for 4 minutes green. It will turn to yellow, let you know you have 1 minute to wrap up. When it goes red, that means your 5 minutes is up. We won't gavel you down immediately, but we would ask you to keep within that 5-minute time frame as much as possible.

It is also the practice of the Committee to swear in all witnesses appearing before it, so if you would not mind, if you could all please stand and raise your right hands.

[Witnesses sworn.]

Mr. CHABOT. All witnesses have indicated in the affirmative and we'll now hear from our first witness. Mr. McDonald you're now recognized for 5 minutes.

TESTIMONY OF LAUGHLIN McDONALD, DIRECTOR, ACLU VOTING RIGHTS PANEL

Mr. MCDONALD. Well, thank you very much, Mr. Chairman, for inviting me to appear and share my thoughts on the need to continue section 5 of the Voting Rights Act. As you might imagine, I have attended a number of conferences recently on the issue of extension of the Voting Rights Act, and I have been struck with the fact that invariably someone will say we don't need section 5 anymore because Bull Connor is dead. Well I've always found that to be simple-minded in the extreme. Bull Connor is dead, but so is Thomas Jefferson, so is George Washington, so is my own grandfather, so is William Tecumseh Sherman, so is William Shakespeare, and the list goes on and on. Simply because all of these people are dead, it does not mean that they are erased from memory and history, that their legacies no longer exist, that they do not influence the way we think and act. The past continues to inform the present.

There is, in fact, abundant modern-day evidence showing that section 5 is still needed in this country and that the right to vote is still in jeopardy. And one of those examples involves Charleston County, South Carolina, which prides itself on its aristocratic traditions and its civility. But in a 2004—not 1904—but in a 2004 opinion, the 4th Circuit Court of Appeals unanimously affirmed a decision in the District Court invalidating Charleston County's at-large elections on the grounds that evidence presented by the parties supports the district court's conclusion that voting in Charleston County council elections is severely and characteristically polarized along racial lines. And it noted the rarity with which Blacks were elected to office of the county council, and that disproportionately few minorities had ever won any of the at-large elections in Charleston County.

And the factors contributing to minority vote dilution found by the District Court included—and these are quotes—"the ongoing

racial separation that exists, socially, economically, religiously, in housing, in business patterns, which makes it especially difficult for African-Americans to get votes from non-African-American voters."

And this is another quote: "Significant evidence of intimidation and harassment of Blacks at the polls during the 1980's and 1990's and even as late as the 2000 general elections." And the court also found that there was evidence of subtle or overt racial appeals in campaigns. And one of the recurring examples of that was that White candidates would take out photographs, which they would run in the newspaper of their Black opponents, and they would darken their features to call attention to their race.

After that decision was handed down by the district court invalidating that at-large system, the Legislature enacted the identical method of elections for the County Board of Education now, despite the fact that it had been held to dilute minority strength in violation of section 2. They, of course, had to submit that for preclearance to the Department of Justice, and the Department of Justice concluded that the proposed change would significantly impair the present ability of minority voters to elect candidates of choice to the school board, and they rejected it.

I would also call to the panel's attention a decision of a three-judge court that was issued in 2002 which involved statewide redistricting. There was a deadlock between the Governor and the Legislature. They couldn't enact a plan. There were several lawsuits filed asking the court to draw a plan. The Court held a lengthy hearing and drew its own plan. And here is one of the things the Court found. And the judges who were on that panel were, all three, South Carolinians—Judge William Traxler, Judge Matthew Perry, and Judge Joe Anderson. And they noted—and this is a quote: "The disturbing fact of racially polarized voting has seen little change in the last decade. Voting in South Carolina continues to be racially polarized to a very high degree in all regions of the State. And in both primary and general elections statewide, Black citizens are a highly politically cohesive group, and Whites engage in significant White bloc voting."

Let me jump now to Indian country. There are hundreds of examples I could give. The time dictates that I only give one or two. As a result of the 1975 amendments of the Voting Rights Act, two counties in South Dakota, Todd and Shannon, which are home to the Pineridge and Rosebud Indian reservations, a large Sioux Indian population, became covered by section 5. Well, William Janklow at that time was the Attorney General of South Dakota. And he was outraged over the extension of section 5 to his State. In fact, he wrote a formal opinion to the South Dakota Secretary of State. He derided the 1975 law as a, "facial absurdity." He was confident that it would be declared unconstitutional by the courts; but in the meantime he instructed the Secretary of State not to comply with section 5, and the Secretary of State in fact did not. There were more than 600 voting changes that were enacted and were not precleared under section 5.

Which, can I just close by saying——

Mr. CHABOT. If you could summarize.

Mr. MCDONALD. —that the other important reason we need section 5 is the deterrent effects. It is applied almost universally by the courts when they implement court-ordered plans. And in fact we are doing a number of reports. I have written a piece about voting rights in South Dakota which is in the American Indian Law Journal. I have also written a chapter for a book about all the litigation in Indian country that I could possibly find.

And our office, which has done more than 300 lawsuits in the South and elsewhere since 1982, and we are preparing a report for that I want to share that with the Committee, because these three examples I have given you are the proverbial tip of the iceberg.

Mr. CHABOT. If you would like to, you can refer those to the record, the actual documents themselves, and we will accept those into the record. Thank you very much Mr. McDonald.

[The prepared statement of Mr. McDonald follows:]

PREPARED STATEMENT OF LAUGHLIN MCDONALD

Testimony of
Laughlin McDonald
Director, Voting Rights Project
American Civil Liberties Union, Fnd.

Before the House Committee on the Judiciary
Subcommittee on the Constitution

The Voting Rights Act: The Continuing Need for Section 5

Tuesday, October 25, 2005

I appreciate the opportunity to appear before you today and share my views on the need for Congress to extend Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.

I have attended a number of conferences recently on the Voting Rights Act and the special provisions that are scheduled to expire in 2007. Invariably someone will make the comment, "we don't need Section 5 anymore because Bull Connor is dead." I have always found such statements to be simpleminded in the extreme. Bull Connor is dead, but so is Thomas Jefferson. So is George Washington. So is my grandfather. So is William Tecumseh Sherman. So is William Shakespeare, and the list goes on and on. Simply because all of these people are dead, it does not mean that they are erased from memory and history, that their legacies no longer exist, that they do not influence the way we think and act. The past continues to inform the present.

Recent voting rights litigation throughout the South and in Indian Country, as well as Court findings of widespread and systematic discrimination against minority voters underscores the need for continuing Section 5, the preclearance provision of the Voting Rights Act.

Section 5 of the Act requires certain jurisdictions with a history of discrimination to obtain approval or "preclearance" from the U.S. Department of Justice or the U.S. District Court in D.C. before they can put into effect any changes to voting practices or procedures. Under the statute, federal approval requires proof that the proposed change is not retrogressive, i.e. does not have a discriminatory purpose and "will not have the effect of "denying or abridging the right to vote on account of race or color."[1] One of the reasons Section 5 is such an effective tool for preventing discrimination is it allows harmful voting laws and practices to be evaluated and rejected before they can take effect. The Supreme Court acknowledged that Section 5 was an "uncommon exercise of

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1 42 U.S.C. §1973c.

congressional power", but found that it was justified by the exceptional history of voting discrimination in the covered jurisdictions.[2]

While progress has been made toward the inclusion of minority voters in the American political process, a careful review of the Section 5 covered jurisdictions reveal that discrimination in voting continues and the need for Section 5 remains. Public officials in covered states continue to adopt election laws and procedures that deny minorities' equal access to the political process. As recently as last year, a federal court determined that South Dakota discriminated against Native-American voters by packing them into a single district to remove their ability to elect a second representative of their choice to the state legislature. Bone Shirt v. Hazeltine, 336 F. Supp. 2nd 976 (D.S.D. 2004). Unfortunately, South Dakota is not an anomaly; there are countless other examples of attempts to disfranchise minority voters and to dilute minority voting strength in Section 5 covered jurisdictions.

Minority Vote Dilution in South Carolina

A. Charleston County Council

There is abundant, modern day evidence showing Section 5 is still needed to protect the equal right to vote of minorities in the covered jurisdictions. Charleston County, South Carolina, which prides itself on its aristocratic traditions and civility is a case in point. In a 2004 opinion, the Fourth Circuit Court of Appeals unanimously affirmed a decision of the district court invalidating at-large elections for the Charleston County Council. The court of appeals found that "evidence presented by both parties supported the district court's conclusion 'that voting in Charleston County Council elections is severely and characteristically polarized along racial lines.'" United States v. Charleston County, 365 F.3d 341, 350 (4th Cir. 2004). The court of appeals further noted "the rarity with which minorities are elected is not unique to the County Council; disproportionately few minorities have ever won any of the at-large elections in Charleston County." Id.

Following the election of several black candidates to the nine member Charleston County school board in 2000, the county legislative delegation, in what the district court described as an "episode[ ] of racial discrimination against African-American citizens attempting to participate in the local political process," tried to change the method of elections to the system used by the County Council and to limit the board's fiscal authority. These voting changes would have made it more difficult for African

2 *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966).

American voters to elect their candidate of choice. The measures were passed by the legislature but were vetoed by the governor. After the 2002 elections, only one African-American remained on the school board. United States v. Charleston County, 316 F.Supp.2d 268, 280, 286 n.23 (D.S.C. 2003).

Other factors contributing to minority vote dilution found by the courts included: "fewer financial resources" available to minority candidates to finance campaigns; "past discrimination that has hindered the present ability of minorities to vote or to participate equally in the political process;" "[t]he on-going racial separation that exists in Charleston County-socially, economically, religiously, in housing and business patterns-[which] makes it especially difficult for African-American candidates seeking county-wide office to reach out to and communicate with the predominantly white electorate;" "significant evidence of intimidation and harassment" of blacks "at the polls during the 1980s and 1990s and even as late as the 2000 general election;" and "incidents of subtle or overt racial appeals" in campaigns, such as white candidates distributing darkened photos of their black opponents to call attention to their race. United States v. Charleston County, 365 F.3d at 351-53; 316 F.Supp.2d at 286 n.23, 294-95.

B. Charleston County School District

In 2003, the state legislature once again enacted, and this time the governor signed, legislation adopting the identical method of elections for the Board of Trustees of the Charleston County School District that had earlier been found in the county council case to dilute minority voting strength in violation of Section 2 of the Voting Rights Act. Under the pre-existing system, elections for the school board were non-partisan, which allowed minority voters the opportunity to "bullet vote" and elect candidates of their choice in multi-seat contests. That possibility would have been effectively eliminated under the proposed new partisan system.

In denying preclearance to the county's submission, the Department of Justice concluded that "[t]he proposed change would significantly impair the present ability of minority voters to elect candidates of choice to the school board and to participate fully in the political process." It noted further that:

> every black member of the Charleston County delegation voted against the proposed change, some specifically citing the retrogressive nature of the change. Our investigation also reveals that the retrogressive nature of this change is not only recognized by black members of the delegation, but is recognized by other citizens in Charleston County, both elected and unelected.

R. Alexander Acosta, Assistant Attorney General, to C. Havird Jones, Jr., February 26, 2004.

Section 5 thus prevented Charleston County from implementing a new and retrogressive voting practice, one which everyone understood was adopted to dilute black voting strength and insure white control of the school board. It also prevented the need for an expensive and time consuming lawsuit seeking to invalidate the new method of elections under Section 2.

C. Statewide Redistricting in South Carolina

Statewide redistricting in South Carolina following the 2000 census provides another modern day example of the continuing racial polarization that characterizes the political process in the state. Racial polarization occurs when majority voters, by bloc voting for its candidates in a series of elections, systematically prevents an ethnic minority from electing most or all of its preferred candidates. The consequences of racial polarization can be devastating because it can deprive minority communities of a committed advocate in councils of governments. In so doing, it impacts the allocation of resources for essential public services such as libraries, schools, public safety, commercial development affordable housing, and public transportation.

In 2002, a three-judge court, after a reapportionment deadlock by the state legislature and the governor, implemented a court ordered redistricting plan for the state's house, senate, and congressional delegation. The court, which consisted of three South Carolinians (Judges Traxler, Perry, and Anderson), noted that the:

> disturbing fact [of racially polarized voting] has seen little change in the last decade. Voting in South Carolina continues to be racially polarized to a very high degree, in all regions of the state and in both primary and general elections. Statewide, black citizens generally are a highly politically cohesive group and whites engage in significant white-bloc voting.

Colleton County Council v. McConnell, 201 F.Supp.2d 618, 641 (D.S.C. 2002).

The three-judge court took special note that the governor and the legislature "have proposed plans that are primarily driven by policy choices designed to effect their particular partisan goals." Id. at 628, 659. Those choices included protecting incumbents and assigning the minority population to maximize the parties' respective political opportunities.

Minority Vote Dilution In Georgia

A. The Switch to At-Large Voting

Following passage of the Voting Rights Act and its several amendments, which resulted in increased black registration and political participation, a number of jurisdictions which used district elections switched to holding their elections at-large. The Supreme Court has noted the potential for discrimination inherent in at-large voting and why its adoption is subject to scrutiny under Section 5:

> 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. This type of change could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting.

Allen v. State Board of Elections, 393 U.S. 544, 569 (1969).

From 1974 to 1993, more than 100 lawsuits were brought against no fewer than 40 cities (in 41 lawsuits) and 62 counties (in 67 law suits) in Georgia alone, challenging at-large election plans as discriminatory violations of either the constitution, the Voting Rights Act, or both. Of the 108 lawsuits during this 19 year period in Georgia, more than three-quarters (72) were not resolved until 1983 or later. Of these 72 cases, all but approximately five were resolved by the creation of single member districts, which allowed blacks the opportunity to elect candidates of their choice. The persistence of at-large voting schemes as a mechanism to dilute minority votes well into the 1980s and 1990s is a testament to the continued need for Section 5, as well as the wisdom of Congress in reauthorizating the special provisions in 1982.

Minority Vote Dilution in South Dakota

Let me cite a present day example from Indian Country that supports the extension of Section 5. As a result of the 1975 amendments of the Voting Rights Act, two counties in South Dakota, Shannon and Todd, which are home to the Pine Ridge and Rosebud Indian Reservations, respectively, became subject to Section 5 preclearance. 41 Fed. Reg. 784 (Jan. 5, 1976). Eight counties in the state, because of their significant Indian populations, were also required to conduct bilingual elections--Todd, Shannon, Bennett, Charles Mix, Corson, Lyman, Mellette, and Washabaugh. 41 Fed.Reg. 30002 (July 20, 1976).

William Janklow, the Attorney General of South Dakota, was outraged over the extension of Section 5 and the bilingual election requirement to his state. In a formal opinion addressed to the South Dakota secretary of state, he derided the 1975 amendments to the Voting Rights Act as a "facial absurdity." Borrowing the States' Rights rhetoric of southern politicians who opposed the modern civil rights movement, he condemned the Voting Rights Act as an unconstitutional federal encroachment that rendered state power "almost meaningless." He quoted with approval Justice Hugo Black's famous dissent in South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966) (which held the basic provisions of the Voting Rights Act constitutional), that Section 5 treated covered jurisdictions as "little more than conquered provinces." Janklow expressed the hope that Congress would soon repeal "the Voting Rights Act currently plaguing South Dakota." In the meantime, he advised the secretary of state not to comply with the preclearance requirement. "I see no need," he said, "to proceed with undue speed to subject our State's laws to a 'one-man veto' by the United States Attorney General." 1977 S.D. Op. Atty. Gen. 175; 1977 WL 36011 (S.D.A.G.).

Although the 1975 amendments were never in fact repealed, state officials followed Janklow's advice and essentially ignored the preclearance requirement. From the date of its official coverage in 1976 until 2002, South Dakota enacted more than 600 statutes and regulations having an effect on elections or voting in Shannon and Todd Counties, but submitted fewer than ten for preclearance. The state did not begin meaningful compliance with Section 5 until they were sued by tribal members, represented by the ACLU, in 2002. Following negotiations among the parties, the court entered a consent order in which it directed the state to develop a comprehensive plan "that will promptly bring the State into full compliance with its obligations under Section 5." Quick Bear Quiver v. Hazeltine, Civ. No. 02-5069 (D.S.D. December 27, 2002), slip op. at 3. The state made its first submission in April 2003, and thus began a process that is expected to take up to three years to complete.

Because of Section 5 private plaintiffs were able bring a lawsuit against South Dakota in order to compel the state to comply with the Voting Rights Act.

The Deterrent Effect of Section 5

There are also those who say we no longer need Section 5 because there are few objections. That argument overlooks the deterrent effect of preclearance. Just this year, in 2005, the Georgia legislature redrew its congressional districts, but before

doing so it adopted resolutions providing that it must comply with the non-retrogression standard of Section 5. The plans that it drew maintained the black voting age population in the two majority black districts (represented by John Lewis and Cynthia McKinney) at almost exactly their pre-existing levels, and it did the same for the two other districts (represented by Sanford Bishop and David Scott) that had elected black members of congress. There was no objection by the Department of Justice when the plan was submitted for preclearance. That does not mean that Section 5 did not play a critical role in the redistricting process. Rather, it means that Section 5 likely encouraged the legislature to ensure that any voting changes would not have a discriminatory effect on minority voters.

The Application of Section 5 by the Courts

Section 5 also continues in importance because it is applied by the federal courts. The three-judge court in Colleton County Council v. McConnell, the litigation filed after the governor and the legislature in South Carolina deadlocked over redistricting in 2001, concluded that it was obligated to comply with Sections 2 and 5 of the Voting Rights Act and proceeded to draw plans that maintained the state's existing majority black congressional district and actually increased the number of majority black house and senate districts. Id. at 655-56, 661, 666. The governor had argued that districts with black populations as low as 44.61% provided black voters an equal opportunity to elect candidates of their choice within the meaning of the Voting Rights Act. The court disagreed. Noting the "high level of racial polarization in the voting process in South Carolina," it concluded that "a majority-minority or very near majority-minority black voting age population in each district remains a minimum requirement." Id. at 643 and n.22.

In Mississippi, which lost a congressional seat as a result of the 2000 census, both the state court and the federal court became involved in the redistricting process and drew plans relying upon the non-retrogression standard of Section 5 which maintained one of the districts as majority black. Smith v. Clark, 189 F.Supp.2d 529, 535, 540 (S.D.Miss. 2002).

In Larios v. Cox, 314 F.Supp.2d 1357, 1360 (N.D.Ga. 2004), in implementing court ordered redistricting for the Georgia house and senate to remedy a one person, one vote violation, the court held that complying with the population equality standard was "a paramount concern in redrawing the maps." Next in importance was "to insure full compliance with the Voting Rights Act."

The district court in South Dakota adopted a court ordered plan for the house and senate this year (2005) to cure a Section 2 violation in a vote dilution suit by Native Americans. In creating new majority Indian districts, the court held that it had adhered to the state's "redistricting principles," which included "protection of minority voting rights consistent with the United States Constitution, the South Dakota Constitution, and federal statutes." Bone Shirt v. Hazeltine, CIV. 01-3032-KES (D.S.D. Aug. 18, 2005), slip op. at 12-3.

Following the 2000 census, the city of Albany, Georgia, adopted a new redistricting plan for its mayor and commission to replace an existing malapportioned plan, but it was rejected by the Department of Justice under Section 5. The department noted that while the black population had steadily increased in Ward 4 over the past two decades, subsequent redistrictings had decreased the black population "in order to forestall the creation of a majority black district." The letter concluded that it was "implicit" that "the proposed plan was designed with the purpose to limit and retrogress the increased black voting strength in Ward 4, as well as in the city as a whole." J. Michael Wiggins, Acting Assistant Attorney General, to Al Grieshaber, Jr., City Attorney, September 23, 2002.

In June 2003, the city submitted a second redistricting plan to the Department of Justice for preclearance. In response, the department requested additional information to enable it to make a determination whether the plan complied with Section 5. In light of the pendency of a municipal election in November 2003, the city notified the department that it was withdrawing its submitted plan, and that the upcoming election would be held under the existing 1990 plan, despite the fact that it contained an unconstitutional deviation among districts of 53%.

Black residents of the city, represented by the ACLU, brought suit to enjoin further use of the malapportioned plan, and requested the court to supervise the construction and implementation of a remedial plan that complied with one person, one vote and the Voting Rights Act. In a series of subsequent orders, the court granted the plaintiffs' motion for summary judgment, enjoined the pending elections, adopted a remedial plan prepared by the state reapportionment office, and directed that a special election for the mayor and city commission by held in February 2004. The court emphasized that "[i]n drawing or adopting redistricting plans, the Court must also comply with Sections 2 and 5 of the Voting Rights Act." Under the court ordered plan, blacks were 50% of the population of Ward 4, and a substantial majority in four of the other wards. Wright v. City of Albany, Georgia, 306

F.Supp.2d 1228, 1235, 1238 (M.D.Ga. 2003), and Order of December 30, 2003. But for Section 5, elections would have gone forward under a plan in which purposeful discrimination was "implicit," and which could only have been challenged in time consuming vote dilution litigation in which the minority plaintiffs would have borne the burden of proof and expense.

Conclusion

These cases from South Carolina, Georgia, Mississippi, and South Dakota are the proverbial tip of the iceberg. I would like to submit for the record an article I wrote that was published this year by the American Indian Law Review on voting rights litigation in South Dakota since the 1982 extension and amendment of the Voting Rights Act. Laughlin McDonald, "The Voting Rights Act in Indian Country: South Dakota, A Case Study," 29 Amer. Ind. L. Rev. 43 (2004-2005). I have also written a chapter on modern voting rights litigation throughout Indian country for a book scheduled to be published by the Russell Sage Foundation.

The continuing voting rights violations throughout the Section 5 covered jurisdictions, the deterrent of Section 5, as well as the role the Courts have played in thwarting attempts to diminish minority voting strength underscores the continuing need for the extension of Section 5 of the Voting Rights Act. We at the ACLU are preparing a report on the voting rights litigation in which we have been involved since the 1982 extension of the Voting Rights Act, amounting to some 300 cases. We will, of course, share all of these reports with this committee and are confident they will help make the case for the extension of Section 5.

Mr. CHABOT. Mr. Hunter you're recognized for 5 minutes.

TESTIMONY OF ROBERT HUNTER, VOTING RIGHTS LITIGATOR, HUNTER, HIGGINS, MILES, ELAM AND BENJAMIN, P.L.L.C.

Mr. HUNTER. Thank you. Thank you, Mr. Chairman, Mr. Nadler, Members of the Committee, thank you and the Subcommittee for inviting me to speak on the topic of reauthorization of section 5 of the Voting Rights Act.

Since 1982 I have been involved in litigation in North Carolina, South Carolina, Virginia, and Florida in redistricting and election law issues implementing the Voting Rights Act. I believe that my comments can be made most useful in the context of the most recent redistricting efforts in the Southeast, particularly in North and South Carolina.

In the 2000 North Carolina redistricting cycle, I served as counsel to the North Carolina Republican Party plaintiffs in challenging the State legislative redistricting plan in State court. In the 2000 cycle in South Carolina, I served as counsel to the Senate Republican defendants in a suit which drafted a court-ordered plan for South Carolina elections.

Now, the purpose of the hearing today is to talk about proof of discriminatory purpose or effect. In my view, the proof of discriminatory purpose or effect was easily understood by most voting rights practitioners in this field during the 1980's and 1990's. However, the meaning of these terms has been modified by thee recent Supreme Court decisions: State of *Georgia v. Ashcroft*; *Reno v. Bossier Parish School Board I*; and *Bossier Parish School Board II*.

As a practical matter, the effect of most of these Supreme Court decisions was the elimination of section 2 analysis by the Attorney General and to eviscerate the "intent" or "purpose" prong of the *Beer* standard. The majority of the Supreme Court substituted an effects test as the sole measure of retrogression. This change has been incorporated in the Department of Justice regulations implementing the act, CFR 51.54 "discriminatory effect."

In reauthorizing section 5, it is evident to me that most, if not all, of the minority districts which have been drafted in redistricting plans throughout the South, are a result of the preventive effects of section 5 and the desire on the part of jurisdictions to avoid section 2 litigation. However, it is also clear to me, as shown both in North and South Carolina litigations this year, that political elements within the South would seek to retrogress or backslide in their obligations to be racially fair in making redistricting decisions in the absence of reauthorization of section 5.

The strongest example of this is in the Colleton County case, which Laughlin mentioned earlier, in South Carolina where the Governor vetoed redistricting plans and urged in lieu of effective minority district concentrations, weakened or bleached districts with minority voting age populations well below 45 percent in many areas. His expert witnesses urged these positions on the three-judge panel which properly rejected this idea.

However, the *Ashcroft* case in Georgia, the case in Virginia, and the case in North Carolina offer equally vivid examples of this flawed idea.

The focus of the congressional inquiry should be on the community whose voting strength is being given legal protection from purposeful or effective discrimination.

Where there is a systematic history of racially polarized voting and where without legal protection a minority community has not historically been able to consistently achieve constitutional parity with other racial groups, the group should be able to elect a candidate of its choice. Sharing that choice with non-group members is not equal opportunity but lessened opportunity.

The focus on legislative action after redistricting suffers from this same point. It does little good in my opinion to ask questions about what legislative power a particular incumbent may get after an election because that focus is on an individual incumbent and not on the community affected.

I realize this Committee faces a factual predicate for renewal of section 5 that its predecessors didn't face. I hope that you will examine the list of cases that have been brought successfully under section 2 in the South. But equally important is for this Committee to catalog those statutes which would spring to life if retrogression is not reauthorized.

In lieu of the Supreme Court approach as indicated in *Bossier I* and *II*, I hope the Committee would consider placing the *Garza v. County of Los Angeles* standard as a desirable purpose approach, which I do not believe would involve itself in the issues raised in *Ashcroft* and *Bossier I* and *Bossier II*. If that were the legal standard, then I think that we would be able to understand in a clear and sufficient way the "purpose" prong that Congress originally intended section 5 to implement.

I see that my time is over. Thank you very much.

Mr. CHABOT. Thank you.

[The prepared statement of Mr. Hunter follows:]

PREPARED STATEMENT OF ROBERT HUNTER

October 20, 2005

Honorable James Sensenbrenner
Chairman House Judiciary Committee
2138 Rayburn House Office Building
Washington, D.C. 20515

RE: Reauthorization of Section 5 of the Voting Rights Act of 1965

Dear Chairman Sensenbrenner,

Thank you and the Judiciary Committee for inviting me to speak on the topic of the re-authorization of Section 5 of the Voting Rights Act of 1965 ("VRA"). Since 1982, I have been principally involved in litigation in North Carolina, South Carolina, Virginia and Florida in redistricting and election law issues implementing the Voting Rights Act. A list of the cases in which I have participated is attached to my biography. I have also written a brief law review article entitled "Racial Gerrymandering and the Voting Rights Act in North Carolina" which was published in the Campbell Law Review (9 Camp. L.Rev 255, (1987), which I have previously supplied to counsel. I appreciate the invitation to appear and give my views.

In North Carolina we have recently formed an ad hoc group of election lawyers to informally discuss voting issues which arise in elections. This informal group consists of about 20 lawyers who regularly practice in the field of voting litigation. Last year when we met, I raised the issue of whether this bi-partisan group felt that re-authorization of Section 5 was still needed after 40 years of effort. The unanimous conclusion of both Republican and Democrat lawyers was that it is still needed, despite the tremendous advances which have been made in voter participation in the South. I agree with this conclusion and trust that the Congress will vote to approve re-authorization.

Your committee counsel, Kimberly Betz, has asked that I comment on some of the following issues:

> *The Supreme Court's interpretation of the Section 5 pre-clearance requirements - that a covered jurisdiction demonstrate that an election change "does not have the purpose or effect of denying or abridging a citizen's right to vote because of race, color, language or minority status" under a "retrogressive" standard before being legally enforceable. In particular, the hearing will look at what legal retrogression means; how it has been defined by the courts; how it is measured; what Section 5's retrogression standard has meant for covered jurisdictions and its minority citizens; what it means both in the future (especially with respect to redistricting, at-large voting schemes, and "influence" districts); and its effectiveness in ensuring that minorities have the ability to elect candidates of their choice and to participate in the political process, and that "backsliding" is prevented.*

I believe that my comments can be made most useful in the context of the most recent redistricting efforts in the Southeast – particularly in North and South Carolina. In 2000 North

Carolina I served as counsel to the North Carolina Republican Party Plaintiffs in challenging the state legislative redistricting plan. [1] In 2000 South Carolina I served as counsel to the State Senate Redistricting Defendants in a suit which drafted a court ordered plan for South Carolina elections.[2]

Section 5 freezes election practices or procedures in certain states until the new procedures have been subjected to review, either after an administrative review by the United States Attorney General, or after a lawsuit before the United States District Court for the District of Columbia. This means that voting changes in covered jurisdictions may not be used until that review has been obtained. North Carolina is a partially covered jurisdiction. South Carolina is a fully covered jurisdiction.

The standard for measurement of retrogression was first defined in *Beer vs. United States*, 425 U.S. 130, 140-142 (1976) and was defined by regulations published by the Attorney General and enforced by the Voting Rights Section. The statutory language of Section 5 required that a covered jurisdiction overcome a presumption of discrimination and show the Attorney General or a three judge panel in D.C., that a voting change did not have a discriminatory purpose or effect.

Proof of discriminatory purpose or effect was easily understood by most practitioners in this field during the 1980s and 1990s. However the meaning of these terms have been modified by three recent Supreme Court decisions: *State of Georgia v. Ashcroft*, 539 U.S. 461 (2003);. *Reno* v. *Bossier Parish School Board,* 528 U.S. 320 (2000) hereinafter (*Bossier I*), *Reno* v. *Bossier Parish School Board,* 520 U.S. 471 (1997)(hereinafter *Bossier II*).

As a practical matter, the effect of these most recent Supreme Court decisions was elimination Section 2 analysis by the Attorney General and eviscerate the "intent" or "purpose" prong of the *Beer* standard . The majority substituted an "effects" test as the sole measure of retrogression. This change has been incorporated in the Department of Justice regulations implementing the act, CFR 51.54 "Discriminatory effect." Will the change make members of a racial or language minority group worse off than they had been before the change with respect to their opportunity to exercise the electoral franchise effectively?

As determined by the Department of Justice, retrogression is measured by reference to a "benchmark" standard. In determining whether a submitted change is retrogressive, the Attorney General will normally compare the submitted change to the last legally enforceable voting practice or procedure in effect at the time of the submission. During the 1990's cycle of redistricting, the Voting Rights Department retrogression policy, together with Section 2 litigation efforts from private civil rights groups, greatly increased the number of electoral

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[1] Stephenson vs. Bartlett (*Stephenson I*), 355 N.C.354, 562 SE2d 377 (Apr.30, 2002); Stephenson vs. Bartlett (*Stephenson II*) 357 N.C. 301, 582 SE2d 247 (July 16, 2003) and Stephenson vs. Bartlett (*Stephenson III*) 358 NC 219, 595 SE2d 112(Apr.22, 2004)

[2] *Colleton County vs. McConnell*, 201 F.Supp.618 (2002)

districts from which black communities could have an equal opportunity to elect candidates of their choice. As my Law Review article points out, this aggressive enforcement led North Carolina from a position where less than 5 black legislators were elected in the late 1970's to where approximately 20 House members and 6 Senators were elected in 2000. This strong enforcement standard was made as a result of a clear congressional policy choice .

As Judge Dickson Phillips points out in his opinion in *Edminsten vs. Gingles*,[3] which interpreted for the first time the 1982 Amendments to the Voting Rights Act.:

> "In enacting amended Section 2, Congress made a deliberate political judgment that the time had come to apply the statute's remedial measures to *present conditions* of racial vote dilution that might be established in particular litigation; that national policy respecting minority voting rights could no longer await the securing of those rights by normal political processes, or by voluntary action of state and local governments, or by judicial remedies limited to proof of intentional racial discrimination. . . .
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> For courts applying Section 2, the significance of Congress's general rejection or

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[3] S.Rep. 97-417, *supra* note 10, at 193 (additional views of Senator Dole) (asserting purpose to eradicate "racial discrimination which ... still exists in the American electoral process"). In making that political judgment, Congress necessarily took into account and rejected as unfounded, or assumed as outweighed, several risks to fundamental political values that opponents of the amendment urged in committee deliberations and floor debate. Among these were the risk that the judicial remedy might actually be at odds with the judgment of significant elements in the racial minority; [FN17] the risk that creating "safe" black-majority single-member districts would perpetuate racial ghettos and racial polarization in voting behavior; [FN18] the risk that reliance upon the judicial remedy would supplant the normal, more healthy processes of acquiring political power by registration, voting and coalition building; [FN19] and the fundamental risk *357 that the recognition of "group voting rights" and the imposing of affirmative obligation upon government to secure those rights by race-conscious electoral mechanisms was alien to the American political tradition. [FN20]

FN17. *See Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary,* 97th Cong., 2d Sess. 542-46 (Feb. 1, 1982) (hereafter *Senate Hearings*) (prepared statement of Professor McManus, pointing to disagreements within black community leadership over relative virtues of local districting plans).

FN18. *See Subcommittee on the Constitution of the Senate Committee on the Judiciary,* 97th Cong., 2d Sess., Voting Rights Act, Report on S. 1992, at 42-43 (Comm.Print 1982) (hereafter *Subcommittee Report*), *reprinted in* S.Rep. No. 97-417, *supra* note 10, 107, 149 (asserting "detrimental consequence of establishing racial polarity in voting where none existed, or was merely episodic, and of establishing race as an accepted factor in the decision-making of elected officials"); *Subcommittee Report, supra,* at 45, *reprinted in*

S.Rep. No. 97-417, *supra* note 10, at 150 (asserting that amended Section 2 would aggravate segregated housing patterns by encouraging blacks to remain in safe black legislative districts).

FN19. *See Subcommittee Report, supra* note 18, at 43-44, *reprinted in* S.Rep. No. 97-417, *supra* note 10, at 149-50.

FN20. *See Senate Hearings, supra,* note 17, at 1351-54 (Feb. 12, 1982) (prepared statement of Professor Blumstein); *id.* at 509-10 (Jan. 28, 1982) (prepared statement of Professor Erler), *reprinted in* S.Rep. No. 97-417, *supra* note 10, at 147; *id.* at 231 (Jan. 27, 1982) (testimony of Professor Berns), *reprinted in* S.Rep. No. 97-417, *supra* note 10, at 147.

> assumption of these risks as a matter of political judgment is that they are not among the circumstances to be considered in determining whether a challenged electoral mechanism presently "results" in racial vote dilution, either as a new or perpetuated condition. If it does, the remedy follows, all risks to these values having been assessed and accepted by Congress. It is therefore irrelevant for courts applying amended Section 2 to speculate or to attempt to make findings as to whether a presently existing condition of racial vote dilution is likely in due course to be removed by normal political processes, or by affirmative acts of the affected government, or that some elements of the racial minority prefer to rely upon those processes rather than having the judicial remedy invoked.

It is unlikely that the Congress meant to implement an aggressive policy in the enforcement of Section 2 and have a different standard in its retrogression analysis of Section 5. I do not believe that was the Congressional intent. Put differently, the Voting Rights Act is intended to implement an intentional Congressional policy choice – creation of minority majority districts in which minority voters have an equal opportunity to elect a candidate of the choice. Congress did not ask the Justice Department nor the courts to measure "influence" or other intangibles, as desirable as the other intangibles maybe. A clear bright line test easily implemented and understood by states and municipalities is what was desired and implemented.

The importance of continued Section 5 enforcement is shown in the 2000 cycle of redistricting. In *Stephenson I,* Judge Knox Jenkins, a conservative democrat state superior court judge, found that the state legislature had failed follow Section 2 and Section 5 guidelines as well as the state constitutional limits in establishing legislative districts. In his remedial decisions, *Stephenson II* Judge Jenkins found the *Gingles* preconditions to exist in several areas of the state and created a court drawn plan adding minority districts in some areas and strengthening minority concentrations in others to correct or ameliorate the problems of racial polarization which he found present in the state legislative plans. Similarly In *Colleton County,* a three judge panel consisting of federal Circuit Judges William B.Traxler, Joseph F. Anderson and Mathew Perry, in South Carolina found as follows:

> "The history of racially polarized voting in South Carolina is long and well documented – so much so that in 1992 the parties in *Burton* stipulated that "since 1984 there is evidence of racially polarized voting in South Carolina." Burton, 793 F.Supp at 1357-58. The three-judge panel in *Smith* made a similar finding . . . . Smith, 946 F.Supp. At 1202-03... "In this case, the parties have presented substantial evidence that this disturbing fact has seen little change in the last decade. Voting in South Carolina continues to be racially polarized to a very high degree, in all regions of the state and in both primary and general elections....

In fact in all jurisdictions in which I have litigated, it would be difficult to find areas of a jurisdiction in which most of the *Gingles* preconditions do not exist and that most of the requirements of the "totality of the circumstances" do not also exist.

In reauthorizing Section 5, it is evident to me that most if not all of the minority districts which have been drafted are a result of the preventive effects of Section 5 and the desire on the part of jurisdictions to avoid Section 2 litigation. However it is also clear to me as shown in both

North and South Carolina litigations this year, that political elements within the South would seek to retrogress or backslide in the obligations to be racially fair in making redistricting decisions.

The 1990's voting rights litigation established a high benchmark in the total number of effective black minority districts in the South. Due to population trends, most of these minority districts suffered population losses over the decade. The residual population of the districts on census day is the measure of minority voting strength which must be maintained. It is against this benchmark that the 2000 redistricting legislation should be measured. However, the reductions in total population and in voting age population in many black communities in the Southeast were used by map drafters to reduce the effective black voting strength in many marginal districts. In addition, the growth in non-citizen minority populations in many parts of the South also allowed reductions in black voting strength to be reduced. It is in these districts (where a combination of out migration of black population and in migration of non-citizen populations) where much of reduction in effective black voting districts has occurred. In addition to the population trends, white democrat incumbents used a theory of "influence districts" to bleach minority districts and place black voters in surrounding white districts to insure the election of white democrat incumbents.

The strongest example is in the *Colleton County* case, where the Governor vetoed redistricting plans and urged in lieu of effective minority district concentrations weakened or bleached minority districts with minority voting age populations well below 45% in many areas. His expert witnesses urged these positions on the three judge panel which properly rejected this idea. *Colleton* at 556-664. However the *Aschcroft* case in Georgia provides equally as vivid examples of this flawed idea.

The focus of the Congressional inquiry should be on the community whose voting strength is being given legal protection from discrimination. Where there is a systematic history of racially polarized voting, and where without legal protection, a minority community has not historically been able to consistently achieve constitutional parity with other racial groups, then the group should be able to select a candidate of its choice. Sharing the choice with non group members is not equal opportunity but lessened opportunity.

Focus on legislative action after redistricting also suffers from this same point. Clearly politicians of whatever race, have mixed motives in legislative votes. Legislation is by its nature a trade-off. A legislator of whatever race may be willing to trade his vote in favor of a redistricting plan in which he is preserved and protected not to create other minority districts elsewhere. This leaves new or emerging minority communities without a political opportunity to elect a candidate of their own. Influence districts are not a remedy or an answer to this problem. In redistricting to require a black incumbent or emerging minority district community to voluntarily reduce their core constituency to improve the election chances of an adjoining white incumbent in return for "legislative" power later is not a choice which other racial communities or legislators are asked to make. Furthermore, it simply goes against incumbent self preservation to require one's most active supporters to be fractured or cracked.

North Carolina, a state where the legislature is controlled by white democrats, like

Georgia, provides another example of the use of influence districts. North Carolina's redistricting history in the 2000 cycle is complex in part due to state constitutional questions which were litigated during this cycle.[4] Chief among the issues, however is the impact of retrogression because in several districts the issue of the measurement and what constitutes retrogression became an important issue.

Following the release of the census information, North Carolina represented to the Justice Department that there were 20 House VRA districts with substantial black populations.[5] Most of the reduction in black voting strength comes in covered counties in eastern North Carolina where the historically rural black population resides.

In the initial draft of legislative districts, the General Assembly created 21 districts which they contended were "effective" minority districts. Large losses in depopulated districts were made up by putting white "Republican" voters in these black districts. The plan also contained three districts, with a population of at least forty percent (40%), which would "afford black voters a strong likelihood of being a dominant force able to elect representatives of their choice." *Id.* District 18 (Brunswick, Columbus, New Hanover, and Pender) 44.00%; District 29 (Durham) 40.22%; District 72 (Forsyth) 45.16%. The State, in its preclearance submissions, argued that District 87, while having a black population of 29.86% and having never elected a black representative, was one of the twenty one districts that has a black majority of . . . voters who are registered Democrats, . . . [and thus,] black voters have the potential to control the Democratic Primary. *Id.* In sum, in the submissions to the Department of Justice, the state argued that black percentages of less than 50% but more than 40% in some cases established "effective black districts" because of the "black percentage of Democrat primary electorate and the success of Democratic nominees in general elections regardless of race."[6] Amazingly this plan was precleared under the relaxed standards of *Bossier I or II,* even through competing plans introduced in the legislature had fairly drawn alternatives which had greater concentrations of minority voters and met redistricting criteria.

The effect of these plans was evident. For example, in Pitt County, North Carolina, House District 8, a white incumbent has been able to remain her legislative position because of low percentages of black population included in the districts, notwithstanding the fact that sufficient black population exists in Pitt County to create a district in which the black community could nominate and elect a candidate of its choice. White candidates continue to represent this district, although it is clear that alternatives to this district could have produced a district in

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[4] *Stephenson v. Bartlett,* 122 S. Ct. 1751, 70 U.S.L.W. 3709 (2002) (Rehnquist, C.J., In Chambers); *Stephenson v. Bartlett,* 180 F. Supp.2d 779 (E.D.N.C. 2001), *appeal dismissed* (4th Cir. 2002) *Sample vs. Jenkins* Case No. 5:02CV383 and *Stephenson v. Bartlett,* 355 N.C. 354, 562 S.E.2d 377 (2002) (*"Stephenson I"*) and *Stephenson v. Bartlett,* 357 N.C. 301, 582 S.E.2d 247 (2003) (*"Stephenson II"*).

[5] See Preclearance Submission for Sutton 3 - 2001 House Redistricting Plan (undated), H-27N Effect of Adoption of Sutton 3 on Minority Voters.

[6] Preclearance Submission for Sutton 3 - 2001 House Redistricting Plan (undated) H-27N Effect of Adoption of Sutton 3 on Minority Voters.

which the black community could nominate and elect a candidate of their choice.

Comparing the treatment of the legislature with that of the state court is useful to show that intent to retrogress still exists in the legislative bodies throughout the South when it is useful for partisan political ends. Sutton 3 (*infra*), was found to be unconstitutional on state constitutional grounds. Subsequently the state court was able to draw a 23 seat minority district plan by strengthening existing black concentrations and creating an additional VRA district in in Wake County. For example, the court plan also reconfigured VRA districts in Guilford to apply with traditional redistricting principles. Districts 33 (48.59%) and 38 (45.61%) in Wake County were created to ensure compliance with federal law. In Guilford County, VRA District 58 was reconfigured with a total black population of 57.69% and District 60 with a total black population of 59.95%. In District 18, the court increased the total black population to 46.99%. This created a total of approximately 23 VRA districts. The court's interim districts were precleared on July 12, 2002. These districts were utilized in the election of 2002.

After the November 2002 elections, the General Assembly declined to draft districts in its regular session and waited until mid November, 2003 to draft new districts. SL 2003-434 contained 21 new VRA House districts and 12 which reduced black voting strength. Most, if not all, of the reductions were used to fracture the core VRA constituent districts created in the court drawn plan and result in shifting black democrats to assist white democratic districts in adjacent districts. The effects were the same as in Georgia, however the Justice Department precleared these plans pending federal litigation in the D.C. Circuit.

Interestingly, in the VRA house district created in Wake County (a second VRA district for Raleigh) democrats nominated a white democrat, Deborah Ross when two black candidates spilt the minority vote. She was elected in the fall. In the redrafting of the districts, she utilized her incumbency to reduce the voting strength in this potential district. (Election statistics for this contest are attached).

In summary, the 2000 history of redistricting in North Carolina showed a concerted attempt on the part of the Legislative leadership to minimalize black voting strength in existing districts and in marginal districts in the state to draw districts in which the black communities' voting strength would be secondary to the ability to elect white democrat representatives. This trade-off in marginal VRA areas, even if supported by minority legislators who may have more legislative influence to gain in support a redistricting plan, does not favor the voting interests of the black community as traditionally understood in Voting Rights law. Put differently, in a system in which loyalty to leadership is rewarded, black incumbents are put in a difficult position of defying white leadership and jeopardizing their own chances of re-election in their districts to support creation of new or stronger black districts elsewhere.

I realize this committee faces a factual predicate for renewal of Section 5, that its predecessors do not face. Voting registration and participation of minorities has greatly improved, however political incentives to reduce these improvements are still present and have been demonstrated during the 2000 redistricting cycle. It is critically important to remember that failure to authorize Section 5 would result in the immediate legal enforceablity of many racially discriminatory statutes which would push back racial progress in office holding. For example,

Section 5 preclearance review had currently held in abeyance or stayed the state from enforcing the state constitutional requirement that a county cannot be subdivided in the creation of a legislative district. However were Section 5 not to be renewed, this state constitutional provision would be enforced. Many other statutes that have not been repealed would suddenly be enforceable. At a minimum the Congress should require jurisdictions which want to escape Section 5 preclearance conditions to repeal enactments which have been found by the courts or the Justice Department to be retrogressive in the past.

Furthermore, the Congress should resolve the dilemma which the *Bossier* cases have placed it in with regard to the retrogression standards. My own opinion is that Congress should clearly spell out the standard it wishes to be used in "purpose" evaluations. The standard should be objective, clear and pragmatic. The test practitioners are left with in *Bossier* and *Ashcroft* is too subjective. It will leave the Department of Justice or a court with discretionary review power which is capable of arbitrary and capricious rulings.

The *Ashcroft* approach leads the Justice Department or court to answer questions such as: "Whether minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive role, in the electoral process"; " the likelihood that candidates elected without decisive minority support would be willing to take the minority's interests into account"; or various studies suggest that the most effective way to maximize minority voting strength may be to create more influence or coalitional districts?" How would a court or the Department of Justice go about a minority group's opportunity to participate in the political process by examining the comparative position of black representatives' legislative leadership, influence? These subjective factors move the focus away from the original intent of Congress to create election districts in which the minority community is assured of electing candidates of its choice and not those whom the surrounding community may wish to reward for proper legislative or political behavior – influence in the legislative body.

In lieu of these questions, I believe the approach which the federal court took in *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir.,1990) *cert.denied* 498 U.S., 1028 (1991) would be a desirable "purpose" approach which would not involve itself in the issues raised in *Ashcroft* and *Bossier I and II* . In his concurring opinion, Judge Kozinski showed how a jurisdiction can enact a voting change which has a discriminatory effect without a malicious motive or purpose.

"Protecting incumbency and safeguarding the voting rights of minorities are purposes often at war with each other. Ethnic and racial communities are natural breeding grounds for challengers; incumbents greet the emergence of such power bases in their districts with all the hospitality corporate managers show hostile takeover bids. . . [Incumbents] who take advantage of their status so as to assure themselves a secure seat at the expense of emerging minority candidates may well be violating the Voting Rights Act.[7]

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[7] Judge Kosinski cites an example to illustrate this point regarding agreements among neighbors not to sell to minorities. A racial covenant not to sell has no "retrogressive" effects since there are not minorities in the neighborhood at the time the agreement is reached. Incumbency protection agreements are the same. What matters is not that you may not have a discriminatory purpose in signing such an agreement, you may want to keep property values high, nevertheless you take actions to keep minorities out of the neighborhood or out of power.

A voting change which fails to recognize the realities of demographic changes in the electorate and which enacts a statute or rule disadvantaging minority voting strength is clearly purposeful discrimination which the Congress wanted to outlaw in Section 5. This point needs clarification in the new legislation.

In summary, it would be my position that the Congress should reauthorize Section 5 of the Voting Rights Act with a clear definition of how it desires retrogressive purpose and effect to be measured and the specific tests – both mathematical and subjective, it would desire a court to use in examining this issue. I would hope that the court would adopt the dissenting views in *Ashcroft* or the views of Judge Kozinski to achieve this standard.

Sincerely yours,

Robert N. Hunter, Jr.

RNHjr/slh

Id. at n. 1.

DEM - NC House District 38
WITH 26 OF 26 PRECINCTS REPORTING

	VOTES	PERCENT
01 = ROSS	2,926	46.64
03 = JORDAN	1,239	19.75
02 = KILLENS	2,108	33.60

	01	02	03
0101 01-01 Brooks Ave Church	248	18	36
0107 01-07 Raleigh Fire Station 5	275	26	16
0108 01-07A Senior Citizens Center	22	7	14
0114 01-14 Trinity United Church	424	53	41
0120 01-20 Roberts Park	64	143	103
0121 01-21 Raleigh Fire Station 2	170	57	70
0122 01-22 SE Raleigh High School	117	292	193
0123 01-23 Witherspoon Center NCSU	127	19	47
0125 01-25 Walnut Terrace	21	10	7
0126 01-26 Chavis Community Center	104	142	43
0127 01-27 Project Enlightenment	203	35	25
0131 01-31 Method Community Center	126	56	53
0135 01-35 Fuller School	87	322	109
0150 01-50 Upper Room Church	54	419	111
1602 16-02 Creech Road School	207	166	107
1603 16-03 Garner Advent Church	105	71	40
1606 16-06 Vandora Springs School	144	53	35
1801 18-01 Raleigh Fire Station 20	192	87	93
3001 OS BOE	108	43	29
3002 OS Cary	1	0	1
3003 OS Garner	28	7	10
3004 OS NW Raleigh	2	0	1

Official Canvass September 10, 2002
Primary

Wake County Board of Elections
RUN DATE:09/12/02 02:35 PM
REPORT-EL52 PAGE 0012

DEM - NC House District 38
WITH 26 OF 26 PRECINCTS REPORTING

	VOTES	PERCENT
01 = ROSS	2,926	46.64
03 = JORDAN	1,239	19.75
02 = KILLENS	2,108	33.60

	01	02	03
3005 OS Phillips	19	55	20
3006 Absentee Mail	28	4	3
3007 Transfers	6	1	1
3008 Provisionals	44	22	31

NC HOUSE DISTRICT 38
WITH 30 OF 30 PRECINCTS REPORTING

	VOTES	PERCENT
01 = Deborah Ross (DEM)	12,566	89.68
02 = Casey Gardner (LIB)	1,446	10.32

		01	02
0101	01-01 Brooks Ave Church	560	110
0107	01-07 Raleigh Fire Station 5	473	51
0108	01-07A Senior Citizens Center	76	3
0114	01-14 Trinity United Church	934	115
0120	01-20 Roberts Park Comm Ctr	548	10
0121	01-21 Raleigh Fire Station 2	698	100
0122	01-22 SE Raleigh High School	1052	12
0123	01-23 Witherspoon Center NCSU	624	152
0125	01-25 Walnut Terrace Rec Ctr	94	1
0126	01-26 Chavis Community Center	643	6
0127	01-27 Project Enlightenment	423	47
0131	01-31 Method Community Center	618	127
0135	01-35 Fuller Elementary School	866	8
0150	01-50 Upper Room Church of God	895	8
1602	16-02 Creech Road Elem School	1017	155
1603	16-03 Garner Advent Church	444	134
1606	16-06 Vandora Springs Elem Sch	395	82
1801	18-01 Raleigh Fire Station 20	898	192
3001	BOE Lobby OS	509	51
3002	Cary OS	6	1
3003	Fuquay OS	1	0
3004	Garner OS	206	20
3005	Green OS	11	2
3006	NWS OS	16	2
3007	Phillips OS	186	5
3008	Wake Forest OS	0	0
3009	Wendell OS	4	0
3010	Absentee Mail	101	18
3011	Transfers	10	2
3012	Provisionals	258	32

Mr. CHABOT. Mr. Gaddie you're recognized for 5 minutes.

TESTIMONY OF RONALD KEITH GADDIE, PROFESSOR OF POLITICAL SCIENCE, THE UNIVERSITY OF OKLAHOMA

Mr. GADDIE. Mr. Chairman, Representative Nadler, and distinguished Committee Members, my thanks for the invitation to appear before this panel. Dramatic changes in American politics have been witnessed in 40 years. Minority voter participation has increased substantially. And descriptive representation of racial and ethnic minorities has never been so widespread. Southern Blacks register and vote at rates as high or higher than Black voters and White voters in much of the Nation. There is a two-party system in the South which fosters Black political empowerment and office holding. However, this empowerment is realized as the party of choice for most African-Americans, the Democratic Party, has been relegated to minority status in legislatures of five section 5 States in the South.

My colleague, Charles Bullock of the University of Georgia, and I are completing a study on the progress of minority voter participation in the jurisdictions covered by section 5 of the Voting Rights Act, supported by the American Enterprise Institute. As to our analysis, we have now completed initial analysis and are completing the write-up on three States: Georgia, Louisiana and South Carolina.

Georgia shows unprecedented progress in voting rights for African-Americans, significant gains in voter participation, voter turnout, and the election of minority candidates when candidates of choice are evident. Black and White Democratic candidates are generally not distinguished by Caucasian voters. African-American candidates win statewide elections, and the Congressional delegation is actually better than proportional to the Black population as of the last Congressional election.

In South Carolina, significant progress has been made in terms of participation and in the election of Black candidates to legislative office. Black candidates have not enjoyed success statewide, though this lack of success is more a function of the fall of the South Carolina Democratic Party than of the race of the candidate *per se*.

Louisiana exhibits evidence of Black progress and voter participation through registration and voting. Black legislators are elected to the Congress and to the State legislature, though not in proportion to their numbers. Louisiana voting is such that the Black candidates running statewide have failed in their efforts. Racial polarization is insufficient to deny the election of Democrats in general who are very successful in statewide elections, but the success has not been obtained by African-Americans running statewide in the Pelican State.

How does this bear on section 5? Let me advance some questions to ponder. These observations come from an empirical social scientist, not a legal scholar, and therefore should be taken as such.

One, after two generations of implementation, are the goals of the Voting Rights Act achieved? The answer is variable by State. But clearly Georgia exhibits progress that makes one wonder why the State continues to be covered by section 5. Other States also

show dramatic and sustained progress, though Georgia is the most progressed of the original section 5 States.

Two, has section 5 been twisted or altered by politics into a tool with which to advance party causes? Political motives for the implementation of the Voting Rights Act are evident in the record of behavior of national and State actors in the implementation of section 5 and in the redistricting process.

Three, have the efforts to satisfy political goals and also the goals of the Voting Rights Act led to problematic or even illegal representative maps? Yes. The political circumstances that collided in the early 1990's led to illegal maps that were as much a product of the goals of parties rather than a pursuit of racial fairness in the implementation of the 15th amendment.

Four, has the standard for satisfying retrogression been altered by practice in the interpretation of the Supreme Court to possibly result in unintended consequences? Again the answer is yes. In the recent controversial Texas congressional redistricting, this very problem appeared in arguments advanced by both political science experts and lawyers, though the argument that derives from this problematic interpretation was rejected by the presiding Federal judge; namely, the status of coalition districts with regard to retrogression or protection under the Voting Rights Act.

Five, and finally, do the circumstances of the empirical test advanced by the Court wherein minority candidates do not require minority-majority districts to prevail and minority political leaders endorse the use of coalition districts to, quote, pull, haul and trade in politics also indicate an environment where section 5 coverage is not warranted? Possibly yes. If we look at Georgia, where minority voters register and turn out at a rate higher than Whites, where Black electoral success is evident at all levels of government, where expert testimonies show that a minority candidate can succeed in nonminority districts, we see a State where the need for preclearance has diminished or, if not, has passed. Thank you.

Mr. CHABOT. Thank you very much.

[The prepared statement of Mr. Gaddie follows:]

PREPARED STATEMENT OF RONALD KEITH GADDIE

The Renewal of Section 5 of the Voting Rights Act: Some Facts and Some Thoughts

Remarks prepared for presentation to the United States House of Representatives Judiciary Committee, Subcommittee on the Constitution

Chairman Chabot, Representative Nadler, and honorable Representatives: my thanks for the invitation to appear before this panel to discuss the renewal of the Voting Rights Act. I am very pleased to appear before you today.

My name is Ronald Keith Gaddie. I am a professor of political science at the University of Oklahoma, where I teach courses and write on American electoral politics. Since 2001 I have worked as a litigation consultant and expert witness in voting rights and redistricting cases in several states, including Texas, Oklahoma, Wisconsin, New Mexico, Virginia, South Dakota, and Georgia, for jurisdictions, plaintiffs, Democrats and Republicans. I have authored or coauthored eight books on aspects of American politics. Currently, with my colleague Charles S. Bullock III of the University of Georgia, I am completing an analysis of the progress on minority voter participation and elections in the jurisdictions covered by Section 5 of the Voting Rights Act. This study is supported by the American Enterprise Institute, through the Blum-Thernstrom Project on Fair Representation.

The Voting Rights Act has framed American electoral politics for forty years. The Act stands as the enforcement mechanism for one of two "superior" redistricting principles of voting rights, that of racial fairness (the other principle being the one-person, one-vote guarantee). The most proactive tools of the Voting Rights Act are up for renewal. This periodic review and renewal of legislation gives us the chance to ask, "what have we done and how far have we come?"

This statement will highlight trends in minority participation in the seven states originally covered by the Act. I will then frame some topics for discussion as we move toward the renewal of the Act, with some attention paid to the history and prospects for minority voter participation in Georgia, Louisiana, and South Carolina.

The Problem

The initial concern of the Voting Rights Act was access to the political process. Political scientist V. O. Key, writing over a half-century ago in his classic *Southern Politics: In State and Nation*, observed that "the South may not be the nation's number one political problem . . . but politics is the South's number one problem." (1949: 3) Participation was

necessary to a functioning democracy, for Key, who observed that the problem of participation in South, like every other problem, could be traced to the status of blacks.

What was the status of Southern blacks? Well, depending on where you went in the South variations were in evidence, but southern blacks were generally disfranchised, generally discriminated against, and generally held at a distance from white society –specifically the prosperous part of white society -- by public policy. Key observed that "whites govern and win for themselves the benefits of discriminatory public policy" and further noted that "discrimination in favor of whites tends to increase roughly as Negroes are more completely excluded from the suffrage" (1949: 528). Exclusion from the vote did not cause discriminatory treatment, but it most certainly reinforced the status of Southern blacks. Key observed in a clinical fashion what Martin Luther King, Jr. argued passionately in 1965, "give us the vote and we will change the South." It was only by the exercise of political power through ballots that politicians would change policy in the long run.

We have the opportunity for a frank, informed conversation about the shape of the Voting Rights Act for the future. And I thank the chairman and committee for holding these hearings in order to advance this conversation. What should take place in this conversation?

Context: The "Then and Now" of the Adoption of Section 5

In 1964, there was one black state legislator in the seven states originally covered by Section 5. The South lumbered under an archaic and outdated political and social culture that clung to the past at the possible cost of the future. There was no viable competition to the Democratic Party, which was locally a contrary adjunct to the national party, opposed to the Democrats in the rest of the nation on most every dimension of social policy politics.

The contemporary South is vibrant, the most populous and fastest-growing region of the nation. Southern children are more likely to attend integrated schools than in the rest of the nation, and an African American is more likely to have black representation in the South than anywhere else in the nation. Education and income differences across the races are matters of degree rather than orders of magnitude. Southern blacks are registered and voting at rates comparable to black voters in the rest of the nation. There is a two-party system in the South which fosters black political empowerment and office-holding. However, that empowerment comes as the party of choice for most African-Americans, the Democratic Party, has been relegated to minority status in the legislature of three of the original Section 5 states and also in the covered states of Texas and Florida.

Race still divides the South, but southern blacks are not helpless in the pursuit of political, social, and economic goals when compared to five decade ago. The context of

race relations and the status of minorities in the South are dramatically changed from four decades ago.

Minority participation in the Political Process and How Section 5 Advanced That Cause

In my previous testimony to the US Commission on Civil Rights, I used as a starting point Table 1, which contains information from Earl and Merle Black's *Politics and Society in the South.* This table shows the growth of black voters in the South. By 1984, South Carolina and Mississippi ranked at the top of proportion black electorate. Mississippi and Alabama registered the largest proportional gain of size in the black electorate, though Mississippi simultaneously ranked "high" and "low" because the baseline for minority participation was so very low, large proportional gains were inevitable. Georgia and Louisiana conversely rank near the bottom of proportional gain in part because of having the highest rates of black registration of any state originally covered by Section 5. By 1984, the black percentage among registrants tracks closely with the black percentage in the voting age population, evidence of the success of the Voting Rights Act in eliminating obstacles to participation. The states with the largest *potential* black electorates (Mississippi and South Carolina) had the most-heavily African-American voter registration rolls.

The Black brothers' analysis informs us as to the proportionately largest black electorates in the South. Tables 2 and 3 present Census Bureau estimates of black voter registration and participation since 1980 for the seven states originally covered by Section 5. Black registration lags white registration for most of the time period in the seven covered states analyzed (as it does in nonsouthern states throughout the time series). But, for the last four elections for which there are comparative data, black registration in six of the seven states (all but Virginia) exceeds black registration rates in the nonsouthern states. In three of the states (Georgia, South Carolina, Mississippi), black registration rates exceeded white registration rates within those states for at least two of the last four elections.

Black turnout rates are less consistently above the national average. As indicated in Table 3, three of the original Section 5 states – Alabama, Mississippi, and Louisiana – have black turnout consistently above the national average for black turnout. Every covered state except Virginia reports higher black than white turnout rates at least once since 1990, and Georgia reports higher black than white turnout in three of the last four general elections. Differences in racial registration and participation have become differences of degree rather than of magnitude.

These votes are generally translated into seats. Figure 1 presents time-lines, since 1964, of the percentage of state legislative seats held by black incumbents in the state legislatures of the seven original Section 5 states. Of these states, Alabama has achieved proportionality in the legislature relative to citizen voting age population, while Georgia, Mississippi, and North Carolina are approaching proportionality (data for this graphic appear in Table 4).

At the congressional level, the 1990s saw significant advancement of descriptive African-American representation. The number of southern, African-American members of Congress tripled. In the states covered by Section 5, the number increased from three in 1991 to a current eleven (one from Virginia, two from North Carolina, one from South Carolina, four from Georgia, one from Alabama, one from Mississippi, and one from Louisiana) -- 18% of all congressmen from these states are African-American, compared to 25% African-American citizen voting age population. If we also add the black congressmen elected from the other two Section 5 southern states – Texas and Florida – we total seventeen black MCs, or 15% of all MCs from nine states that are collectively 18.9% black by citizen voting age population.[1] Black representation in the Section 5 states is not proportional to the black citizen voting age population. But, black descriptive representation is as high as it has ever been in southern legislatures in modern times, and is approaching proportionality to the extent that the geographic placement of black voters and the tendencies of electorates in general elect black candidates who seek legislative office (see Table 5). As is widely recognized, in single-member, plurality political systems like in the US (in contrast with the proportional systems used in most of Europe), the majority group gets a disproportionate share of the legislative seats and the minority groups gets less than its proportional share.

What is Retrogression?

A change in election law that results in an adverse effect on opportunities for a racial (or protected language minority) group to participate in the electoral process constitutes retrogression. More precisely, legal retrogression occurs when a jurisdiction covered by Section 5, reduces the opportunity for minorities to participate effectively. The law firm of Bickerstaff, Heath, Smiley, Pollan, Kever, & McDaniel LL of Dallas describes a retrogressive change as follows:

> The preclearance inquiry examines whether a proposed voting change is retrogressive compared to the legal benchmark . . . For example, a change from a single-member district system in which a minority group consistently has been able to elect candidates of its choice, to an at-large system in which the minority group has such small numbers that it will always be outvoted for all elected positions by the larger non-minority population, would be retrogressive and unlikely to receive preclearance. This is an extreme example, of course; there are

[1] The nine Southern states that are Section 5-covered contain one-fourth of the citizen voting age population in the United States. Those states are 18.9% African-American citizen VAP, and contain 43.9% of all citizen VAP blacks in the United States. The original seven Section 5 states are 24.9% citizen VAP by population, and contain 30.8% of all citizen VAP black in the United States.

> other instances involving less obviously adverse changes that might be considered retrogressive.[2]

The benchmark is the last legally-enforceable plan; preclearance alone does not guarantee status as the benchmark, as is evident from cases such as *Miller*.[3] How jurisdictions address retrogression became a source of political and legal confusion in the first decade of the 21st century. Until July 2003, retrogression occurred if the ability of a minority group to elect its candidates of choice was reduced. Retrogression, when applied to redistricting, is measured for the entire proposed plan relative to opportunities under the new plan.

Assume, for example, an existing thirty-district state legislative map had three majority-minority districts, all of which elected candidates of choice of the minority group. The new map eliminates a minority districts and does not create an offsetting one elsewhere. The new map retrogresses against existing minority opportunities. Were a new district plan to eliminate a minority district while creating a new one, the number of minority

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[2]See *Beer v. United States*; quote from "Frequently Asked Questions on DOJ and Preclearance." http://www.votinglaw.com/dojfaq.html#13, accessed September 30 2005. Bickerstaff et al assert that the last precleared plan is the benchmark, which is incorrect. In *Young v. Fordice* (520 U.S. 273 (1997).), the State of Mississippi had administratively implemented a new "provisional" registration system in order to comply with the Motor Voter Act (the provisional plan) this plan was represented by state election officials as the plan that would be passed by the legislature and this plan was subsequently precleared by the Department of Justice even though it was not in conformance with Mississippi statutory law. Contrary to the representations of elections officials, the legislature refused to pass the provisional plan and created a dual registration system for federal and state elections. The Department of Justice asserted that since the provisional plan had already been implemented and precleared, it became the benchmark for measuring the system created by the legislature. The Supreme Court, in a unanimous opinion, rejected this argument and held that the provisional plan was not the benchmark, and that the old system, prior to the Motor Voter Act was the benchmark for the measurement of retrogression. In *Abrams v. Johnson* (521 U.S. 74 (1997)), after the redistricting plan for the Georgia congressional districts had been found unconstitutional by the District Court, various parties asserted a variety of benchmarks under §5. The Department of Justice proposed that the redistricting plan "shorn of its constitutional defects" was the appropriate benchmark. Other appellants asserted that the 1992 redistricting plan passed by the Georgia Legislature, signed by the Governor and submitted but objected to by the Department of Justice constituted the benchmark under §5. The Court rejected both proposals and stated unequivocally that the "appropriate benchmark is, in fact, what the district court concluded it would be, the 1982 plan." As the Court noted "there are sound reasons for requiring benchmarks to be plans that have been in effect; otherwise a myriad of benchmarks would be proposed in every case, with attendant confusion."

[3] See also 42 U.S.C. § 1973c; *Beer v. United States*, 425 U.S. 130 (1976); *Miller v. Johnson*, 515 U.S. 900 (1995).

opportunities for access would be unchanged, and retrogression would not have occurred.[4] The submitting jurisdiction rather than the Department of Justice (DOJ) bears the burden of proof for demonstrating non-retrogression. Another facet of the retrogression standard generally prohibited the reduction in the minority concentration in an existing majority-minority district.

The US Department of Justice may not apply other standards in addition to retrogression when determining whether to preclear new districting plans. The Supreme Court has ruled out standards that go beyond the charge to the agency under Section 5 which only sets the floor of ensuring no loss of political ground by minorities.[5]

Georgia v. Ashcroft altered the retrogression standard.[6] Georgia lowered the black percentage of the voting age population in a number of state legislative districts and redistributed this population to craft more districts that were competitive for Democratic candidates. In majority-white districts with increased numbers of blacks it would be possible for a biracial coalition to elect Democrats. In reviewing the Georgia plan, the Supreme Court held that evidence of non-retrogression can include coalition districts – identified by plaintiffs as districts between 30% and 50% black by population. This offered to jurisdictions two avenues for satisfying the non-retrogression: fewer, safer minority districts, more less-safe minority districts and coalition districts, or some combination. The second option offered in *Ashcroft* permits reducing the concentrations of minorities in majority-minority districts – which may result in less certainty of minority candidates being elected -- in exchange for a greater number of districts in which minorities may be able to coalesce with white voters to elect candidates preferred by the minority voters. In other words, with less certainty comes greater opportunity to spread influence, assuming one were willing to pull, trade, and haul. Such districts were deemed more permissible if the elected representatives belonging to the minority community supported the creating of access and influence districts in the political process. As stated by Justice O'Conner, writing for the majority:

> the retrogression inquiry asks how "voters will probably act in the circumstances in which they live." Post, at 19. The representatives of districts created to ensure continued minority participation in the political process have some knowledge about how "voters will probably act" and whether the proposed change will decrease minority voters' effective exercise of the electoral franchise.[7]

So there are multiple avenues to satisfy Section 5. Does this broadening of solutions also broaden the scope of districts protected from retrogression? To understand the means by which one satisfies nonretrogression, we need to consider the nature of Section 5. Has it become so blurred by recent litigation that the provision is emerging as a vehicle for the

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[4] Retrogression is assessed using the old district plan as a baseline, but applying the most recent census data to the previous (old) boundaries.

[5] *Reno v. Bossier Parish School Board,* 520 U.S. 471 (1997).

[6] *Georgia v. Ashcroft,* 539 U.S. ____ (2003).

[7] 539 U. S. ____ (2003), at page 20.

pursuit of partisan advantage rather than ensuring minority group access to the political process?

Republican administrations, specifically the first Bush Administration, used the Voting Rights Act as a lever to encourage the creation of majority-minority districts, and to limit the opportunities to create cross-racial coalitions in support of Democrats. White Democrats in turn preferred districts with sizeable (but not majority) minority populations because of the biracial coalitions that could command more seats. In the 1980 and 1990 rounds of redistricting, African-American Democrats preferred districts with black majorities sufficient to elect an African American.

The aggressive use of Section 2 of the Voting Rights Act to create majority-minority districts in the early 1990s resulted in an electoral map that shifted one-third of all southern congressional districts to the GOP in a three-election period. That these newly acquired Republican districts were largely bereft of minority voters and next-door to majority-minority districts is more than coincidence. These districts were urged by the Justice Department as part of a "maximization strategy", using preclearance as a policy lever.[8] Congressional plans which maximized minority seats and had been approved (in some cases demanded) by the Justice Department were overturned by courts in Georgia, Louisiana, North Carolina, Virginia, and Texas. A quote from John Dunne, assistant attorney general for civil rights in the first Bush Administration Justice Department, taken at deposition in *Miller v. Johnson*, is instructive in acknowledging the political dimension to the use of preclearance:

> You know, I can't tell you that I was sort of like a monk hidden away in a monastery with only the most pure of intentions. I am a Republican. I was part of a Republican administration. And to tell you that at no moment during the course of my, the discharge of my responsibilities, was I totally immune or insensitive to political considerations, I don't think would justify anybody's belief. But I can't really tell you much more than that.

The consequence -- concentrating the most loyal Democratic voters into the fewest districts possible -- paid political benefits. The number of congressional districts with between 20 and 40% African-American population southwide – districts especially likely to elect white Democrats -- fell from 50 seats to 22, and within two elections the number of Republicans from southern states nearly doubled.

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[8] An example of the judicial eye recognizing this strategy comes from the Georgia litigation, wherein the court concluded "[i]t is clear that a black maximization policy had become an integral part of the Section 5 preclearance process . . . when the Georgia redistricting plans were under review. The net effect of the DOJ's preclearance objection[s] . . . was to require the State of Georgia to increase the number of majority black districts in its redistricting plans, which were already ameliorative plans, beyond any reasonable concept of non-retrogression." 929 F. Supp., at 1540–1541

Another effect was the shape of the new congressional constituencies. Described as bizarre, tortured, irregular, and non-compact, many of the new congressional districts created by states to comply with Justice Department efforts – combined with the pursuit of other political goals such as incumbency protection -- stretched the credibility of the terms "compact" and "contiguous." This "spiral down" effect on compactness resulted from the meeting of the policies of the Department of Justice and the determination of the legislatures in the jurisdictions to protect incumbents.

> DOJ refused to enforce any compactness rule asserting that compactness was a state policy and therefore the level of compactness in districts was an issue outside of the scope of the preclearance process. As stated in its preclearance letter for the Texas congressional redistricting scheme [w]hile we are preclearing this plan under Section 5 the extraordinarily convoluted nature of some of the districts compels me to disclaim any implication that our preclearance establishes that the proposed plan is otherwise lawful or constitutional…Our preclearance of the submitted redistricting plan in no way addresses the state's approach to its redistricting obligations other than with regard to section 5.[9]

DOJ's policy that "reductions in the minority percentages in one district might be effectively counterbalanced by increases in others" essentially meant that jurisdictions did not have to be geographically specific when attempting to remedy the dilution of a minority community's voting strength. In jurisdictions such as North Carolina, Georgia, and Texas, mapmakers responded by drawing far less compact minority districts than might have been possible, in order to ameliorate the political effects of drawing the compact majority minority district.[10] This "new" standard of compactness was then used to prompt the crafting of additional majority minority districts, which could not be drawn under the original standard of compactness advocated by the jurisdiction. The result was a downward spiral of demands for crafting minority districts, lowered compactness, and sparring to protect incumbents, which in turn led to the least compact plans, but with more majority minority districts than ever before.

So, we see two political dimensions of the implementation of voting rights creating further legal and political conflict: the effort by southern legislatures to protect incumbents and facilitate (possibly) politically-motivated Justice Department demands to create new minority opportunities, results in the torturous shape of the legislative districts challenged in the Shaw/Reno-styled cases of the 1990s.

Partisan goals and the role of minority voters continue to define redistricting. Most recently, Georgia and Texas offer opposite perspectives on the effort to seize electoral advantage while playing politics that affect or relate to the Voting Rights Act.

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[9] Letter of John Dunne to Texas Attorney General Morales, Nov. 18, 1991.

[10] Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 52 Fed. Reg. 486, 488 (1987) (commentary to the rule) (codified at 28 C.F.R. §51 et seq.)

In 2001 Georgia Democrats moved to retain control of the state legislature while also expanding their foothold in the state's congressional delegation. This was accomplished through the efficient allocation of black, Democratic voters in a fashion partially opposed by the Justice Department, and which required litigation to establish. This efficient allocation reduced minority majorities particularly in some state Senate districts and was considered retrogressive by the Justice Department. Because the elected representatives of the community of interest approved of the strategy, and because minority choices could prevail in most of the coalition districts, the Supreme Court held that the use of coalition districts as an alternative to less heavily-minority districts was permissible (though not required) to satisfy Section 5.[11]

This change in the definition of retrogression occurred during the recent Texas redistricting. In Texas, plaintiffs challenged the mid-decade congressional redistricting on several dimensions. One claim was that districts lacking a majority of a minority, but electing candidates preferred by minority voters, were protected from change under Section 5. One Plaintiff's expert testified that districts as low as 5% minority population might be protected from change under the Voting Rights Act, unless agreed to by the minority community's leadership. This reasoning was rejected by both the Justice Department, which precleared the new Texas map and the Federal district court in Austin, which explicitly rejected the argument that there is an obligation to create coalition districts under federal law.

The use of Section 2 as incorporated into Section 5 reviews was a powerful lever for concentrating instead of spreading minority populations in creating minority-majority districts and accompanying, largely white districts that presented electoral opportunities for Republicans. From the perspective of the Republican Party, it has been successfully used, given the dramatic realignment of southern congressional delegation in the early 1990s. The redistricting compelled by the Justice Department under Section 5 is not solely responsible, but when combined with the departure of incumbents and wedge issues, the redistricting facilitated the doubling of Southern Republican congressional strength. The interpretation under *Ashcroft* facilitates the reintroduction of coalition constituencies, with the approval of the representatives of the minority community, or, in other words, allows in theory for the crafting of constituencies of the sort that once contributed to the Democratic southern congressional majority until 1994.

This latest change raises a question that I first articulated in 2003 at the Texas State Senate redistricting hearings, of how one establishes a baseline for evaluating retrogression. My perspective is that of a social scientist charged with conducting analyses to inform those who make and interpret the law, rather than from the perspective of a legal thinker, and should be taken as such. If retrogression is evaluated in the context of an entire map, and constituencies in which a white legislator relies on biracial support are among the districts protected from retrogression, then how are those districts to be treated in subsequent efforts to baseline minority access and evaluate retrogression?

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[11] The Justice Department did approve of 53 of 56 proposed Georgia Senate districts, indicating the relatively narrow scope of objection to the total map.

My concern with efforts to use retrogression to maintain coalition districts is that it sets up a circumstance where part of the legislative map becomes immune to political change under redistricting. If districts where a cohesive minority electorate is not in a position to control the election of consequence are counted among protected districts, then party bias is introduced. Any district, anywhere, in which minorities, no matter how small a percentage of the electorate, vote for the Democratic candidate, conceivably becomes immune from change. In this instance, Democratic districts are locked in as part of the district format. One party gets a guarantee of protection for its seats, but the other does not.

A second question arises. If minority candidates and candidates of choice can be elected from districts with minority percentages of the voting age population of under a majority, say as low as 44.3%, or even as low as the hypothetical 30% coalition district advanced by plaintiffs and noted by the court in *Ashcroft*, then is there a need to have Section 5 coverage of the jurisdiction? In order to have an "even chance" at winning a 44.3% voting age population district, and we assume equal turnout with 90% minority voter cohesion, a candidate of choice will need to capture 18.1% of the Anglo vote. To have an even chance at winning a 40% minority-turnout district requires 23.3% of the Anglo vote. And, to have an even chance at 30% minority-turnout and 90% cohesion requires 32.8% of the white, Anglo vote. These thresholds for white crossover voting increase as the rate of minority turnout falls.

If candidates are capable of winning in less-than-majority districts (as Sanford Bishop, Cynthia McKinney, David Scott, and, in the past, Andrew Young have done)-- or can exercise control of seats under circumstances where the minority of white voters coalesced with the cohesive minority vote to create winning coalitions -- is Section 5 coverage still necessary? If the prevailing candidate is not just a candidate of choice, but a candidate of color, is Section 5 coverage still necessary? The circumstances that favor the use of coalition districts – sufficient white cross-over vote and political support from minority elected officials – seem to satisfy the notion and circumstances that Section 5 coverage is no longer necessary.

We need to revisit the need to continue Section 5 in all covered jurisdictions

Virginia offers evidence that local circumstances can change in order to allow jurisdictions to "bail out" from under Section 5. Efforts should be made to explore how the Justice Department can further work with jurisdictions that have made real strides in improving their racial political climate, in order to remove the footprint of federal oversight where it is no longer required. The existing rules for bailing out from Section 5 set high evidentiary standards for jurisdictions to attain. Do those standards impede the removal of the preclearance mechanism in states where recent evidence of progress is overwhelming?

A state in which this question is relevant is Georgia. The fastest-growing of the original Section 5 states offers real evidence of voting rights progress in the last decade. African-American candidates run as well or better than white candidates for statewide office of the same party. The work of Professor Epstein indicates that African-American legislative candidates are capable of winning non-majority black districts on an even basis. There are currently two black Republicans in the Georgia Legislature, from heavily-white Gwinnett County and Middle Georgia Houston County. The state has the most-heavily black congressional delegation in the US House (31% of seats). Georgia's African-American Attorney General Thurburt Baker asserted that:

> The State (sic) racial and political experience in recent years is radically different than it was 10 or 20 years ago, and that is exemplified on every level of politics from statewide elections on down. The election history for legislative offices in Georgia - - House, Senate and Congress - - reflect a high level of success by African American candidates [Post-trial brief of the state of Georgia, *Georgia v. Ashcroft* C.A. No. 01-2111 (EGS) (D.C., DC 2002), p. 2].

However, the current rules governing bailing out from under Section 5 preclude Georgia's departure, due to recent objections by the Justice Department. And, many local jurisdictions have a history of Section 5 objections. At the highest levels of government, Georgia accomplished more than any other state covered by Section 5.

Where We Stand in Our Project

My colleague Professor Charles S. Bullock, III, and I are engaged in an extended analysis of the progress in voting rights in Section 5-covered jurisdictions, as such progress pertains to congressional elections. We have completed analyses of three states – Georgia, Louisiana, and South Carolina – and are nearing completion of the analysis in six other states – Alabama, Florida, Mississippi, North Carolina, Texas, Virginia. This research is funded by the American Enterprise Institute.

Our analysis in Georgia reveals a state where substantial progress on voting rights for African-Americans has been made. Black Democratic candidates are little distinguished from white Democratic candidates in elections. African Americans have made significant gains in voter participation, voter turnout, the election of candidates, and recent political science research shows that black candidates and candidates of choice can usually prevail in legislative constituencies as low as 44% African-American. African-American candidates win statewide elections, and the congressional delegation is better than proportional to the black population. John Lewis (GA-5) noted the change in Georgia in his affidavit in *Georgia v. Ashcroft:*

> The state is not the same state it was. It's not the same state that it was in 1965 or in 1975, or even in 1980 or 1990. We have changed. We've come a great

> distance. I think in - - it's not just in Georgia, but in the American South, I think people are preparing to lay down the burden of race.[12]

Change is afoot in Georgia, and throughout the South. Circumstance and politics have changed, and both black political empowerment and white acceptance of black politicians is part of that New South. Part of this change is the ability of black politicians to pull, haul, and trade, and the willingness of sufficient white voters to pull the lever for those politicians. Again, as observed by Representative Lewis:

> I think many voters, white and black voters, in metro Atlanta and elsewhere in Georgia, have been able to see black candidates get out and campaign and work hard for all voters. And they have seen people deal with issues as, I said before, that transcend race: economic issues, environmental issues, issues of war and peace. . . So there has been a transformation, it's a different state, it's a different political climate, it's a different political environment. It's altogether a different world that we live, really.[13]

In South Carolina, significant progress has been made in terms of participation and in the election of black candidates to legislative office, and analysis indicates that African-American candidates of choice can prevail in less-than-majority black districts on an even basis. While black candidates enjoy no success statewide, this lack of success is more a function of the fall of the South Carolina Democratic Party than of race of the candidate. Black and white candidates perform similarly poorly with white voters in major contests in the Palmetto State, the notable recent exceptions being Rep. John Spratt and Inez Tenenbaum's bids for Superintendent of Education (but not the US Senate).

Then, in Louisiana, we see evidence of black progress in voter participation through registration and voting. Black legislators are elected to Congress and the state legislature, though not in proportion to their numbers. Louisiana voting is such that black candidates running statewide have failed in their efforts. Racial polarization in insufficient to deny the election of Democrats in general, who are very successful in statewide elections, but African-American candidates fare less well among white voters. However, some black candidates are not candidates of choice of the black electorate, and in Democrat versus Republican head-to-head elections, cohesive black voting plus a minority of the white electorate can elect Democrats who are preferred by black voters. The current domination of statewide offices by Democrats indicates that, at least as previously constituted, the Louisiana electorate afforded circumstances where black voters act as critical partners in crafting statewide majorities for constitutional office.

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[12] Affidavit of John Lewis in *Georgia v. Ashcroft*, 539 U. S. ____ (2003), February 1, 2002, p. 18.
[13] *Ibid*, pp. 15-16.

TABLE 1: THE CHANGING SIZE OF THE BLACK SHARE OF THE ELECTORATE FROM 1960 TO 1984

State	%Black Among Registered Voters 1960	1984	Proportion Gain
South Carolina	11	28	2.54
Mississippi	4	26	6.50
Alabama	7	22	3.14
North Carolina	10	19	1.90
Louisiana	14	25	1.79
Virginia	10	17	1.70
Georgia	15	22	1.47

Source: From Table 6.2 of Earl Black and Merle Black, 1987. *Politics and Society in the South.* Cambridge: Harvard (at page 139).

TABLE 2: VOTER REGISTRATION BY RACE, SEVEN ORIGINAL SECTION 5 STATES VERSUS NON-SOUTHERN STATES

	1980	1982	1984	1986	1988	1990	1992	1994	1996	1998	2000	2002	2004
Alabama													
Black	62.2	57.7	71.4	75.4	68.4	65.3	71.8	66.3	69.2	74.3	72	67.6	72.9
White	73.3	70.2	77.2	74.3	75	74.9	79.3	73.3	75.8	74.1	74.5	73.7	73.8
Georgia													
Black	59.8	51.9	58	55.3	56.8	57	53.9	57.6	64.6	64.1	66.3	61.6	64.2
White	67	59.7	65.7	60.4	63.9	58.1	67.3	55	67.8	62	59.3	62.7	63.5
Louisiana													
Black	69	68.5	74.8	71.9	77.1	72	82.3	65.7	71.9	69.5	73.5	73.5	71.1
White	74.5	67.5	73.2	71.4	75.1	74.1	76.2	72.7	74.5	75.2	77.5	74.2	75.1
Mississippi													
Black	72.2	75.8	85.6	75.9	74.2	71.4	78.5	69.9	67.4	71.3	73.7	67.9	76.1
White	85.2	76.9	81.4	77.3	80.5	70.8	80.2	74.6	75	75.2	72.2	70.7	72.3
North Carolina													
Black	49.2	43.6	59.5	57.1	58.2	60.1	64	53.1	65.5	57.4	62.9	58.2	70.4
White	63.7	62.5	67	65.8	65.6	63.6	70.8	63.9	70.4	65.6	67.9	63.1	69.4
South Carolina													
Black	61.4	53.3	62.2	58.8	56.7	61.9	62	59	64.3	68	68.6	68.3	71.1
White	57.2	54.5	57.3	56.4	61.8	56.2	69.2	62.6	69.7	67.9	68.2	66.2	74.4
Virginia													
Black	49.7	53.6	62.1	66.5	63.8	58.1	64.5	51.1	64	53.6	58	47.5	57.4
White	65.4	60.8	63.7	63.3	68.5	61.9	67.2	63.6	68.4	63.5	67.6	64.1	68.2
Non-South													
Black	60.6	61.7	67.2	63.1	65.9	58.4	63	58.3	62	58.5	61.7	57	na
White	69.3	66.7	70.5	66.2	68.5	64.4	70.9	65.6	68.1	63.9	65.9	63	na

Source: Various post-election reports by the U.S. Bureau of the Census.

TABLE 3: VOTER TURNOUT BY RACE, SEVEN ORIGINAL SECTION 5 STATES VERSUS NON-SOUTHERN STATES

	1980	1982	1984	1986	1988	1990	1992	1994	1996	1998	2000	2002
Alabama												
Black	48.9	41.5	54.8	55.2	52.4	45.7	58.1	53.5	54.3	51.6	57.2	43.3
White	59.2	52	62.8	52.5	58.4	52.7	65.9	64.3	56.3	51.6	60.8	50.7
Georgia												
Black	43.7	32.5	45.9	37.3	42.4	42.3	47.1	30.9	45.6	40.2	51.6	38.5
White	56	40.7	55.3	40.5	53.2	42.6	58.7	38.3	52.3	36.8	48.3	44.8
Louisiana												
Black	60.1	32	66.4	55.8	61.5	55.9	71.5	30.9	60.9	46	63.2	46.9
White	65.6	23.6	64.7	57.5	67.5	50.2	68.3	35.6	62.6	35.7	66.4	51
Mississippi												
Black	59.5	50.8	69.6	40.2	60.3	32.5	61.9	41.7	48.8	40.4	58.5	40.2
White	70.9	52.4	69.2	45.8	64.2	35.8	69.4	46.2	59.3	40.7	61.2	43.6
North Carolina												
Black	38.8	30.4	47.2	39.1	46.6	48.1	54.1	28.3	48.7	38.2	47.6	42.2
White	55.9	41.7	59.1	47.1	55.2	49.9	62.4	38.4	56.4	40.5	55.9	43.5
South Carolina												
Black	51.3	38.9	51.4	42	40.7	44.6	48.8	38.7	49.9	42.8	60.7	48.7
White	51.7	37	47.9	41.3	52.3	42	61.6	49.4	56.2	48.8	58.7	45.1
Virginia												
Black	42.9	44.3	55	42.5	47.7	32	59	33.8	53.3	23.8	52.7	27.2
White	58.3	46.2	57.8	36.8	61.1	39.6	63.4	50.4	58.5	32.4	60.4	37.8
NonSouth												
Black	52.8	48.5	58.9	44.2	55.6	38.4	53.8	40.2	51.4	40.4	53.1	39.3
White	62.4	53.1	63	48.7	60.4	48.2	64.9	49.3	57.4	45.4	57.5	44.7

Source: Various post-election reports by the U.S. Bureau of the Census.

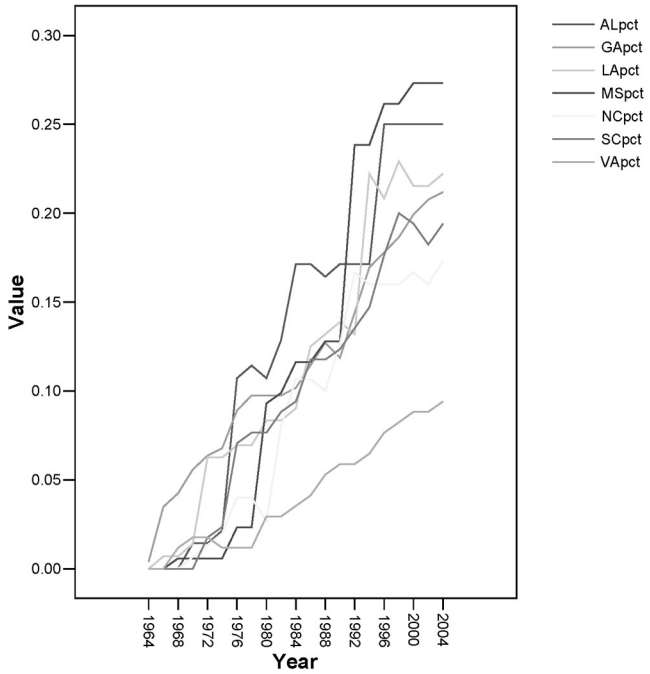

FIGURE 1: PROPORTION OF STATE LEGISLATORS WHO ARE AFRICAN-AMERICAN, SEVEN STATES COVERED BY SECTION 5

TABLE 4: DATA ON BLACK LEGISLATIVE OFFICE HOLDING FROM FIGURE 1

Year	Alabama	Georgia	Louisiana	Mississippi	North Carolina	South Carolina	Virginia
1964	0	1	0	0	0	0	0
1966	0	9	1	0	0	0	0
1968	0	11	1	1	0	0	2
1970	2	14	2	1	1		3
1972	2	15	9	1	2	3	3
1974	3	16	9	1	3	4	2
1976	15	21	10	4	6	12	2
1978	16	23	10	4	6	13	2
1980	15	23	12	16	4	13	5
1982	18	23	12	17	12	15	5
1984	24	24	13	20	16	16	6
1986	24	27	18	20	16	20	7
1988	23	30	19	22	15	20	9
1990	24	28	20	22	19	21	10
1992	24	34	19	41	25	23	10
1994	24	40	32	41	24	25	11
1996	35	42	30	45	24	30	13
1998	35	44	33	45	24	34	14
2000	35	47	31	47	25	33	15
2002	35	49	31	47	24	31	15
2004	35.	50	32	47	26	33	16
N	140	236 (GA: N=259 until 1971, 251 in 1971, 236 since 1973)	144	172	150	170	140

Source: Charles S. Bullock III and Mark J. Rozell, Forthcoming. *The New Politics of the Old South.* Boulder: Rowman and Littlefield.

TABLE 5

AFRICAN-AMERICAN REPRESENTATIVES AND AFRICAN-AMERICAN CITIZEN VOTING AGE POPULATION, ORIGINAL SECTION 5 STATES AND OTHER STATES

State	Citizen VAP	Black CVAP	African-American Proportion: CitizenVAP	Representatives
United States	193,376,975	22,614,559	.12	.092
Alabama	3,276,570	791,752	.24	.143
Georgia	5,675,210	1,564,032	.28	.308
Louisiana	3,198,079	957,771	.30	.143
Mississippi	2,049,386	684,233	.33	.250
North Carolina	5,820,423	1,199,611	.21	.154
South Carolina	2,939,606	811,761	.28	.167
Virginia	5,051,517	955,503	.19	.091
Seven Original Covered Southern States				
	28,010,791	6,964,663	.25	.18
Florida	11,081,542	1,365,175	.12	.12
Texas	13,299,845	1,606,131	.12	.094
US, Outside Seven Original Covered Southern States				
	165,366,184	15,649,896	.095	.078
US, Outside Nine Covered Southern States				
	140,984,797	12,678,590	.089	.073

Source: Data compiled by author from the U.S. Census and Michael Barone and Richard E. Cohen (2005). *The Almanac of American Politics 2006.* Washington, DC: National Journal.

Mr. CHABOT. Mr. Engstrom, you are our final witness and you're recognized for 5 minutes.

TESTIMONY OF RICHARD ENGSTROM, PROFESSOR, THE UNIVERSITY OF NEW ORLEANS

Mr. ENGSTROM. Thank you. I also appreciate very much, Mr. Chairman and Members of the distinguished Committee, this opportunity to appear before you today and discuss a future of the preclearance requirement of section 5 of the Voting Rights Act.

I have some prepared remarks. I am going to give a quick summary. But what I would like to point out right away is we have heard a lot of statistics already, the statistics about the increase in the African-American vote in the American South, and it can apply to other protected minorities elsewhere, and the subsequent increase in descriptive representation. One thing I want to point out right away, however, it is not a simple relationship. You increase minority votes, you increase minority representation, because those minority votes have to be channeled through an election system, and the increase in representation didn't—did lag behind the increase in minority votes largely because it took time for a number of majority-minority districts to be created.

And the reason we have the descriptive representation is not just because of the increased Black vote, but also the increased number of majority-minority or near majority-minority districts that have been created to allow that vote to be converted into descriptive representation.

But what I want to point out is those districts are crucial all right, and the reason those districts are crucial is because racially polarized voting continues to persist in the American South and certainly no doubt in other jurisdictions across the country.

The Voting Rights Act was—the reason why the Voting Rights Act was renewed, or at least one reason it was renewed in 1970, 1975, and again in 1982, was because racially polarized voting continued to exist. And unfortunately we are—23 years later, racially polarized voting continues to exist in the American South as well today.

I am going to testify about some of my work as a consultant, or my testimony will be informed by my work as a consultant in redistricting process for State legislators, for individual members working for political parties, whatever, and alsoas an expert witness. That work has covered both major political parties. That work has also covered—and plaintiffs and defendants in voting rights litigation.

One thing I want to do is to document, at least in one State as an example, and only as an example, the existence of racially polarized voting today. The State is going to be the State of Louisiana, my home State. I didn't choose Louisiana because it is my home State, and I didn't choose Louisiana because it is in any way unique in terms of the existence of racially polarized voting. But what I want to do is look at data. I chose Louisiana because there is an extensive amount of data concerning a large number of elections, over a large number of different offices, that have been analyzed for the purpose of determining the extent to which racially polarized voting was present in those elections.

That work is my own work. It was done as an expert witness in the case called *Louisiana House of Representatives v. Ashcroft,* a section 5 case. This case did not go to trial. The State did—it was settled when changes were made in the map that were favorable to minorities in Louisiana. But I want to use this as a demonstration.

In the tables that are part of my written testimony you will see lots of numbers. And basically, let me say quickly because of time, I have used three different procedures, all three commonly used in the social sciences. I have used all the procedures I know to study past elections and look at the extent to which race—racial divisions may be present.

These are 90 elections. They are all biracial elections. These are all elections in which there is at least a Black candidate and a White candidate or at least a non-Black candidate competing. Those types of elections are generally considered the most probative.

I can see my time is lapsing so let me go right to the results. And these results I can summarize, and the summary is on page 9 of my report, but out of these 90 elections, 78, that is 86.7 percent, showed racial divisions in candidate preferences, and normally to quite high levels, all right, not just some preference, but extraordinarily strong preferences of one group favoring candidates different from the other.

So that is 86.7 percent. The time frame for this study was 1991 to 2002, the entire time in which we were existing under the previous map in Louisiana. And time frame made no difference under the extent to which there was racially polarized voting. The office made no difference. It didn't matter if we are talking about State Rep, State Senator, Governor, Mayor, Register of Conveyances, Recorder of Mortgages, or Traffic Court Judge. Racially polarized voting was there across basically all the offices that were contested.

So this is designed to give you an idea of how intense and persistent and prevalent racially polarized voting may be in the South.

I want to wrap up quickly by saying, again, Louisiana is not unique. I can point to some court cases, post 2000 representational districting cases. South Carolina has been mentioned by the court, and South Carolina Federal courts said voting in South Carolina continues to be racially polarized to a very high degree. Courts in Texas found racially polarized voting throughout the State between Latinos and non-Latinos. In the Florida case they found a substantial degree of racially polarized voting in South Florida and Northeast Florida. And even the Georgia case, the case that you've heard referenced several times already, please let me note that in Georgia the Federal district court did find that in the three State Senate districts at issue in the preclearance litigation, there was, quote, highly racially polarized voting in the proposed districts. And that was a conclusion that was not disturbed by the U.S. Supreme Court when it reviewed the case. The Court said the district court needed to expand its inquiry, but in no way touched its findings on racially polarized voting.

Mr. CHABOT. Thank you very much.

[The prepared statement of Mr. Engstrom follows:]

PREPARED STATEMENT OF RICHARD L. ENGSTROM

Testimony of Richard L. Engstrom,
Research Professor of Political Science and Endowed Professor of Africana Studies, University of New Orleans, before the Subcommittee on the Constitution of the House Committee on the Judiciary

October 25, 2005
Washington, D.C.

Mr. Chairman and members of the subcommittee, thank you for the opportunity to appear before this distinguished subcommittee and to testify about the continued need for the preclearance provision of Section 5 of the Voting Rights Act.

The Voting Rights Act's preclearance requirement, contained in Section 5 of the Act, is a fundamental protection against minority vote dilution in covered jurisdictions generally, and in the American South in particular.[1] Section 5 mandates that any changes in the election arrangements in covered jurisdictions, including changes in voting rules and the manner in which electoral competition is structured, must be reviewed by the Attorney General or the District Court in the District of Columbia before they may be implemented. The purpose of this review is to preclude state and local governments in the South's covered jurisdictions from implementing changes in their election arrangements that would have a "retrogressive" impact in the electoral position of minority group protected by the Act -- African Americans, Latinos, Native Americans, Asian Americans, and Native Alaskans. Changes that place minorities in a worse electoral position than they were in prior to the change are to be denied preclearance and therefore may not be implemented [Beer v. United States, 425 U.D. 130 (1976)].

[1] The traditional definition of the South, at least for political purposes, has been the 11 states of the Confederacy. Seven of these states, Alabama, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia, are covered completely, in geographical terms, by this provision, while two others, Florida and North Carolina, are covered partially. Only Arkansas and Tennessee, two states considered to be in the rim or peripheral south, are not covered by it.

I

The preclearance provision provides a significant protection against "minority vote dilution." This concept denotes the use of electoral arrangements that systematically impede the ability of minority voters to convert their voting strength into the election of representatives of their choice. Minority vote dilution is considered a second generation form of discrimination in the conduct of elections. The first generation of discriminatory devices constituted impediments to voting itself. As many racially discriminatory disfranchisement practices were eliminated, we confronted and continue to confront this second generation problem of dilution. Minorities were added to the electoral rolls, but the structure of electoral competition interfered with their ability to convert those votes into representation of their choice. The Supreme Court made it clear, in Allen v. State Board of Elections [393 U.S. 544, 566 (1968)], that the Voting Rights Act was aimed at the subtle, not just the obvious, forms of discrimination in the electoral process, and therefore potentially dilutive changes, such as the adoption of at-large elections, annexations, and the revision of electoral districts, must be precleared in order to be implemented.

The concept of minority vote dilution is premised on differences in the representational preferences between or among groups. Obviously, if two groups have the same preferences, the votes cast by the voters of one group cannot dilute those of the other. Preferences between groups must differ in order for the votes cast by members of the larger group to veto the preferences of the smaller. When the representatives of choice of African Americans are different than those of the other voters, voting is considered to be "racially polarized" [Thornburg v. Gingles, 478 U.S. 30, 53 n. 21 (1986)]. When considering whether a change in an election system will increase the dilutive nature of the system, the degree to which voting is racially polarized is a central consideration. Racially polarized voting therefore is a necessary, but not

always sufficient, condition for retrogression to occur. As long as it remains a feature of elections in covered jurisdictions, however, then it is critical that the preclearance protection remain in place.

II

Racially polarized voting has been a prominent feature of the political landscape in the American South, and it was a central consideration in Congress concluding previously that Section 5 needed to be extended, first in 1970, and then again in 1975 and 1982. Unfortunately, 24 years after the last extension of the provision, racially polarized voting still remains prominent in the South today. While this phenomenon conflicts with the normative values of our country, and therefore is difficult for some to admit, it remains an empirical fact. Two of the leading scholars of southern politics write in their most recent book that race continues to be "the central political cleavage" in the South (see Black and Black, 2002: 4). This cleavage is a pronounced aspect of the competition between the two major political parties in the South today. Indeed, to quote those same authors again, "The racial divide remains the most important partisan cleavage" in the region (at 244; see also Lublin, 2004: 134-171, and McKee and Shaw, 2005: 285, 287, 300). But racially polarized voting is not limited to the partisan context alone. Its presence has been documented in numerous party primaries and nonpartisan elections in recent years as well. Racially polarized voting in the South is not yet a phenomenon of interest to only the historians of southern politics.

The continued presence of racially polarized voting within the covered southern states has been well documented during the latest round of redistricting, following the 2000 Census. I myself have participated in this, along with other social scientists and numerous lay witnesses. Following the 2000 Census I worked as a consultant and/or an expert witness in seven of the nine

southern states impacted by Section 5. These are Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, and Texas. This work entailed consulting with officials of both major parties, and serving as an expert witness for both plaintiffs and defendants in litigation. In both of the cases in which I testified at trial, my evidence about the presence of racially polarized voting has been credited and relied upon by the court to support findings that racially polarized voting was a feature of elections in those jurisdictions [Georgia v. Ashcroft, 195 F. Supp. 2d 25, (D.D.C. 2002) and 204 F. Supp. 2d 4 (D.D.C. 2002) and Sessions v. Perry, 258 F. Supp. 2d 451 (ED TX 200), referencing testimony concerning Latino and non-Latino voting in Balderas v. Texas, (ED TX No. 6:01-CV-158, 2002) (unpublished)].

III

My testimony before this committee will focus on my home state of Louisiana. This is not because Louisiana is unique in the extent to which its elections are infected with racially polarized voting. It is not. I focus on it because of the number of recent elections studied and the number of offices at issue in these elections are both large. The analysis on which I rely was performed by me for a section 5 case, Louisiana House of Representatives v. Ashcroft (D.D.C. CA No.1: 02cv00062), a case that never went to trial but was settled on terms favorable to the minority voters.

Prior to the settlement retrogression issues were raised concerning four state House of Representatives districts, Dists. 11, 21, 72, and 98, adopted by the state following the 2000 census, and the state introduced a focus on a fifth district, Dist. 102. These districts are located in different areas across the state. Dist. 11 is located in northwestern Louisiana under the Arkansas border, Dist. 21 in northeastern Louisiana along the Mississippi River, Dist. 72 in southeastern Louisiana under the Mississippi border, and Dists. 98 and 102 in New Orleans, with

the later containing areas on both the east and west banks of the Mississippi River. I analyzed a total of 90 elections, eight in Dist. 11, 12 in Dist. 21, 14 in Dist. 72, 38 in Dist. 98, and 18 in Dist. 102. These elections were held between 1991 and 2002, inclusive, the time period during which the previous redistricting plan, adopted following the 1990 census, was in place.

These were the 90 elections in which voters in these areas were presented with a choice between or among African American and non-African American candidates. These included the elections for the state House seats themselves and also elections for other offices, called exogenous elections, in which voters in these districts participated. All of these elections were held under Louisiana's unusual election system, in which all candidates compete, regardless of party, in an initial (primary) election. The party identifications of candidates are noted on the ballot, and if no candidate wins a majority of the votes a runoff is held between the top two vote recipients, again regardless of party. Many, if not most, of the elections analyzed were contests involving only Democratic candidates. The analysis of the exogenous elections included elections in which voters in at least 20 precincts in a district voted so that these elections would cover more than a very small portion of the district. In addition, exogenous elections in which either all of the African American candidates or all of the non-African American candidates were minor candidates were excluded. The largest overall vote in the area of the district for any excluded candidate was only 13.2 percent in the area.

Elections involving a biracial choice of candidates are widely recognized as the most probative for the purpose of determining whether, and the extent to which, voting is racially polarized. If the analyses of these types of elections reveal that African American voters have a distinct preference to be represented by people from within their own group, and non-African Americans voters reveal a distinct preference to be represented by others, then any dilution or

retrogression inquiry must be concerned with the relative opportunities that African Americans have to elect fellow African Americans. The determination of these opportunities cannot be informed by an analysis of elections in which the choices are limited to only non-African Americans. This is an essential element of a retrogression analysis, even one that attempts to assess the allegedly beneficial "trade-offs" for African Americans resulting from a reduction of such opportunities, such as those alleged in Georgia v. Ashcroft, [539 U.S. 461 (2003)].

IV

Attached to this testimony are tables that report the results of the analyses of these elections. Table 1 contains the results of the analyses of the previous elections for the state House seats themselves in Dists. 1, 21, 72, and 98, while Table 2 contains the results of the analyses of the exogenous elections in the areas of the districts. Tables 3 and 4 provide the same information for House Dist. 102. The analyses are based on the number of African American and non-African Americans receiving ballots in each precinct for each respective election, and the number of votes received by each candidate in the respective precincts. These data were provided by the state. When more than one African American was a candidate in an election, analyses of the racial divisions in the vote are reported for all of the African American candidates combined as well as for the particular African American candidate that received the greatest support from African American voters.

In the far right column the values of correlation coefficients are reported for each analysis. These coefficients may vary from 1.0 through 0.0 to –1.0. If increases in the African American percentage of those receiving ballots in the precincts relate to increases in the percentage of the vote received by the African American candidate or candidates in a perfectly consistent way across the precincts, then the value of the coefficient will be 1.0. If the relative

presence of African American voters in the precincts does not relate at all to the vote cast for the African American candidate or candidates, then the value of the coefficient will be 0.0. If the relative presence of African American voters is inversely related, again in a perfectly consistent way, to the vote received by these candidates, then the value of the coefficient will be –1.0.

While coefficients with values of .9 or above are virtually unheard of in social science research generally, this has not been the case when the coefficients concern the relationship between the race of voters and the race of the candidates they support. Among the 127 correlation coefficients reported in these tables, 102 have values of .9 or greater. All but one of the 127 coefficients is statistically significant at the conventional .05 cutoff. Clearly, across these elections, the votes received by the African American candidates in the precincts and the race of the voters in those precincts are variables that are strongly related.

Correlation coefficients show how consistently the race of the voters relates to the votes cast for candidates. But they do not provide estimates of how much the voters divide along racial lines in their candidate preferences. Estimates of these divisions are provided in the second and third columns of the tables. Reported in these columns are estimates of the percentage of African American voters that cast ballots for the African American candidate or candidates. Multiple estimation techniques are employed for this purpose. Two were approved by the United Sates Supreme Court in Thornburg v. Gingles [478 U.S. 30, 52-53 (1986)]. These were ecological regression analysis and homogeneous precinct analysis. Both techniques compare the votes cast in precincts to the racial composition of the precinct electorates.

The homogeneous precinct analysis simply compares the votes cast in predominantly African American precincts with those cast in predominately non-African American precincts. These are identified in these analyses as the precincts in which over 90 percent of the people

receiving ballots was African American and those in which less than 10 percent was African American. The votes cast for the respective candidates in the two sets of precincts are simply added and compared. Regression analysis is likewise based on a comparison of the precinct electorates and the votes cast in the precincts, but it employs all of the precincts, not only those at the extremes. This is done through statistically regressing the percentage of the votes received by the African American candidate or candidates in each precinct onto the percentage of those receiving ballots that was African American in each precinct. By examining the regression intercept and coefficient the percentage of African American and non-African American voters that voted for an African American candidate can be estimated. The third technique, know as Ecological Inference, was developed subsequent to the Thornburg case by Gary King. This procedure, which also takes into account all of the precincts, employs the method of bounds and maximum likelihood estimation to provide an additional way to obtain estimates (King 1997). A quick glance at the tables shows that the estimates produced by these three procedures rarely vary in any meaningful way.

V

Any examination of these tables reveals that voting in these dispersed areas of Louisiana is unquestionably characterized as racially polarized. Indeed, the phenomenon is pronounced. In 78 of the 90 elections analyzed, 86.7 percent, all available estimates show that African Americans cast a majority of their votes, usually extraordinary majorities of them, in support of an African American candidate, while a majority, also usually an extraordinary majority, of the non-African Americans voted for a non-African American candidate. This was true for 23 of the 25 elections (92.0 percent) for the state House seats, and 55 of the 65 elections (84.6 percent) for other offices. In only one of the areas did the analysis reveal that all of the available estimates

did not show racial divisions in the candidate preferences in over 80 percent of the elections. The exception was Dist. 98 in New Orleans, in which all available estimates showed such divisions in 79.5 percent of the elections.

There is no evidence in this analysis that racially polarized voting is a thing of the past in Louisiana. In the later years of the time period studied voting remained polarized just as it was in the earlier years. And the racial differences in candidate preferences are pervasive across offices. It doesn't matter whether the office at issue is state Representative, state Senator, Governor, Mayor, District Attorney, or Public Service Commissioner. It could be for a position as Recorder of Mortgages or Register of Conveyances. Or it could be for a variety of judicial offices – such as seats on the state Court of Appeals, state District Court, City Court, or on a specialized courts like Juvenile Court or Traffic Court. Racially polarized voting remains pronounced and pervasive in Louisiana.

VI

As noted above, Louisiana is not unique. Post-2000 redistricting litigation has revealed the presence of racially polarized voting in other states that are entirely or partly covered by the preclearance requirement. In a case involving the redrawing of state legislative and congressional districts in South Carolina, a federal district court found that "Voting in South Carolina continues to be racially polarized to a very high degree, in all regions of the state and in both primary elections and general elections" [Colleton County Council v. McConnell, (DC SC 201 F. Supp. 2d 618, 641, 2002)]. In a case involving congressional districting in Texas, a federal district court found, based on evidence from Democratic primaries and general elections, that "the presence of racially polarized voting throughout the state" between Latinos and non-Latinos [Sessions v. Perry, 258 F. Supp. 2d 451, 493 (ED. TX 2004)]. In a case involving

congressional and state legislative districts in Florida, a federal court found, based on nonpartisan, party primary, and general elections, that "There is a substantial degree of racially polarized voting in south Florida and northeast Florida – the areas of the state involved in plaintiffs' claim of racial vote dilution" [Martinez v. Bush, 234 F. Supp. 2d 1275, 1298-1299 (SD FL 2002)]. These findings applied to divisions between African Americans and non-African Americans and between Latinos and non-Latinos. And in a section 5 case involving state senate districts in Georgia, a federal district court found, based on nonpartisan, party primary, and general elections, "highly racially polarized voting in the proposed districts" [Georgia v. Ashcroft, 195 F. Supp. 2d 25, 88 (DC DC 2002); and see Georgia v. Ashcroft, 204 F. Supp. 2d 4, 10, 12 (DC DC 2002].[2]

VII

Racially polarized voting remains a prominent feature in covered jurisdictions within the South, and no doubt in many other covered jurisdictions as well, and therefore how electoral competition is structured has a major impact on the opportunities of minority voters in these areas to elect representatives of their choice. The presence of this phenomenon makes it critical that the preclearance provision of Section 5 continues to apply to these areas.

The importance of Section 5 cannot be measured only by the number of times preclearance is denied to changes in electoral arrangements. Any measure of its importance must also take into account its profound deterrent effect. In my redistricting work I have witnessed the power of this deterrent effect. I have seen the importance of preclearance to districting cartographers and decision makers. I have seen district lines revised in order to avoid their

[2] While some may think that the Supreme Court reversed this finding in its decision in Georgia v. Ashcroft, no such thing occurred. The finding of racially polarized was undisturbed. The case was not tried again after being remanded to the district court because Georgia enhanced the African American voting age population percentages in the districts at issue and the Attorney General no longer objected to preclearance.

retrogressive consequences and the denial of preclearance. Racially polarized voting is, unfortunately, a fact of political life in the South, and it is an important factor in electoral strategizing. The preclearance provision therefore needs to be maintained, so that this strategizing does not result in new electoral arrangements that set back the hard won gains of the protected minorities in the covered jurisdictions.

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ATTACHMENT

TABLE 1

State House of Representatives Elections

Estimates Divisions in Support for African American Candidates

Reported in the following order:
King's Ecological Inference
Regression Analysis
Homogeneous Precinct Analysis

Candidate(s)	% of African Americans	% of Non- African Americans	Correlation Coefficient
LA House District 11			
1991 Primary			
Three African Americans[1]	90.8	17.8	
	93.4	13.5	.950
	92.5	19.5	
Wilkerson[2]	60.4	7.0	
	62.0	4.3	.943
	66.0	8.6	
1991 Runoff			
Wilkerson	85.7	9.6	
	88.7	4.5	.957
	91.0	12.2	
2000 Primary			
Three African Americans	97.7	59.4	
	101.1	52.1	.914
	98.0	54.5	
Gallot	70.4	29.0	
	73.7	21.7	.630
	69.1	25.2	

[1] If more than one African American and more than one non-African American are competing in a primary election, the specific number of such candidates will be identified.

[2] The particular African American candidate, when there are more than one, who receives the most votes from African American voters.

Candidate(s)	% of African Americans	% of Non- African Americans	Correlation Coefficient
	LA House District 21		
1991 Primary			
Two African Americans	94.8	10.9	
	98.2	8.2	.989
	94.7	8.2	
Williams	63.8	4.6	
	63.7	4.8	.970
	60.3	3.7	
1991 Runoff			
Williams	89.6	11.5	
	91.0	10.8	.893
	91.5	14.7	
1995 Primary			
Two African Americans *(vs. two-Non-African Am.)*	81.8	6.5	
	85.7	4.0	.987
	81.6	5.4	
Davis	79.5	5.6	
	83.1	2.9	.988
	79.4	4.6	
1995 Runoff			
Davis	91.0	4.2	
	92.7	2.4	.997
	90.2	5.6	
1999 Primary			
Davis	67.5	3.9	
	68.8	3.2	.927
	70.2	5.7	

Candidate(s)	% of African Americans	% of Non- African Americans	Correlation Coefficient
	LA House District 72		
1991 Primary			
Four African Americans (*vs. four non-African Americans)*	64.1 71.5 73.2	11.0 4.8 6.1	.823
Minor	22.5 (pl.)[3] 28.5 (pl.) 39.3 (pl.)	0.1 -4.6 0.6	.536
1995 Primary			
Gremillion (*vs. three non-African Am.*)	47.9 (pl) 61.3 84.9	4.8 -5.4 7.1	.758
1995 Runoff			
Gremillion	62.4 68.0 92.6	23.5 17.8 26.1	.658
1996 Primary			
Four African Americans (*vs. six non-African Am.*)	66.1 71.4 95.3	6.7 1.5 8.8	.834
Gremillion	29.3 (pl) 39.3 (pl) 84.5	0.1 -8.9 1.5	.615
1999 Primary			
Two African Americans	57.8 60.3 81.8	33.9 31.7 38.9	.525
Fabve	52.2 54.6 77.2	19.0 17.2 22.3	.646

[3] (pl) indicates that the particular candidate received a plurality, but not a majority, of the votes cast by African Americans or by non-African Americans.

Candidate(s)	% of African Americans	% of Non- African Americans	Correlation Coefficient
	LA House District 98		
1991 Primary			
Three African	74.9	19.2	
Americans (*vs. two*	76.7	18.3	.959
Non- African Am.)	73.9	18.9	
Garnett	31.0 (pl)	1.0	
	32.3 (pl)	0.2	.942
	34.3 (pl)	2.1	
1995 Primary			
Rome	53.4	6.7	
	53.6	6.5	.967
	50.6	3.5	
1997 Primary			
Five African	83.8	10.0	
Americans *(vs. five*	90.4	4.3	.957
Non-African Am.)	88.8	4.9	
L. Charbonnet	32.5 (pl)	2.4	
	33.1 (pl)	1.9	.931
	33.4 (pl)	1.7	
1999 Primary			
DeBose-Parent	63.1	15.2	
	64.1	13.5	.935
	60.9	11.4	

Table 2
Exogenous Elections

Estimated Divisions in Support for African American Candidates

Reported in the following order:
King's Ecological Inference
Regression Analysis
Homogeneous Precinct Analysis

Candidate(s)	% of African Americans	% of Non- African Americans	Correlation Coefficient
LA House District 11			
1995 Primary: Governor			
Two African	70.0	4.1	
Americans (*vs. 14*	73.9	1.0	.979
Non-African Am.)	75.5	4.3	
C. Fields	70.5	3.3	
	73.1	0.0	.979
	75.2	4.2	
1995 Runoff			
C. Fields	97.3	11.0	
	100.4	5.9	.996
	98.4	11.1	
1999 Primary: Governor			
Jefferson (*vs. 10*	83.9	5.0	
Non-African Am).	85.5	2.9	.981
	85.2	9.5	
1999 Primary: Ruston City Judge			
Gallot (*vs. three*	87.4	15.0	
Non-African Am).	96.2	1.8	.959
	83.4	NA	
1999 Runoff: Ruston City Judge			
Gallot	99.3	20.7	
	101.9	14.4	.993
	98.2	17.7	

Candidate(s)	% of African Americans	% of Non- African Americans	Correlation Coefficient
	LA House District 21		
State Senate Elections: District 34			
1991 Primary			
Two African	88.8	8.8	
Americans	90.1	8.8	.972
	87.3	10.6	
Jones	86.0	5.5	
	87.1	5.9	.967
	84.2	7.0	
1995 Primary			
Jones	94.7	10.0	
	97.7	6.2	.987
	94.8	10.9	
Other Elections			
1995 Primary: Governor			
Two African	67.7	2.6	
Americans (*vs. 14*	70.7	0.3	.984
Non-African Am.)	68.1	1.9	
Fields	67.6	1.8	
	70.4	0.9	.983
	67.7	1.8	
1995 Runoff: Governor			
Fields	98.7	7.0	
	99.4	5.8	.998
	96.8	9.1	
1996 Primary: 6th District Judge			
Kelly	68.6	10.2	
	68.6	10.3	.904
	67.5	14.1	

Candidate(s)	% of African Americans	% of Non- African Americans	Correlation Coefficient
1999 Primary: Governor			
Jefferson *(vs. 10 African Amn)*	80.3	3.6	
	80.2	3.8	.991
	76.3	5.2	
1999 Primary: 6th District Judge			
Kelly	84.3	9.2	
	86.4	6.5	.966
	81.7	10.2	

LA House District 72

State Senate Elections: District 15

1991 Primary			
Four African Americans	83.9	12.0	
	87.8	6.3	.929
	89.1	8.7	
Nelson	57.8	1.5	
	66.3	-9.1	.846
	77.0	3.5	
1999 Primary			
W. Fields	96.3	28.7	
	101.3	24.5	.960
	NA	24.3	
Other Elections			
1995 Primary: Governor			
Two African Americans *(vs. 14 Non-African Am.)*	86.4	9.0	
	90.9	5.0	.971
	88.3	5.9	
C. Fields	87.4	7.6	
	90.7	4.9	.971
	88.1	5.9	

Candidate(s)	% of African Americans	% of Non- African Americans	Correlation Coefficient
1995 Runoff: Governor			
C. Fields	98.9	17.0	
	97.2	18.7	.938
	98.2	29.2	
1996 Primary: 20th Judicial District Attorney			
Shropshire	85.0	18.5	
(vs. three non-	84.7	18.1	.878
African Am.)	NA	13.9	
21st Judicial District Attorney			
Butler (vs. four	74.8	6.2	
Non-African Am.)	75.3	2.8	.915
	NA	10.4	
1998 Primary: 21st Judicial District Attorney			
McCraney (vs. four	70.3	10.4	
Non-African Am.)	73.4	7.5	.926
	56.8	13.9	
1999 Primary: Governor			
Jefferson *(vs. 10*	89.7	9.5	
African Amn)	90.8	9.1	.977
	85.3	11.5	
1999 Primary: Board of Elementary and Secondary Education District 8			
Two African	95.8	72.3	
Americans	97.0	71.8	.868
	96.6	71.1	
Johnson	63.0	37.6 (pl)	
	63.4	38.9 (pl)	.743
	64.2	40.8 (pl)	

Candidate(s)	% of African Americans	% of Non- African Americans	Correlation Coefficient
	LA House District 98		
1995 Primary: Governor			
Two African	51.1	0.9	
Americans (*vs. 14*	50.8	1.0	.983
Non-African Am.)	48.7	1.0	
C. Fields	50.9	1.0	
	50.7	0.9	.982
	48.7	1.0	
1995 Primary: Civil District Court, I			
Two African	92.3	19.9	
Americans (*vs. 2*	91.8	20.5	.972
Non-African Am.)	91.3	28.1	
Love	70.6	4.5	
	71.0	3.9	.960
	72.0	7.9	
1995 Runoff: Governor			
C. Fields	99.1	15.7	
	98.8	15.7	.992
	98.9	16.1	
1995 Runoff: Civil District Court			
Love	97.4	29.0	
	98.9	28.1	.987
	96.3	24.6	
1996 Primary: District Attorney			
Two African	77.3	4.6	
Americans (*vs. 3*	75.4	6.9	.985
Non-African Am.)	72.3	4.7	
Reed	43.7 (pl)	1.1	
	43.3 (pl)	1.5	.952
	41.8 (pl)	2.6	

Candidate(s)	% of African Americans	% of Non- African Americans	Correlation Coefficient
1996 Primary: Constable 1st City Court			
Two African Americans	78.9	30.2	
	78.6	30.8	.954
	74.1	24.0	
Boissiere	70.1	22.2	
	69.0	23.7	.957
	64.6	19.6	
1996 Primary: Civil District Court D			
Two African Americans	94.1	60.6	
	94.1	60.3	.893
	95.9	65.2	
Medley	47.1 (pl)	41.4	
	48.6 (pl)	39.0	.433
	54.9	43.9(pl)	
1996 Primary: Criminal District Court A			
Three African Americans	80.4	13.3	
	81.3	12.2	.987
	84.2	17.0	
Elloie	60.4	3.1	
	62.3	0.6	.975
	66.0	3.3	
1996 Primary: Criminal District Court F			
Two African Americans	60.7	22.1	
	60.4	22.7	.900
	54.3	16.0	
Jenkins	41.5 (pl)	17.1	
	41.4 (pl)	17.4	.814
	36.3	10.8	
1996 Primary: Civil District Court I			
Pryor	45.8	6.8	
	45.3	7.8	.929
	44.2	8.4	

Candidate(s)	% of African Americans	% of Non- African Americans	Correlation Coefficient
1996 Primary: Criminal District L			
Pinkston	49.3	13.9	
	50.6	21.3	.924
	48.6	6.8	
1996 Primary: Juvenile E			
Harris	48.1	8.2	
	46.8	9.8	.925
	41.9	6.5	
1996 Primary: Municipal Court			
Vanison	44.1	9.5	
	45.2	8.0	.931
	43.0	6.2	
1996 Runoff: District Attorney			
Reed	64.3	4.8	
	64.5	4.8	.968
	59.1	5.1	
1997 Primary: Traffic Court			
Morrell	90.7	2.3	
	92.9	1.2	.993
	94.2	4.3	
1998 Primary: Mayor			
Morial	97.6	32.8	
	97.7	32.2	.984
	95.9	35.8	
1998 Primary: Recorder of Mortgages			
D. Charbonnet	74.1	13.0	
	73.5	13.9	.982
	71.4	14.2	

Candidate(s)	% of African Americans	% of Non- African Americans	Correlation Coefficient
1998 Primary: Register of Conveyances			
Bookman (*vs. 2 Non-African Am.)*	63.6	8.9	
	64.1	8.3	.980
	62.0	7.8	
1998 Runoff: Register of Conveyances			
Bookman	76.6	5.1	
	77.2	4.8	.987
	75.0	6.6	
1998 Primary: Pub Service Comm. District 3			
Two African Americans	91.8	23.0	
	92.2	25.5	.978
	91.3	NA	
Dixon	58.2	7.1	
	60.1	5.4	.903
	61.3	NA	
1998 Primary: Criminal District Court H			
Two African Americans	54.0	10.6	
	55.7	9.1	.944
	52.6	6.6	
Reed	35.1	5.7	
	37.0	4.1	.926
	36.0	3.3	
1998 Primary: 1st City Ct. Court C			
Two African Americans	87.3	19.8	
	90.3	16.6	.970
	82.6	9.4	
Spears	80.4	14.1	
	82.4	11.9	.979
	76.4	8.1	
1998 Runoff: Public Service Committee; District 3			
Dixon	90.2	14.9	
	90.0	16.0	.973
	89.0	NA	

Candidate(s)	% of African Americans	% of Non- African Americans	Correlation Coefficient
1998 Runoff: City Court C			
Spears	91.6	13.6	
	93.9	10.8	.990
	89.7	9.1	
1999 Primary: Governor			
Jefferson *(v. 10*	95.6	13.1	
Non-African Am.)	95.2	13.5	.993
	93.1	14.4	
1999 Primary: Fourth Court of Appeals			
Russell	86.5	13.6	
	94.0	-4.4	.966
	88.5	5.4	
1999 Primary: Civil District Court M			
King (*vs. 2*	89.4	14.3	
Non-African Am.)	89.0	15.4	.990
	85.1	15.1	
1999 Primary: Juvenile Court F			
Three African	93.4	18.8	
Americans	103.1	3.0	.974
	89.9	6.5	
Hughes	69.6	9.4	
	77.9	-2.0	.942
	73.6	3.8	
1999 Runoff: Juvenile Court F			
Hughes			
	89.4	19.0	
	109.7	8.1	.958
	88.9	7.2	

Candidate(s)	% of African Americans	% of Non- African Americans	Correlation Coefficient
2000 Primary: Juvenile Court C			
Hughes (*vs. 2 Non-African Am.*)	72.0	7.8	
	71.3	9.3	.957
	65.2	6.7	
2001 Primary: Civil District Court E			
Ware	24.0	14.6	
	23.4	15.5	.432
	23.3	12.9	
2001 Primary: Civil District Court I			
Two African Americans	96.0	24.4	
	97.8	23.5	.946
	93.4	18.1	
Griffin	70.4	19.6	
	69.1	19.6	.852
	69.4	17.4	
2001 Primary: Civil District Court L			
Three African Americans (*vs. 3 Non-African Am.*)	89.7	32.2	
	90.0	31.8	.975
	88.7	29.5	
Reese	35.8 (p1)	28.5	
	36.1 (p1)	28.0	.332
	36.1 (p1)	23.2	
2001 Runoff: Civil District Court L			
Reese	86.5	20.5	
	87.4	19.8	.962
	86.7	19.0	

TABLE 3
State House of Representatives Elections
District 102
Estimates Divisions in Support for African American Candidates

Reported in the following order:
King's Ecological Inference
Regression Analysis
Homogeneous Precinct Analysis

Candidate(s)	% of African Americans	% of Non- African Americans	Correlation Coefficient
1991 Primary			
Four African Americans	95.5	3.6	
	100.1	3.6	.986
	95.3	10.0	
Carter	43.8 (pl)	3.4	
	43.6	6.8	.754
	41.8	7.2	
Casby	39.6	0.4	
	45.5 (pl)	-4.8	.834
	44.8 (pl)	7.2	
1991 Runoff			
Carter	95.6	17.0	
	96.1	18.3	.976
	93.7	24.4	
1994 Primary			
Four African Americans	89.4	10.0	
	89.3	10.0	.996
	85.2	12.1	
Mitchell-Grubb	58.7	9.7	
	57.2	10.8	.949
	52.2	10.4	

Candidate(s)	% of African Americans	% of Non- African Americans	Correlation Coefficient
1994 Runoff			
Mitchell-Grubb	90.3	9.0	
	90.5	8.0	.992
	86.3	10.6	
1995 Primary			
Guidry	75.3	6.2	
	75.0	6.3	.988
	71.4	9.3	
1995 Runoff			
Guidry	82.6	12.6	
	82.8	1.2	.991
	81.1	16.3	
1999 Primary			
Three African Americans	69.0	3.6	
	70.6	1.7	.975
	69.3	8.2	
Gasper	26.9	0.6	
	30.4 (pl)	-3.5	.874
	33.1 (pl)	1.8	
2002 Primary			
Four African Americans	82.0	4.6	
	82.7	3.9	.990
	82.1	9.0	
Ford	33.9 (pl)	4.8	
	33.2 (pl)	5.2	.727
	23.6	5.9	
Gastinell	27.1	0.3	
	31.7	-2.7	.594
	41.5 (pl)	1.3	

Table 4
Exogenous Elections
District 102

Estimated Divisions in Support for African American Candidates

Reported in the following order:
King's Ecological Inference
Regression Analysis
Homogeneous Precinct Analysis

Candidate(s)	% of African Americans	% of Non- African Americans	Correlation Coefficient
1999 Primary: Governor			
Jefferson *(v. 10*	97.5	10.9	
Non-African Am.)	98.0	10.2	.994
	94.2	15.9	
1999 Primary: Fourth Court of Appeals			
Russell	82.3	4.6	
	82.9	4.2	.984
	82.7	9.4	
1999 Primary: Civil District Court M			
King *(vs. 2*	85.4	23.0	
Non-African Am.)	85.0	23.1	.974
	79.1	23.0	
1999 Primary: Juvenile Court F			
Three African	97.5	12.8	
Americans	98.6	11.6	.991
	94.2	16.2	
Pierre	54.0	3.1	
	56.3	0.6	.961
	55.4	6.1	
1999 Runoff: Juvenile Court F			
Hughes			
	94.7	6.4	
	94.7	6.0	.994
	91.5	9.3	

Candidate(s)	% of African Americans	% of Non- African Americans	Correlation Coefficient
2000 Primary: Juvenile Court C			
Hughes (*vs. 2 Non-African Am.*)	73.5	13.6	
	78.7	6.6	.973
	71.6	15.7	
2001 Primary: Civil District Court E			
Ware	19.7	19.5	
	19.3	19.9	.045(n.s)
	19.0	21.2	
2001 Primary: Civil District Court I			
Two African Americans	94.2	19.5	
	95.1	18.5	.985
	92.6	20.6	
Griffin	70.1	16.1	
	70.8	15.4	.968
	67.8	18.2	
2001 Primary: Civil District Court L			
Three African Americans (*vs. 3 Non-African Am.*)	95.0	36.6	
	95.5	35.7	.970
	92.5	40.5	
Harrison	60.2	7.6	
	60.7	6.9	.926
	59.4	11.3	
2001 Runoff: Civil District Court L			
Reese	91.2	13.8	
	91.1	13.8	.981
	89.5	18.5	

Mr. CHABOT. The Members of the Committee will now have 5 minutes to ask questions, and I yield myself 5 minutes for that purpose. And this question I would address to each of the panel members, and we will begin with you, Mr. McDonald.

How effective is the current retrogression standard to protect and prevent against minority backsliding?

Mr. MCDONALD. Well, there is no question that there is some deterrent effect. The State of Georgia, for example, just this year redistricted its congressional delegation. And before it did so, it adopted a resolution saying that it must comply with section 5. And the plan that it ultimately adopted didn't change the Black voting age population in the two districts that were majority Black and in the two that were majority—barely majority White. They did not affect or reduce at all the Black voting age population, so we know there is a deterrent effect.

The City of Albany, Georgia, after the 2000 census enacted a redistricting plan for the city. And it was submitted for preclearance. The Department of Justice objected on the grounds that there was evidence that it was animated by purposeful discrimination to limit the opportunities of minorities. So it continues to have an actual impact and a deterrent effect. But I think it is also the case that section 5 has been weakened by a couple of recent Supreme Court decisions, what is called *Bossier II,* which involves an objection on the purpose grounds can only be made if something has a retrogressive purpose.

I just remember in 1982 the State of Georgia enacted a plan with a discriminatory purpose, but it was not retrogressive because they actually increased the Black population in district 5. Julian Bond was in the Senate and submitted a plan creating like a 69 percent Black district. It got to the House. Joe McWilson—I hate to speak in the language that he uses—but the N word was part of his every day vocabulary. He told his colleagues on the House side, quote, "I am not going to draw any nigger districts," end quote.

So the plan that they ended up with was not retrogressive if it didn't make Blacks worse off because it slightly increased the Black population based on the benchmark plan; but if *Bossier II* had been in effect, arguably that would not have been objectionable because the purpose was not to make Blacks worse off. It was actually—their percent in the Fifth District was actually increased. I think that's an absurd result. And I really think that the Congress ought to take very seriously the problems of *Bossier II.*

Mr. CHABOT. Thank you. Mr. Hunter.

Mr. HUNTER. I would like to say I agree with Laughlin about the effects of the most recent Supreme Court decisions. I know that if I were to compare the 1990 review of, say, the North Carolina or South Carolina or Florida section 5 preclearance review that was—given the legislative plans at that time—with the review that the Justice Department gave the similar plans in 2000, the review was far more rigorous and vigorous in the 1990's than it is today.

I think that is a direct result of these three cases and the challenge is on largely federalism grounds I think, to the implementation of section 5. And I think it is important to remember that the 14th and 15th amendments, which are the enforcement powers, and the Republican form of government section of the Constitution,

are really antifederalism-type implementations. There are amendments to federalism to allow national power to work its will.

So I certainly agree that where you have an agreement among incumbents to keep emerging minority districts or to prevent new districts from being drawn, then I think you have a problem of intentional discrimination without a retrogressive effect, not just, as Judge Scalia says, an incompetent retrogressor.

Mr. CHABOT. Thank you. My time is running out. Mr. Gaddie.

Mr. GADDIE. Mr. Chairman, I would agree with my colleagues that the most recent decisions have altered or potentially altered the effectiveness of section 5 and section 5 has been critical to advancing minority representation. I also agree with my colleague, Dr. Engstrom, that without those new minority-majority districts enacted in the 1990's, you would not have seen those initial advancements in minority representation.

That being said, to the current state of section 5 as a social scientist, I have three concerns with regard to its current status.

One is how do we describe retrogression. If we consider coalition districts in the process of assessing retrogression or non-retrogression, 10 years from now we will have to ask the question, how do we count those coalition districts in creating the new baseline? These are not minority-majority districts, but coalition districts that might be counted toward establishing non-retrogression. How do we treat them down the road?

This leads to the question of how do we describe representation. Is it sufficient to have access to the process to coalesce, to elect a member from a party? Or is what matters the election of the candidate of choice from the community from which those votes are coming? Where does the obligation to pull, haul, and trade get balanced against the guarantees of access and descriptive representation in the process?

For social scientists, we have a tough challenge which is, how do we weigh a coalition district? If we were to apply the *Ashcroft* standard in 1991, we might not have created the new majority-minority districts that we did. So this standard has changed the measure of retrogression and the ability to assess it.

Mr. CHABOT. Thank you. My time has expired, but if you could answer briefly Mr. Engstrom.

Mr. ENGSTROM. I think the only thing I would add is to stress the deterrent effect. I think the act has been effective. What the *Georgia v. Ashcroft* situation will be is yet to be played out. But I think when we look at how effective it has been, it has been effective. I don't think we can just count objections from the Justice Department. I do think we have to take into account the deterrent effect of the preclearance provision.

And I can say as a consultant who has had a role in drawing maps and the process, that the section 5 looms seriously over political cartographers and decision makers when it comes to plans. And I can testify that I have seen districts changed in order to avoid retrogression and gain preclearance. Districts that had already been agreed upon in effect from the political end were changed in order to satisfy the law.

Mr. CHABOT. If you could provide those to the Committee, we would like to have that; any information, papers, reports, graphs,

anything you might have. If you can provide those, not necessarily right now, but——

Mr. ENGSTROM. The consulting work often is, I don't know that I am privileged—I can say the results I cannot——

Mr. CHABOT. To the extent that you're able to provide it, we would appreciate it. If you can't, we understand.

Mr. CHABOT. Thank you very much. My time has expired.

The gentleman from New York, Mr. Nadler, has 5 minutes.

Mr. NADLER. Thank you, Mr. Chairman. At this time, with your permission, I would like to defer my questions and yield—not yield, but ask that the distinguished Ranking Member of the full Committee Mr. Conyers, has questions now.

Mr. CHABOT. Absolutely. We will take your time back.

Mr. NADLER. I take my time back.

Mr. CHABOT. We will give Mr. Conyers your 5 minutes at this time.

Mr. CONYERS. Thank you, Mr. Chairman, and thank you, Mr. Nadler. We really need a lot more than 5 minutes each, don't we?

We have got so many things floating around in this panel and we have suddenly, after a lot of wonderful rhetoric in some other panels, we are down to some very serious questions. Namely, does *Georgia v. Ashcroft* need remedying in this new renewal and section 5 continuation? I hope everyone agrees with me that *Bossier* certainly does, and everyone here seems to support the reauthorization. But the question around section 5 is that should influence districts not be counted or not? Should they be counted or not? And that is where we get into some very difficult issues.

Do not be dismayed by the fact that times are changing and that the issues and the way we remedy them are changed, too.

Should African-American influence be allowed to, as it were, unpack some of these districts where we used to need from 65 to 80 percent to elect an African-American, when now frequently considerably less is necessary.

So this is where we come into this traditional issue. And I would like Mr. McDonald and Mr. Engstrom to quickly put your oar into those sets of issues that are floating around on the top. And then I would very much, very much like to hear from Mr. Hunter, Attorney Hunter, and Mr. Gaddie.

Mr. MCDONALD. Mr. Conyers, I think that you don't go astray if you keep your eye on the basic right that the Voting Rights Act protects, and that is the equal right of covered minorities to participate in the political process and elect candidates of their choice. And I don't think that it serves the ultimate purpose of the Voting Rights Act to say that that standard is met if you can simply influence the election of candidates.

I think one of the great ironies of the influence theory is that the whole Shaw-Miller cases were brought by White voters who were placed in White-influence districts. They were the minority White district, but they were 45, 46 percent of the population, and they could influence the election of candidates. And yet those White voters convinced the U.S. Supreme Court that putting them in White-influenced districts violated the 14th amendment. But yet people say, oh, it is okay for Black voters to be in Black-influence districts. Again, I keep my eye on what the fundamental right is.

Nobody supports packing, believe me. And people constantly talk about the *Georgia v. Ashcroft* decision and I think give the mistaken impression that the three Senate districts at issue, they were majority White districts, and that somehow the Black Caucus supported those districts. That is not factually correct. They were three majority Black districts, and I have talked to—if I can resort to hearsay—but I have talked to Tyrone Brooks who is the Chair of the Georgia Association of Black Elected Officials, and others, and they said they would never have supported a plan that abolished the majority Black districts. These were still majority Black districts, but they thought that nonetheless that Black voters still had the chance to elect candidates of choice.

Mr. CONYERS. Mr. Engstrom.

Mr. ENGSTROM. Let me say just quickly at the beginning, as I said earlier, we have to see what *Georgia v. Ashcroft*—how it plays out. We don't have a single court case that applies that. The *Georgia* case, when it went back on remand, *Georgia* changed the districts that were at issue. They didn't make a coalition or an influenced district argument. They got precleared simply in a previous way by increasing the African-American percentage in those three districts, and the Justices said we are satisfied.

As to influenced districts, a couple quick things. One, I am disturbed by the fact, and I think Laughlin has pointed out, that it is a racially selective concept. This was clear vividly in *Hayes v. Louisiana,* one of the 1990 cases. But the Court in effect said any district with over 25, 30, percent basically Black voting-age population was a Black-influenced district. But yet the two Representatives that had districts that were about 55 percent were basically considered—these would be racial partisans. It is like it is a racially selective application that goes into one direction.

I also think the concept—and this is true in *Georgia v. Ashcroft*—is incredibly simplistic at this point in time. It just says in *Georgia v. Ashcroft* sometimes it is 20 percent, sometimes it is 25 percent, sometimes it is 30 percent. But in effect, the Court used those numbers and there was nothing to back them up. It is not just how many minorities; also, what are the other voters in that district like? Are they going to be available there for coalition politics or what?

I can note one of the disturbing things in the *Georgia* case when the case was on remand. The State of Georgia identified 17 districts that were influenced districts, quote unquote, based on what they said was the O'Connor standard. But it was 25 percent Black voting-age population.

After that election, when the legislature met, 7—over 40 percent of those districts—7 of the 17 were represented by White Republicans. Now, three of those districts, influenced districts, actually resulted in the election of Republicans. Four more resulted in the election of White Democrats who subsequently changed party.

That is how influenced the minority was in their district, to become Republicans and allow the Republican Party to organize the Chamber and control it.

Two of those—two of those districts were walkovers, no contest, at least in the general election. Two others were districts in which the White Democrat got over 90 percent of the African-American

vote and less than a majority of the White vote, or the non-African-American vote. Yet despite in effect Blacks being pivotal to their election, they switched parties by the time the legislature was in session.

I don't think—we don't have a good handle on an influence district. We certainly can't go forward and say it is just some specific percentage of Blacks present in a district. We have to be far more serious about this concept than we have been to this point in time.

Mr. CHABOT. The gentleman's time has expired. The gentleman from Florida, Mr. Feeney, is recognized for 5 minutes.

Mr. FEENEY. I will, if I can back up on that, because I really think this is the gist of the question that is before the panel here today. We went from earlier this morning where Mr. Blum told us at first that there was no more Jim Crow-era segregationist intent anywhere in Georgia, and modified that to say no elected official with control over any process had that intent, which I still find remarkable. And we still have a huge difference between Mr. Gaddie and Mr. Blum on the one hand, the first witnesses to tell us, because we have got increased minority registration, participation, and election of candidates, that section 5 may no longer be necessary anywhere in the country, versus all the other testimony we have, both factual and anecdotal, which tends to go very much averse to that and just say that the techniques for purpose or effects that discriminate against participation to elect candidates of your choice have just become different, whether it is at-large voting, whether it is annexation, whether it is redistricting or other subtle techniques.

But the problem we have with the *Georgia v. Ashcroft* case seems to be a real defining one for this Committee.

The problem with—you know, Bull Connor may be dead, but O'Connor is very much alive, and the standard is unenforceable because it is unintelligible. I think that what an influenced district is a very interesting question, and it will change from candidate to candidate and cycle to cycle and geographic area to geographic area. And even Mr. Gaddie I think agreed with that.

For example, arguably African-Americans in the State of Alabama in the 1960's could influence the outcome of the race between George Wallace and Big Jim Folsom on the theory that influence means getting the candidate that is the lesser of two evils may be an important choice for African-Americans at the time. But I hope we aspire to better than that. And I know that if we are not going to allow retrogression, we expect better than that, as we define what these issues mean.

And I think even the specifics of the *Georgia v. Ashcroft* case are very telling, because let's face it, there are minority voters in my community that will be very attractive in drawing White votes, even a majority of White votes. Maybe the instances we look at, some of the success candidates have had in Georgia or other areas anecdotally, there will be other minorities that are very highly acceptable and desirable in the minority community that may not be able to attract significant support from the White community. So I am interested, if we are not going to change the standards laid out by a narrow majority in *Ashcroft,* how do we define what influ-

ence means and isn't that a standard that evolves day to day, candidate to candidate, and geography to geography?

Mr. Hunter, I will let you start and then ask the other panelists if they have an opinion as to how this standard, whether it is even enforceable, but I will leave with you this. You outlined the dramatic effects in terms of the number of minorities that are elected to office in North Carolina. In Florida for 110 years, we had no African-Americans, and only one Cuban-American ever represented the people of Florida in Congress. And I can say that for the most part, Floridians are grateful for the change, although they don't like some of the specific Congresspersons from our State.

But Mr. Hunter, do you think the standard in *Ashcroft* can ever be intelligible, let alone enforceable?

Mr. HUNTER. I tried a case about the election of North Carolina judges, Superior Court judges, statewide called *Martin v. Republican Party*. It took 12 years to litigate an intentional discrimination against Republican voters in the State in the election of Superior Court judges. It was incredibly difficult. We finally won. It's the only political gerrymandering case that's ever been successful. It took us 12 years to prove it, and it has to do with this whole idea of influence.

You know, influence is something that you get—I think when people confuse it they are talking about influencing in the election or influence subsequently when people get into a body or a chamber, and I think that's what Justice O'Connor proves. Proving legislative intent or influence is one of the most amorphous things you can possible prove. Is one legislator more influential than another? Is a coalition of Blacks and Whites more influential? Influenced to do what?

I think it's a very difficult standard. It's not objective. It's not easily understood. It allows the Department of Justice or the three-judge panel in the District of Columbia to come up with differing results. Practitioners aren't going to understand it at all. I just think it's just such an amorphous concept.

The second thing I want to say—and I'll just use Congressman Watt's district as an example because I'm from North Carolina and I happen to know it—I've never met an incumbent legislator who wanted an influence district. If I were to go to Congressman Watt and say, as minority legislators are wont to do—they're the ones being asked to have an influence district. If I were to go to Congressman Watt and say, good news, Congressman, your district has been selected to go from a majority Black district to an influence district, and we're only going to give you 40 percent of your core district and give you 60 percent or whatever percentage, and I've got a political scientist here who's real smart and he's going to tell you you can theoretically win in that and it will help your party later on, I don't think I'm going to be Mr. Watt's lawyer for very long.

I just don't think—incumbents don't want that. They want certainty. They want surety. Because their influence is what's important to them in the body after the next redistricting and after the election. So influence districts don't mean anything, is a theoretical matter to incumbents, and influence districts in the community at large are just so ephemeral, I don't know what it means.

Mr. CHABOT. I believe the gentleman asked Mr. Gaddie also to respond as well. The gentleman's time has expired.

Mr. FEENEY. With the indulgence of the Committee, maybe Mr. Engstrom has something to say as well.

Mr. CHABOT. As well as Mr. Gaddie, you mean.

Mr. ENGSTROM. I share the concern that, as I said earlier, we do not at this point have a handle on the concept of influence district. We don't really know what it is. We don't know how to measure it; and whether we're going to be able to measure it, say, by the 2010 round of redistricting is an open question. I'm not really persuaded that we're that close or whether we ever will be.

There's another dimension to *Georgia v. Ashcroft* that I want to note. Just as influence district can be quite subjective—and I'll add another example. I don't mean to name a Member of Congress, but there's supposedly a Latino influence district in Texas. It's a district that elects a Latino Republican. The Latino Republican has never been supported by Latino voters in his district, never, and what the State did was simply go out, eliminate Latinos from his district, because that was starting to put him at risk, and go out and get more Anglo Republicans to replace Latino Democrats.

The court in Texas called that a Latino influence district. Well, if that's a Latino influence district, I think we can just ignore the concept completely. That is not a district in which the representative is likely to feel electorally accountable in a very serious way to the Latino voters.

Let me add one other thing that disturbs me about *Georgia v. Ashcroft*—and I'm not a lawyer. Let me preface that. But, as I read it, I understand Justice O'Connor said the ultimate test or the ultimate standard was going to be the totality of the circumstances. Well, if we think influence district is an amorphous and vague concept, difficult to measure, what in the world are the totality of circumstances? Totality of circumstances is a test that leaves judicial discretion a mile wide, just like influence district, just like that concept does as well.

So, again, lawyers may be able to tell you better how these standards will play out, but I am definitely pessimistic about the concept of influence district and being able to objectively measure that concept and work it into some kind of calculation or some kind of relationship that tells us whether these are valuable, beneficial trade-offs to actual opportunities to elect and hold electoral or hold representatives accountable.

Mr. CHABOT. Mr. Gaddie, did you want to respond very briefly?

Mr. GADDIE. I get a sense Dick may have cribbed some of my notes here, so I will be brief.

It is difficult to measure this thing, and this is the principal challenge that comes out of *Ashcroft*. Indeed it's difficult to measure performance in any instance because measuring a performing district varies by constituency.

Professor Abstein in his testimony in *Ashcroft* noted that an African-American candidate had a fair chance of winning a district at 44.7 percent African-American VAP. He had a similar analysis in South Carolina that indicated a number of 47 percent African-American BAP. As I look at Representative Scott's district that he

was initially elected from in 2002, this was a district that approached but did not meet this threshold.

African-American candidates can win districts where there is not a majority of African-American voters. That being said, we will have to ascertain the threshold for every jurisdiction. We will have to use methods that have predictive error around them to try an ascertain the ability to perform.

But there's a larger issue here, a representation issue. Our colleague, Carol Swain at Vanderbilt, has noted that Black representatives can respond to White constituencies, White representatives can respond to Black constituencies, but getting a proportional representation, are we supposed to do like the odds of a lottery and look at the proportion or contribution to the majority and ascertain if that proportion of the representation is being derived from the minority community? This may be one way to do it, but I'm not sure how we'd measure it. So we've been left with a vast uncertainty here, but let's forget about—let's remember part of the totality of circumstances.

In *Ashcroft,* Justice O'Connor took note of the support of African-American legislators in the Georgia legislature for this map that pulled down African-American percentages in districts, that the consent of the representatives of that community was important to establishing the totality of circumstances.

Now if we have African-American representation being part of a majority that agrees that you can pull down percentages in terms of threshold and enter into coalition, we are back to the question I brought up earlier, how critical is section 5 to a State where African-American politicians feel confident in pulling down their percentages in their districts and where they have such power in the legislature to provide critical votes to the creation of redistricting maps?

Mr. CHABOT. The gentleman's time is expired.

The gentleman from New York, Mr. Nadler, is recognized for 5 minutes.

Mr. NADLER. Mr. McDonald, do you want to answer that rhetorical question?

Mr. MCDONALD. I would say two things. The first is that the three-judge court in the South Carolina case rejected the argument that 47 percent would comply with the non-retrogression standard of section 5. That testimony was rejected, and the court made a specific finding that in order to provide Black voters an equal opportunity to elect candidates of choice you had to have a majority of Black voting-age population or near majority.

Mr. NADLER. Was that finding or that ruling in that decision for the circumstances of that case or of general applicability?

Mr. MCDONALD. For the circumstances of that case.

Let me say one thing. The mere fact that legislators vote for something, whatever the compromises are, is not—cannot be dispositive. I would remind us all that during the reconstruction years Blacks who were members of Congressional or Constitutional Conventions and who served in the legislature voted for racially segregated schools. There were examples of voting for poll taxes. In Georgia, they voted to abolish locally elected government, plainly a racially motivated attempt to deprive Blacks.

I mean, I don't think that insulates racially segregated schools and the poll tax from an independent review. There are a lot of decisions that are made politically, but the bottom line is that the Members of the Black Caucus would never have supported a redistricting plan that abolished the majority Black districts.

Mr. NADLER. Thank you.

Mr. Engstrom, we've been having a lot of discussion about crossover voting by White voters. Have you determined the effect of incumbency on racial Black voting behavior? I suspect it's obvious that crossover voting is more prevalent for incumbents than first-time candidates. You can look at initial elections of a number of candidates. I won't name them. I also suspect there's greater crossover at the Federal electoral level. What does crossover look like as elections get more local? Can you talk about that?

Mr. ENGSTROM. Well, let me say, in terms of incumbency, what I have often seen is that the incumbency advantage is itself racially specific. I have seen much racially polarized voting in many elections in which there was an incumbent and in which there was racially polarized voting; and in many of those elections what happens is, if it's a White incumbent, Whites or non-African-Americans support that incumbent and often minorities do not. Likewise, if it's a minority incumbent, they are supported by the minority voters; and White or Anglo or non-minority voters don't share that preference. So incumbency doesn't explain as much as a lot of people think.

Now at the local level what I have found is at the local level you get—well, a lot of elections are high salients in which candidates' race and things are well-known by people, but in local elections there are some in which they're well-known and others in which they may not be as well-known. But still you have local candidates, and I think observations or understandings of the racial composition of a candidate pool are stronger at the local level.

Now I did do research in *Georgia v. Ashcroft* which has been cited. I mean, it's part of my testimony. It's been cited by some to say that Georgia has changed a great deal, and what I found was a very distinct difference in crossover voting when it came to Statewide elections as opposed to local elections.

Mr. NADLER. More crossover voting in the State?

Mr. ENGSTROM. At the local level. When candidates ran Statewide—and keep in mind these may not be candidates from the local area. In most instances, they're not going to be candidates from the local area. There was a pronounced difference in Statewide elections in Georgia. Statewide elections were still racially polarized but not to the degree that the local elections I studied were.

Mr. NADLER. The local elections are more racially polarized?

Mr. ENGSTROM. The local ones were more than the Statewide. In the districts I studied.

Mr. NADLER. Do you have any idea what the explanation for that might be?

Mr. ENGSTROM. I have not studied Georgia politics in the sense that I was asked that in court and I did not have really an answer for why. I've not revisited the issue except to acknowledge that that difference was present.

There's some difference I suspect in visibility, in campaign strategy, endorsement.

Mr. NADLER. Thank you.

I have one more question. Mr. Blum in the earlier panel took the position that certain racial data from recent Georgia elections supports the case for letting section 5 lapse. Is his methodology for concluding that there's White crossover voting in Georgia correct and does that hold any significance for other States in your opinion?

Mr. ENGSTROM. He was referencing a study I'm not familiar with.

But one concern when you read a study like that and concern I will have is to see what kind of elections are being analyzed. Because one of the big distinctions is what role do White-on-White elections play. It's come up a little earlier today. Some people want to look at racially polarized voting on White-on-White elections and what they find is often minorities can get on the winning side on a White-on-White election. It doesn't mean they're electing a representative of your choice.

And I would qualify something that Laughlin said earlier. The purpose of the act is not to elect candidates of your choice, it's to elect representatives of your choice. And some arrangements——

Mr. NADLER. What's the difference between representative of your choice and candidate of your choice?

Mr. ENGSTROM. Quite significant, I think. The representative of choice may not be in the candidate pool because of the racial composition of the district. One reason we say Black on White, minority versus non-minority elections are more probative is because if they show a consistent preference for being represented by people from within your own group, then the opportunity to elect, if it's going to be close to equal, has to include the opportunity to elect from within your own group.

Mr. CHABOT. The gentleman's time has expired. Did you want to finish up?

Mr. ENGSTROM. I was just going to—I forgot my thoughts. I'm sorry.

Mr. NADLER. You were saying that you were making a distinction of the representative versus candidate and you were saying obviously—I think what you were saying is that a candidate of your choice is not really a candidate of your choice if you didn't have a choice because the representative is not running.

Mr. ENGSTROM. Section 2 of the act, for example, says representative of your choice. Equal opportunity to elect representatives of choice. You're stuck with candidates. But the way electoral competition is structured can certainly affect the pool of candidates, and it can filter out who may be the representative of choice.

What I think I was saying is study after study after study of biracial elections show that Blacks do indeed prefer to be represented by people from within their own group. That's a preference not shared by non-African-American voters.

Mr. CHABOT. The gentleman's time has expired.

The gentleman from Virginia, Mr. Scott, is recognized for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman.

I want to get back to some of that, but let me ask a couple of quick questions first.

At the previous hearing we heard evidence that in some areas the rate of voting, rate of registration was equal between Blacks and Whites in some areas and, therefore, the Voting Rights Act had done its duty and was no longer needed. We're talking about minority voters. Isn't it true that minority voters are still vulnerable to schemes, whether they're voting at the same level as everybody else or not? Mr. McDonald?

Mr. MCDONALD. The dramatic example of that, Mr. Scott, is what the State of Georgia did this year in 2005. It passed the most draconian photo-ID requirement for in-person voting of any State in the Union. I think maybe Indiana has a similar one.

Mr. SCOTT. So that the rate of voting does not immunize you from schemes to diminish the effects of the votes that could be cast. And redistricting would be the same thing. You take the same number of votes, just divide them up.

Mr. MCDONALD. Absolutely.

Can I add one thing? I think this is an excellent gloss on what the State of Georgia did. Judge Murphy, the Federal District Court judge in Rome, Georgia, last week issued a preliminary injunction enjoining use of Georgia's photo ID requirement because you have got to pay $20 to get one and he said this was in the nature of a poll tax.

So when people talk about new and subtle schemes to disfranchise, we're going back to history and getting one of the most discriminatory devices for excluding poor and Blacks and making that part of the modern-day scheme.

Mr. SCOTT. One of the things we have to consider is whether we're going to reauthorize section 5. If we didn't have section 5 and one of these groups came up with a plan that is clearly retrogressive, isn't it true that the burden of proof would be, without section 5, would be on the victims of the discrimination?

Mr. MCDONALD. Yes, sir.

Mr. SCOTT. If we didn't have section 5, the burden of expert witnesses and proving the case and the costs of litigation would be on the victims.

Mr. MCDONALD. Yes.

Mr. SCOTT. And wouldn't it be true that the benefits of the scheme would be enjoyed by the perpetrators of the scheme until such time as the victims could get themselves together, get into court and win a case?

Mr. MCDONALD. Yes.

Mr. SCOTT. Okay. If you have a case that something is being presented—and we've kind of talked about this a little bit—there's a clear section 2 violation, should it be precleared if it is not technically retrogressive? If they're no worse of off than before but you have a plan that is clearly retrogressive—not retrogressive but a clear violation of section 2, should the Attorney General preclear such a plan?

Mr. MCDONALD. My personal view is no.

Mr. SCOTT. Anybody think that the Attorney General, if there is a clear, by any objective standard, violation of section 2, should it be precleared under section 5? Anybody believe it?

Mr. HUNTER. I would like to mention one thing. The Supreme Court has taken section 2 analysis out of section 5 preclearance material. But then in *Bossier I*—but then in the *Ashcroft* case they seem to put it back in and say we're supposed to do a totality of the circumstances——

Mr. SCOTT. But the benchmark is totality of the circumstances. You are no worse off than you were before.

Mr. HUNTER. Yes. That's why it's confusing.

Mr. SCOTT. It's a retrogression standard.

Mr. HUNTER. Yes, sir. That's under the second case.

The problem is, I don't know what intent to retrogress means. I know what discriminatory intent is, but intent to retrogress doesn't have a lot of meaning.

Mr. SCOTT. Some of these are going to be hard. Redistricting is hard. Anybody who thinks you can redistrict in the abstract is a fool. Some areas you need—a candidate may need 40 or 50 percent African-American to win. Sometimes 60, 70 percent isn't enough. You have got to redistrict where you are, and there are different variables different places.

My time is running short. Let me just ask a general question. In looking at the totality of the circumstances, if you have an African-American district where you have a reasonable shot at electing a candidate of choice and right beside that in that area where you can elect with a coalition a supportive candidate, is that—can you eliminate that influence district? I mean, should you be able—shouldn't you be able to count the influence district? Because there is a difference between an African-American sitting here by himself and an influence district, compared to sitting there without an influence district. In other words, can you gratuitously carve up that influence district and not be retrogressive? Assuming that you can have a reasonable coalition, a functioning coalition which will be different some places than others.

Mr. GADDIE. Representative Scott, this is really the great question mark.

In Texas—and Professor Engstrom may recall this as well—Judge Higgenbotham had this issue put on him with regard to maintaining the integrity of Representative Frost's district, whether Representative Frost was a candidate of choice for the African-American community, his district which had no particular majority but was a majority of minorities. The Federal court said, no, this district is not protected from retrogression. But that's not also our issue. Because there's no obligation to create a coalition district. Likewise, there is no obligation to retain that one. If that district is a district where minority voters control the primary, where minority voters are able to coalesce with a minority of White voters and they're electing the representative of choice of their community, we have some very significant gray area to deal with. Our hope is you can give us guidance under the law, but we can't give you data to clarify that.

Mr. SCOTT. Well, if in *Georgia v. Ashcroft* they diluted some districts in order to create influence districts, without counting influence districts, you couldn't do that because that would clearly just in those three districts be retrogression.

Mr. CHABOT. The gentleman's time has expired.

Mr. SCOTT. If I can just continue this.

Mr. CHABOT. Would you like an additional minute?

The gentleman has an additional minute.

Mr. SCOTT. You could not. Although there were still districts where the minority community can elect a candidate of its choice, the percentage of those districts was lower, and if those are the only three districts you're looking at, that would clearly be retrogression. But looking at the plan as a whole, because you considered the influence districts next door, the totality of the circumstances, whatever that means, met—concluded that the minority community was better off with the total map—excuse me, wasn't any worse off—since it's section 5, wasn't any worse off under the new map than it was under the old map even though in those individual districts there may have been retrogression.

Now if you don't have that analysis, how would you not be stuck with overpacked districts and can never get out from under overpacked districts?

Mr. ENGSTROM. I don't think the retrogression requirement says that you can't lower the percentages in a district. It depends on the context.

Now the districts—the State Senate districts in Georgia were districts that were roughly around 55 African-American and voting age population.

Mr. SCOTT. In the new map.

Mr. ENGSTROM. In the baseline map.

Mr. SCOTT. The baseline map.

Mr. ENGSTROM. The changes whittled them down to roughly 50 percent.

Mr. SCOTT. If you didn't create any influence districts you're telling me you could do that gratuitously?

Mr. ENGSTROM. I'm saying I believe that would be retrogressive. But if you're sitting with a district that's 80 percent African-American and you reduce it to 75 percent, I don't think that calls for an objection under the preclearance requirement. You have got an opportunity to elect—when you go from 75 to 80, as a general matter the opportunity doesn't change. Very little. So you don't have to look at it like a linear thing and you're always stuck with a packed district. You can reduce those district percentages without having a retrogressive consequence.

So I don't think we're stuck with necessarily packing and ratcheting up, ratcheting up, ratcheting up after every census. I don't think that's the case at all. The Justice Department has made clear they don't have a standard that says you can't have a lower percentage in any of the district.

Mr. CHABOT. The gentleman's time expired a while ago.

Mr. SCOTT. If I could—I'm not going to ask another question. I would want to say it puts the minority community in an awkward position to never having a choice when you talk about an 80 to 70. Maybe that's not, in most places, insignificant, but 70 to 55 could be very significant. And unless you allow the consideration of what else is going on in the map, you'd be stuck with the 70.

There are a lot of areas where you may, for political reasons of effective participation in the Government and the City Council, whatever, may want to reduce the percentage from a 70, say, to a

55 in order to create a more accommodating council, and unless you count the influence districts, you're stuck. If all you're looking at is one district, you're retrogressing from 70 to 55. If you go from 70 to 55 but create a good council where you might actually be able to take over, you don't want to foreclose that as a possibility, ever; and if you don't consider the totality of the circumstances, how do you do that? If we have another round——

Mr. CHABOT. We're not planning on that, but the gentleman's time has expired.

The gentleman from North Carolina, Mr. Watt, is recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman. Let me say to the witnesses that this has been just an absolutely great hearing this afternoon; and the one this morning was outstanding, too. So I want to thank all of you for being here.

I think I'll ask two questions. I want to ask the researchers a question, and then I want to ask the lawyers a question, two different questions. Let me deal with the researchers first.

Because Mr. Blum this morning seemed to be saying that your study, Mr. Gaddie, leads to a conclusion that you don't need section 5 in Georgia. The beauty of this job is when I was practicing law I couldn't ask a question I didn't know the answer to. I can ask a question here, but I don't know the answer. I don't know what you're going to say in response to this. Do you think your study suggests that, as Mr. Blum indicated this morning, that section 5 preclearance is not warranted in Georgia?

Mr. GADDIE. Mr. Watt, first of all, it's nice to have an attorney ask a question where I have an advantage in cross-examination, so thank you.

The context of the study is congressional elections, Statewide elections, minority participation. Using methodologies that both Professor Engstrom and I are familiar with, we examined bi-racial contests, which had the most probative value, and also White-on-White contests for comparison; and in the context of what is typically now the election of consequence at these levels in Georgia, the general election, there's little differentiation in the White voter choice between Black and White Democrats.

This is really the point that I think needs to be made. We can assume a very high degree of cohesion among African-American voters in States like Georgia. Our estimates typically show 90 to 99 percent Africa-American voter cohesion. So the question is, to what extent are White voters crossing over?

When we look at the election of Thurgood Baker, we look at the election of Mike Thurmond, two Statewide Black elected officials in Georgia, we see them receiving votes from Whites at a rate comparable to other Democrats who win Statewide in Georgia. When we look at African-Americans who lose Statewide, Denise Majette for the U.S. Senate, we see her vote totals and her White vote shares coming in at a level comparable to other White candidates who lose Statewide.

So in the context of partisan politics, African-American candidates are little differentiated from White candidates in Georgia. But, by the same token, if we look at the opportunities that exist, African-Americans are elected to the legislature, they are elected

from districts that are approaching 50 percent. They could be elected from districts as low as 44 percent, and they are attracting White votes in the same fashion as Black candidates.

So in the context of congressional elections and in the context of Statewide elections to State legislature, yes, I would agree with Mr. Blum. We have no conclusions about local Government.

It has been alleged in a previous hearing here that 90 percent of jurisdictions covered by section 5 can bail out now if they wanted to. Maybe what we need to do is take a look and see if that number is correct, because there are probably jurisdictions in Georgia that still need to be covered, but, Statewide, Georgia seems to be in good shape.

Mr. WATT. Has Georgia applied the bailout? And wouldn't that be a fail-safe form even if the conclusion you say is a correct conclusion? I'm not cutting you off. I just want to get Mr. Engstrom to comment on the same question. Then I've got a legal question that I want to ask both the lawyers to comment on. So don't take too much time because my red light is going to come on.

Mr. ENGSTROM. Let me say, first of all, that Dr. Gaddie has said that districts as low as 44 percent provide an equal opportunity. I assume what he means is to elect African-American candidates of choice. I don't agree. That's based on that analysis done by Professor Epstein in the case which the District Court dismissed and which the Supreme Court only referenced. There's no finding in the Supreme Court that says it's 44 percent. The Supreme Court simply said and the State has a witness who will say that it's 44 percent.

I looked at that data when I was doing the case, and I discovered that that figure was—if you take out Cynthia McKinney, who wasn't running for a State Senate seat but reelection to the U.S. House of Representatives, if you take her out and you look at Senate districts, without her the figure goes up over 50 percent. Or if you look at only Senate districts, I think it was—the figure went up over 50 percent. When McKinney and others were included, not dealing with State Senate elections but throwing in congressional and others, that brought the figure back down.

But you had—what was in there were people like Cynthia McKinney running as incumbents and other African-American legislators running as incumbents. And I do want to note she was even treated as not an incumbent when she ran for reelection because of a decision rule that said not over 50 percent of her old district was in her new district. That was after the mid-decade change, I believe.

Mr. WATT. So I can't reconcile what Mr. Blum, Mr. Gaddie and Mr. Engstrom just told me. I just have to be a fact finder here and make up my own mind. That's what you all are telling me.

Mr. ENGSTROM. I can add one thing, but I don't——

Mr. CHABOT. The gentleman's time has expired. However, you can answer the question.

Mr. ENGSTROM. I just want to say one other thing that disturbed me. I haven't read the study, haven't seen it at all, but the constant references to no different than some States that are not subject to a preclearance—and I remember Arkansas being mentioned. Well, I would hope we would not throw out the preclearance provi-

sion of section 5, because in some of those jurisdictions racially polarized voting is similar to the State of Arkansas. I haven't done recent work in Arkansas, but I did work in Arkansas. I was an expert in a case in which racially polarized voting was found, and it was at a substantial level, and it was not only found by my statistics that I presented. But three judges, all from—who had grown up and lived in Arkansas, they simply said, in addition to my evidence, they take judicial notice that voting is racially polarized in the State of Arkansas.

Mr. WATT. Mr. Chairman, can I ask unanimous consent for one additional minute on the presumption that the lawyers will answer my questions quicker than the social scientists will?

Mr. CHABOT. Without objection.

Mr. WATT. Legal question, is there any doubt in the two lawyers' minds that the Supreme Court has now interpreted the section 5 preclearance standard different than what Congress intended for it to be? And what do you think the standard ought to be? I think Mr. Hunter already got toward that objective in the later part of his written testimony. What's you all's opinion on where the Supreme Court has gotten to on this standard? Is it consistent with what you understood to be congressional intent?

Mr. HUNTER. No, sir, it would not be mine. I think if you move back toward the Arlington Heights kind of analysis you'd be on safe constitutional ground, and I don't believe that—and I believe it would be consistent with what was meant in the '60's, '70's and '80's when you reauthorized the act.

Mr. MCDONALD. I fully share Mr. Hunter's views. I think *Bossier II* is just fundamentally inconsistent.

Mr. WATT. See, I told you all lawyers could answer questions quicker than social scientists. I didn't have any doubt about it.

I yield back.

Mr. CHABOT. The gentleman's time is expired.

The gentlelady from California, Ms. Sánchez, who's not actually a Member of this Committee but is a Member of the full Committee, I would ask unanimous consent, although they don't normally ask questions, I would be happy if she would like to take 5 minutes to ask questions if no one will object.

Hearing none, the gentlelady has 5 minutes.

Ms. SÁNCHEZ. Thank you, Mr. Chairman.

Before I begin, I just wanted to bring the Committee's attention to the fact that a pioneer in voter participation and minority representation passed. Ed Roybal, who was a Member of the House of Representatives for 30 years, passed yesterday; and I just wanted to honor him by keeping him in our thoughts. He's the father of Representative Lucille Roybal-Allard, so please keep her in your thoughts as well.

I would also ask unanimous consent to submit an opening statement for the record.

Mr. CHABOT. Without objection, it will be entered into the record.

[The prepared statement of Ms. Sánchez follows in the Appendix]

Ms. SÁNCHEZ. I could lie and say they're going to be quick questions, but that all depends on how lengthy the answers are.

I'd like to begin with Professor Engstrom. I agree with your conclusions that your research supports, given the racial polarization

of many jurisdictions, that section 5 coverage needs to remain in force where it presently applies. My question is, with the growth of the Latino population in the United States and the potential establishment of new racially polarized cities and counties, how do you recommend that those jurisdictions receive protection from voting discrimination? Do you believe that it would be wise to establish a mechanism when the VRA is reauthorized to allow the Department of Justice to exercise some oversight or control in those areas?

Mr. ENGSTROM. I have to admit I'm answering first impression, but my first impression is, yes, given Latino growth, given areas that may not have been previously covered because of the relative absence of Latinos and now a substantial presence of them, I think it is something definitely worthy of looking into to see if the coverage mechanism couldn't include new problems that are new geographically, not old problems, but are now surfacing in new situations because of the change in population and demographics.

Ms. SÁNCHEZ. Could you envision mechanisms that are comparable to some of the mechanisms that have been used in the past where the minority population has historically been African-American that has experienced these kinds of discriminatory tactics?

Mr. ENGSTROM. I think the first thing would be to look at whether existing mechanisms do the job and would do it effectively in this new context. I don't really have—it's not something I've been thinking a lot of, I have to admit. I'm sorry.

Ms. SÁNCHEZ. I've hopefully planted the seed.

Mr. CHABOT. Will the gentlelady yield for a moment?

I believe section 3, I think that already covers it, but we appreciate the lady bringing that up.

I yield back.

Ms. SÁNCHEZ. Anything further to add, Mr. Engstrom?

Mr. ENGSTROM. I don't have the answers. Again it's something I'd have to give thought to, but I think it's worthy of taking a serious look at.

Ms. SÁNCHEZ. Thank you.

Mr. McDonald, a question for you. I would like, if you would be so kind, for you to shed some more light on how proposed changes to voting laws can have retrogressive effects. I know that some detractors feel that it's no longer necessary to gain Federal approval to insure that a proposed voting change is not retrogressive. I'm specifically interested if you can explain how seemingly minor voting changes can have a major retrogressive effect on voting acts, for example, the changing of a polling place location. Can you talk a little bit more about that?

Mr. MCDONALD. Well, all of these changes can have an important affect. The implementation of a majority vote requirement, for example, for a Mayor of a city doesn't sound like a huge change, but if you have three or four White candidates running and one Black candidate running, it may very well be that the White candidates will split the White vote and the Black candidate would get the plurality. If you abolish that and go to a majority vote requirement, it means the Whites can always regroup in the runoff. In fact, throughout the South there is a pattern of the adoption by jurisdic-

tions of those kinds of discriminatory voting practices to blunt the effect of increased registration and turnout by Blacks.

Things like numbered post provisions, which isolate people on one-on-one contests, also dilute the voting strength of a discrete minority. Staggered terms of office, which restrict the number of posts that are up in any election, have the same effect. We had the State Legislature in South Carolina 2 years ago enacting a system for a school board going from a nonpartisan, multi-seat format to a partisan format which the district court had just ruled diluted minority voting strength and you have the legislature adopting that very system for the school board. So I mean some of them are subtle; some are not so subtle. We have the State of Georgia enacting its photo ID requirement, which is resurrecting the poll tax.

Ms. SÁNCHEZ. Thank you so much for your testimony, and I yield back.

Mr. CHABOT. Thank you. The gentlelady's time is expired.

I think that concludes the questioning by the Members of the panel up here this afternoon.

I would just note again for the record something I had indicated early on in the hearing, that we had scheduled two hearings this Thursday which will no longer take place. They'll be, we think, next week; and we'll let both sides know when they are rescheduled.

We want to thank the panel this afternoon. My esteemed colleague from New York, the Ranking Member, said not only was this interesting but the testimony was scintillating. His term, but I think he's right. This was very helpful.

Also goes to again make sure that the record which will be necessary ultimately to make sure that it's complete is more complete than it was prior to this hearing, and we appreciate very much this panel for having that effect. So thank you again for coming.

If there's no further business to come before the Committee, we're adjourned. Thank you.

[Whereupon, at 3:40 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN AND MEMBER OF THE SUBCOMMITEE ON CONSTITUTION

With our review of the history, scope and purpose of Section 5, we turn to the heart of the matter on reauthorization of the Voting Rights Act. Under Section 5, any change with respect to voting in a covered jurisdiction—or any political subunit within it—cannot legally be enforced unless and until the jurisdiction first obtains preclearance, either from the Department of Justice or the United States District Court for the District of Columbia.

Preclearance requires proof that the proposed voting change does not deny or abridge the right to vote on account of race, color, or membership in a language minority group. If the jurisdiction is unable to prove the absence of such discrimination, the District Court denies preclearance, or in the case of administrative submissions, the Attorney General objects to the change, and it remains legally unenforceable.

At the time of its original passage, some in Congress complained of the serious burden that Section 5 placed on covered jurisdictions, as they do today. But then, as now, I believe it is more important to focus on the fundamental rights being protected by the Act and the history of federal enforcement efforts.

Some choose to ignore the fact that, prior to 1965, the federal government had attempted to strike down discrimination in voting, only to face some mutation of a discriminatory scheme from jurisdictions shortly thereafter. Section 5 was designed to stop this continual march from court to court and to achieve a substantial initial victory allowing African-American access to the ballot box.

The Voting Rights Act has been amended three (3) times to broaden the scope of the Section 5's coverage to language minorities and to cope with the changing nature of voting discrimination. Now we must ask ourselves: how does Section 5 evolve or has it outlived its usefulness. Today, some of our witnesses may suggest that the time for Section5 has passed and that we should move on, relying on Section 2 of the Act to address any continuing discrimination.

Others have already pointed out that the continuing record of Section 5 objections supports a need for reauthorization and strengthening enforcement provisions, like Section 5. While I believe that the Act should be fully reauthorized, it is vital that we understand all the arguments regarding the merits of Section 5, and the other special provisions, to ensure that we build a record adequate to insulate this important legislation from any constitutional challenge. I look forward to our exploration of the evolution of Section 5 over the course of these next four (4) hearings.

STATEMENT OF THE HONORABLE LINDA T. SÁNCHEZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Thank you Chairman Chabot and Ranking Member Nadler for convening today's hearing. I appreciate the opportunity to join the Constitution Subcommittee's review of the "Continuing Need for Section 5" of the Voting Rights Act.

I believe very strongly that Section 5 of the Voting Rights Act needs to continue so that minority voters are empowered to elect the candidates of their choice and fully participate in the political process.

In recent nationally published op-eds, some commentators have described the preclearance provision as "antiquarian nonsense." Apparently, these detractors believe that preventing voting fraud and intimidation is "nonsense." I firmly disagree.

The pre-clearance provision of Section 5 offers protections against retrogressive changes to polling places and other tactics that can further fraud and intimidation.

Section 5's pre-clearance requirements have effectively detected and prohibited voting laws and procedures used in many jurisdictions to deprive Latinos and other minorities of their voting power.

In addition to its direct effects, Section 5 acts as a strong deterrent against discriminatory voting changes by local officials and legislators. These officials are much less likely to propose discriminatory voting changes because they know that these changes have to meet the pre-clearance requirements.

One of the most important elements of Section 5 is that it is broad in scope and provides all minority voters with full protection from discrimination.

Another key element of Section 5 is that it's written in plain language that has long been understood to prohibit both purposeful discriminatory voting changes and also those voting changes that have a discriminatory effect.

The breadth of Section 5 and its plain language provides minority voters with substantial protections against discriminatory voting practices.

However, recent Supreme Court rulings have effectively eliminated many of the protections in the Section 5 pre-clearance test, and as a result significantly reduced the power of Section 5.

For example, in the *Reno v. Bossier Parish School Board,* the Supreme Court upheld a Louisiana school board district plan that *intentionally* prevented African-American majority districts from being established.

The court reasoned that because there had never been a Black district in Bossier Parish, the Department of Justice was powerless to block intentionally discriminatory voting changes unless it found that the jurisdiction acted with the "retrogressive purpose" of making things worse for African-Americans.

As a result of the Supreme Court's ruling, election officials in purposefully segregated jurisdictions can now make new voting changes that are intentionally meant to perpetuate the discrimination against minority voters, and those changes would not violate Section 5.

That is certainly not the result that Congress contemplated when Section 5 was written. Section 5 has an "effect" prong and a "purpose" prong that are meant to prohibit voting practices that are discriminatory both in effect *and* in intent.

The Supreme Court's ruling has substantially weakened the Department of Justice's power to protect minority voters from voting practices that are *intentionally* designed to diminish minorities' power in the political process.

It is critical that Section 5 be reauthorized and also changed to restore the "purpose" prong of the Section 5 pre-clearance test and give the Department of Justice full power to enforce the Voting Rights Act.

Before I conclude, I would also like to state for the record my opposition to the nationwide application of Section 5. This would be disastrous, and would ultimately render this important provision ineffective.

Under current law, the Department of Justice has the ability to focus and target their enforcement. We need to ensure that DOJ retains this power so that they can better focus their work on the jurisdictions where a recent history of voting discrimination remains.

Again, I thank Chairman Chabot and Ranking Member Nadler for their courtesy in letting me participate in these hearings.

I yield back the balance of my time.

APPENDIX TO THE STATEMENT OF LAUGHLIN MCDONALD: "THE NEED TO EXPAND THE COVERAGE OF SECTION 5 OF THE VOTING RIGHTS ACT IN INDIAN COUNTRY"

THE NEED TO EXPAND THE COVERAGE OF SECTION FIVE OF THE VOTING RIGHTS ACT IN INDIAN COUNTRY

Laughlin McDonald[1]

Recent voting rights litigation in Indian country, with its findings of widespread and systematic discrimination against Indians, underscores the need for continuing the special preclearance and language minority provision of the Voting Rights Act. It also makes a strong case for extension of the preclearance requirement throughout the West, and not simply to the relatively small number of counties presently covered under existing law.

I

How the Voting Rights Act Works in Indian Country

Congress amended the Voting Rights Act in 1975 to extend its protections to "language minorities," defined as American Indians, Asian-Americans, Alaskan Natives, and persons of Spanish Heritage.[1] Indians, as a "cognizable racial group," were undoubtedly already covered by the permanent provisions of the original Voting Rights Act of 1965, which prohibited discrimination on the basis of "race or color."[2] While Indians were held to be a political, not a racial, group for purposes of determining the constitutionality of granting members of federally recognized tribes preference in hiring by the Bureau of Indian Affairs,[3] the courts have also held that Indians were entitled to claim the protection of the Fourteenth Amendment.[4] In addition, a number of jurisdictions which had substantial Native American populations were covered by the special preclearance provisions of Section 5 of the Voting Rights Act of 1965, including the state of Alaska and four counties in Arizona.[5] The 1975 amendments made the coverage of Indians explicit.

The 1975 amendments also expanded the geographic coverage of Section 5 by including in the definition of a "test or device" the use of English-only election materials in jurisdictions where more than five percent of the voting age citizen population was comprised of a single language minority group.[6] As a result of this new definition, the preclearance requirement was extended to fifteen counties and townships in California, Florida, Michigan, New Hampshire, New York, and South Dakota, and the entire states of Alaska, Arizona, and Texas.[7] Seven counties were covered because of their Indian populations.

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[1]This is a chapter from a book, *The Future of the Voting Rights Act* (Russell Sage Foundation, forthcoming 2006), edited by Richard H. Pildes, Rodolfo de la Garza, David Epstein, and Sharyn O'Halloran.

The amendments in 1975 further required certain states and political subdivisions, pursuant to Section 203 of the Act, to provide voting materials and oral assistance in languages other than English.[8] While there are several tests for "coverage," the requirement is imposed upon jurisdictions with significant language minority populations who are limited-English proficient and where the illiteracy rate of the language minority is higher than the national literacy rate. Covered jurisdictions are required to furnish voting materials in the language of the applicable minority group as well as in English. Jurisdictions covered by the bilingual election requirement include the entire states of California, New Mexico, and Texas, and more than four thousand local jurisdictions in twenty-seven other states, from Alaska to Florida and New York to Arizona.[9] Eighty counties in seventeen states were covered because of their Indian populations.

II

The Legislative History of the 1975 Amendments

During hearings on the 1975 amendments, Rep. Peter Rodino, chair of the House Judiciary Committee, said that members of language minority groups, including American Indians, related "instances of discriminatory plans, discriminatory annexations, and acts of physical and economic intimidation." According to Rodino, "[t]he entire situation of these uncovered jurisdictions is tragically reminiscent of the earlier and, in some respects, current problems experienced by blacks in currently covered areas."[10] Rep. Robert Drinan noted similarly during the floor debate that there was "evidence that American Indians do suffer from extensive infringement of their voting rights," and that the Department of Justice "has been involved in 33 cases involving discrimination against Indians since 1970."[11] House members also took note of various court decisions documenting voting discrimination against Native Americans, including Klahr v. Williams (finding that legislative redistricting in Arizona had been adopted for the purpose of diluting Indian voting strength),[12] Oregon v. Mitchell, (noting that literacy "tests have been used at times as a discriminatory weapon against . . . Indians"),[13] and Goodluck v. Apache County (finding that a county redistricting plan had been adopted to diminish Indian voting strength).[14]

The house report that accompanied the 1975 amendments of the act found "a close and direct correlation between high illiteracy among [language minority] groups and low voter participation." The illiteracy rate among American Indians was 15.5 percent, compared to a nationwide illiteracy rate of only 4.5 percent for Anglos. The report concluded that these disparities were "the product of the failure of state and

local officials to offer equal educational opportunities to members of language minority groups."[15]

During debate in the senate, Sen. William Scott read into the record a report prepared by the Library of Congress, "Prejudice and Discrimination in American History," which concluded:

> Discrimination of the most basic kind has been directed against the American Indian from the day that settlers from Europe set foot upon American shores. . . . [A]s late as 1948 certain Indians were still refused the right to vote. The resulting distress of Indians is as severe as that of any group discriminated against in American society.[16]

III

Federal and State Policy Towards American Indians

United States policy towards American Indians has been remarkably volatile and contradictory. At various times in history Indians have been regarded as independent nations, political communities that should be removed or placed on reservations, dependent wards of the federal government, and a race that should be assimilated, suppressed, or simply allowed to vanish, and whose lands sold or allotted to whites. In more modern times, and in an equally contradictory manner, Congress has provided that Indians be given the rights of citizenship, the tribes be firmly established as viable units of self-government, the reservation system be maintained, the reservation system be terminated and tribal governments dissolved, the states assume jurisdiction over Indians, and, most recently, the federal/tribal system be maintained, traditional Indian religions and culture and family units be protected, and Indians be given maximum opportunities for self-development and self-determination. (Pevar 2002; Prucha, 1984; Tyler 1973)

Historically, Indians were described as dependents, or "wards of the nation,"[17] and were neither citizens nor foreigners, but a special dependent and administratively controlled class. As non-citizens, Indians had no federally protected right to vote or to direct representation, and thus lacked any power to pass or modify laws enacted by Congress to control their affairs. In upholding the state of Nebraska's refusal to allow Indians to vote, the Supreme Court declared in a 1884 opinion that Indians "are not citizens," and in the absence of being naturalized were not entitled to the franchise.[18]

One way that Indians could become citizens was by being assimilated. The General Allotment Act of 1887,[19] also known as the Dawes Act, authorized Congress and the President to survey tribal reservation lands and allot plots to individual Indians to be held in trust by the federal government for twenty-five years with the remaining lands to be sold to the public. The act granted citizenship to any allotted Indian following termination of the trust, but only on condition that such Indian reside "separate and apart from any tribe of

Indians therein and has adopted the habits of civilized life." The purpose of the act, as explained by the Court, was the "eventual assimilation of the Indian population" and the "gradual extinction of Indian reservations and Indian tribes."[20]

In 1906 Congress passed the Burke Act, which allowed the Secretary of Interior to bypass the trust period restrictions of the Dawes Act. As a result of allotments under these acts, sales of their allotments by impoverished Indians, and tax foreclosures, the number of acres of land owned collectively by Indian tribes shrank from 140 million in 1887 to 50 million by 1934. The allotment system was described by the American Indian Policy Review Commission as "an efficient device for separating Indians from their land and pauperizing them." (American Indian Policy Review Comm. 66-7, 1977)

Indians could also become citizens by serving in the armed forces. More than seven thousand Indians, most of whom were not citizens, served in the armed forces during World War I. (Wolfley, 179 n.72, 1991) In recognition of that service, Congress passed legislation in 1919 that all Indians who had served honorably in the armed forces were eligible for American citizenship.[21] Subsequently, Congress enacted the Indian Citizenship Act of 1924 which gave Indians as a group, if born in the United States, United States citizenship, and at least in theory the equal right to vote.[22] Many states, however, blunted the impact of the Indian Citizenship Act by making registration more difficult, cancelling all voter registration, requiring re-registration, or simply denying registration altogether. South Dakota, despite passage of the Citizenship Act, continued to deny Indians the right to vote and hold office until the 1940s.[23] Even after the repeal of state law denying Indians the right to vote, the state as late as 1975 prohibited Indians from voting in elections in counties that were "unorganized" under state law.[24] The three unorganized counties were Todd, Shannon, and Washabaugh, whose residents were overwhelmingly Indian. The state also prohibited residents of these unorganized counties from holding county office until as recently as 1980.[25] Five other states (Idaho, Maine, Mississippi, New Mexico, and Washington), prohibited "Indians not taxed" from voting, although there was no similar disqualification of non-taxpaying whites. (Wolfley 185, 1991) Arizona denied Indians living on reservations the right to vote because they were "under guardianship" of the federal government and thus disqualified from voting by the state constitution. The practice was not struck down until 1948, when the state supreme court ruled the language in the state constitution referred to a judicially established guardianship, and had no application to the status of Indians as a class under federal law.[26] Utah denied

Indians living on reservations the right to vote because they were non-residents under state law. The law was upheld by the state supreme court, but was repealed by the legislature after the Supreme Court, at the request of the state attorney general, agreed to review the case.[27] Montana amended its constitution in 1932 to provide that not only must a person be a "citizen" to be entitled to vote, but in respect to issues related to "the creation of any levy, debt or liability the person" must also be a "taxpayer," unless that person had the right to vote "at the time of the adoption of this Constitution."[28] The state enacted a statute in 1937 requiring all deputy voter registrars to be "qualified, taxpaying" residents of their precincts.[29] Since Indians living on reservations were exempt from some local taxes, the requirement excluded virtually all Indians from serving as deputy registrars and denied Indians access to voter registration in their own precincts on the reservation. This provision remained in effect until its repeal in 1975.[30] Another statute enacted in 1937 cancelled the registration of all electors and required re-registration.[31] Indian voter registration remained depressed after the purge until the 1980s. In Colorado, Indians residing on reservations were not allowed to vote until 1970.[32]

The Indian Citizenship Act did not translate into significant Indian participation in the federal and state political processes. It did, however, reflect an increasing awareness and concern by Congress with the plight of Indians and set the stage for passage of additional federal legislation affecting the tribes.

The Indian Reorganization Act of 1934,[33] enacted during the administration of President Franklin Roosevelt, was designed to restore Indian tribes as viable units of self-government. The bill was developed by Commissioner of Indian Affairs John Collier and was sponsored by Senator Burton Wheeler of Montana and Representative Howard of Nebraska. The act repudiated the prior policy of allotment, extended existing periods of trust until otherwise directed by Congress, restored surplus land to tribal ownership, provided for the creation of new reservations for landless tribes, gave Indians preference in BIA hiring, and in general established the tribal unit as a viable self-determining authority after a long period of attempts at suppression and assimilation. The various tribes were extended the power of local self-government as federal corporations with the right to organize for the common welfare and negotiate with federal, state, and local governments. The overall effect of the act was to emphasize modernization of tribal government, make them more equivalent to other local governmental units, and initiate more contacts between Indians and other governments and units of the private sector. According to Collier, the true significance of the act was that

it emphasized responsible democracy, "of all experiences, the most therapeutic." (Collier 226, 1947)

The period following World War II, however, saw another dramatic change in federal Indian policy. In 1953, the House of Representatives adopted a resolution establishing a policy of terminating the federal/tribal relationship and declaring that federal benefits and services to various Indian tribes should be ended "at the earliest possible time."[34] Central to the policy of termination was the relocation of Indians from reservation to urban areas for job training and education, and the transfer of federal responsibility and jurisdiction to state governments.

Indians in general, and some legislators, opposed the termination policy. Congressman Lee Metcalf of Montana, in a speech at the Thirteenth Convention of the National Congress of American Indians in Salt Lake City in 1956, described the new termination policy as a "most persistent and serious attack" on Indians and their property. (Peterson 1957) Despite such opposition, over the next decade Congress terminated its assistance to over 100 tribes, and required them to distribute their land and property to their members and dissolve their tribal governments. (Pevar 11, 2002) According to the United States Commission on Civil Rights, the termination policy "was aggressively carried out by Dillon Myer, former director of detention camps for Japanese Americans, who became the Commissioner of Indian Affairs in 1950." (U.S. Comm. on Civil Rights 23, 1981)

In a further effort to displace federal authority, Congress enacted a statute in 1953 giving five states complete criminal, and some civil, jurisdiction over Indian reservations located within their states and authorized all other states at their option to assume similar jurisdiction.[35] The relocation of Indians was the subject of other legislation during the 1950's involving job training and education of tribal members in urban areas.[36] The legislation was designed to support the integration of Indians into the regional and national economies, and weaken their ties to the reservations.

Federal Indian policy changed abruptly once again during the administration of President Lyndon Johnson, which repudiated the policy of terminating the federal/tribal relationship. In 1968, in the wake of the Great Society and the War on Poverty, Congress amended the 1953 act authorizing the states to assume civil and criminal jurisdiction over Indian reservations to require the consent of the affected tribes.[37] Johnson also articulated a national policy of "maximum choice for the American Indian: a policy expressed in programs of self-help, self-development, self-determination." (Johnson 440, 1968)

Numerous congressional and Civil Rights Commission reports of the 1960s and 70s documented the extent and continuing effects of discrimination against Indians, supporting and setting the stage for further remedial federal legislation.[38] In a message to Congress in 1970, President Richard Nixon summed up the plight of American Indians as follows:

> The First Americans - the Indians - are the most deprived and most isolated minority group in our nation. On virtually every scale of measurement - employment, income, education, health - the condition of the Indian people ranks at the bottom. This condition is the heritage of centuries of injustice. From the time of their first contact with European settlers, the American Indians have been oppressed and brutalized, deprived of their ancestral lands and denied the opportunity to control their own destiny.

Nixon proposed to "break decisively" with past policies of termination and excessive dependence on the federal government and "create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions." (Nixon 1, 1970)

During the decade of the 1970s Congress enacted a number of laws to implement the policies outlined by Johnson and Nixon, including the Indian Financing Act (1974), the Indian Self-Determination and Education Assistance Act (1975), the Indian Health Care Improvement Act (1976), the American Indian Religious Freedom Act (1978), and the Indian Child Welfare Act (1978). But one of the most critical enactments by Congress was the Voting Rights Act and its extension to language minorities, including American Indians, in 1975. Of all the modern congressional enactments addressing the problems of American Indians, the Voting Rights Act was designed to give Indians a more active voice in the adoption of national, state, and local laws that directly affected their lives and well being. And for that reason, it was most likely to advance the goals of self-help, self-development, and self-determination articulated by the Johnson and Nixon administrations.

Section 2, one of the original provisions of the 1965 act, was also amended in 1982 to incorporate a discriminatory "results" standard. Section 2 was a permanent, nationwide prohibition on the use of voting practices or procedures that "deny or abridge" the right to vote on the basis of race or color, and protected the equal right of minorities "to elect representatives of their choice."[39] In amending Section 2, Congress relied on several decisions documenting discrimination against Indians, including United States v. Humboldt County, Nev. (finding that registrars discriminated against Indians in voter registration);[40] United States v. Board of Supervisors of Thurston County, Neb. (challenge to at-large elections as diluting Indian voting strength);[41] United States v. San Juan County, N.M. (same);[42] and, United States v. Bartleme, Wis. (finding

purposeful discrimination against Indians in voting).[43]

V

Implementing the Voting Rights Act in Indian Country

Despite the application of the Voting Rights Act to Indians, both in its enactment in 1965 and extension in 1975, relatively little litigation to enforce the act, or the constitution, was brought on behalf of Indian voters in the West until fairly recently. For example, from 1974 to 1990, only one law suit was brought in Montana challenging at-large elections as diluting Indian voting strength, despite the presence in the state of seven Indian reservations, a significant Indian population, and the widespread use of at-large voting.[44] In Georgia, by contrast, during the same period of time, lawsuits were brought by African Americans against 97 counties and cities challenging their use of at-large elections. (McDonald 81, 1994) Indian country was largely bypassed by the extensive voting rights litigation campaign being waged elsewhere, particularly in the South after the amendment of Section 2 to incorporate a discriminatory results standard.

The lack of enforcement of the Voting Rights Act in Indian Country was the result of a combination of factors. They included a lack of resources and access to legal assistance by the Indian community, lax enforcement of the Voting Rights Act by the Department of Justice, the isolation of the Indian community, and the debilitating legacy of years of discrimination by the federal and state governments. But where there has been litigation, the courts have invariably found patterns of widespread discrimination against Indians in the political process, including chronic racial bloc voting.

A. Nebraska

(1) Thurston County

Thurston County in eastern Nebraska is home to members of the Omaha and Winnebago Tribes, whose members in 1975 made up approximately 28 percent of the county's population. Historically, the county elected its board of supervisors from districts. Following the election of an Indian in 1964, and passage of the Voting Rights Act of 1965, the county abandoned its district system and adopted at-large elections in 1971. The practice of switching from district to at-large elections following increased minority registration or office holding was widespread in the South following passage of the Voting Rights Act. (McDonald 131-32, 141-42, 2003) As the Supreme Court has noted, "[v]oters 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. This type of change [from to district to at-large] could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting."[45]

Seven years later, in 1978, the United States sued Thurston County alleging that its adoption of at-large elections diluted Indian voting strength and was in violation of the constitution and the Voting Rights Act. The county, while specifically denying liability, entered into a consent decree returning to district voting and adopting a plan containing two (out of seven) majority Indian districts. The county also consented to being placed under Section 5 for five years so that its compliance with the court's order could be "more effectively monitored."[46]

The 1990 census showed the Indian population in Thurston County had grown to nearly 44 percent, and that the supervisor districts were malapportioned. The county adopted a new plan to comply with one person, one vote, but the plan still contained only two majority Indian districts. Indians were "packed" in those two districts at 88 and 97 percent respectively, leaving the other districts majority white. Tribal members, with the assistance of the American Civil Liberties Union (ACLU), sued the county in 1993 alleging that the new plan diluted Indian voting strength in violation of the Voting Rights Act and the constitution. They sought the creation of a third majority Indian district to reflect the increase in Indian population in the county.

The district court, in ruling for the plaintiffs, found: "Native Americans vote together and choose Native American candidates when given the opportunity;" "whites vote for white candidates to defeat the Native American candidate of choice;" "it is obvious that Native Americans lag behind whites in areas such as housing, poverty, and employment;" and there was evidence of "overt and subtle racial discrimination in the community."[47] The court invalidated the at-large plan under Section 2 of the Voting Rights Act and held that plaintiffs were entitled to a new plan creating a third majority Indian district. The court, however, dismissed similar challenges brought by the plaintiffs against a county school board and the board of trustees of the Village of Walthill because Indians were not sufficiently compact to form a majority in a single member district. Both sides appealed, but the court of appeals affirmed the decision of the trial court.[48]

B. New Mexico

(1) Legislative Redistricting

Navajo and Pueblo Indians, and Hispanics, initially challenged New Mexico's 1982 house redistricting plan on the grounds that it violated the one person, one vote standard of the Fourteenth Amendment. The three-judge court agreed, noting that the state's use of a "votes-cast formula" in constructing districts produced unacceptable population deviations.[49] The state was given an opportunity to adopt a remedial plan, which it did in June 1982. That plan was also challenged by minority voters as a racially motivated gerrymander and as diluting minority voting strength.

In a lengthy opinion, the three-judge court concluded that seventeen of the nineteen challenged house districts were in violation of Section 2. Although Indians were more than eight percent of the population and were concentrated in certain geographic areas of the state, only one Indian was a member of the house. For the past decade, only two of the state's 112 legislators had been Indian. No Indian had been elected to a national or statewide office, and only four Indians had been elected to district boards of education or county commissions.[50]

The court found consistent patterns of political cohesion among Indians and racial bloc voting by whites. It noted the history of discrimination against Indians, including denial of the right to vote until 1948. And although the right of Indians to vote was no longer in dispute, "there are still regular attempts by certain legislators to deny that right to Indians living on land exempt from state taxation."[51]

Given the depressed levels of Indian voting, the votes-cast formula systematically discriminated against Indians. "This defect in the formula was not random or sporadic but inherent and systematic." The perception among Indians, grounded in large part in the discrimination of the past, that the state is an enemy of the tribes was "the single biggest factor in the depressed political participation of Indians in New Mexico."[52]

Voter registration had increased in recent years, but this was the result of Indian led, not state sponsored, initiatives such as the registration campaigns of the All Indian Pueblo Council. While similar drives were conducted among blacks in the South decades ago, "they only began among New Mexico Indians in the past six years."[53]

White legislators claimed to be concerned with the needs of their Indian constituencies, but the record was to the contrary. There was "no evidence of any true legislative commitment to studying, addressing and helping to resolve the serious problems facing New Mexico Indians."[54]

Indians ranked "far behind other ethnic groups in educational achievement, employment rates and per capita income. . . Indians are the poorest of the poor." Cultural and linguistic barriers were further factors "which enhance the redistricting plan's discriminatory effect on Indians," said the court. Concentrations of rural Indian population were also systematically split and attached to urban areas, causing the dilution of Indian voting strength. The court made similar findings with respect to areas of the state with concentrations of Hispanic population.[55]

The remedial plan drawn by the court avoided splitting concentrations of minority population and increased the number of majority minority house districts. The Supreme Court summarily affirmed the decision of the three-judge court.[56]

(2) Other Vote Dilution Litigation

In other vote dilution litigation brought by Indians in New Mexico challenging at-large elections for local school boards and a county commission, the defendants entered into consent decrees adopting single member districts.[57] In a challenge to at-large elections for the board of a public junior college, the court ordered into effect single member districts.[58] In another case the court held that state law requiring cities with more than ten thousand people to use single member districts overrode a city's home rule charter providing for at-large elections.[59]

C. Arizona

(1) Legislative and Congressional Redistricting

The San Carlos Apache Tribe and several of its members, among others, challenged legislative and congressional redistricting in Arizona following the 1980 census as violating the constitution and the Voting Rights Act. Historically, the tribe had been kept intact within a single congressional district, as well as a single legislative district, each of which elected one state senator and two state representatives. Under the challenged plan, the tribe was divided into three legislative and three congressional districts.

After the complaint was filed, the Department of Justice precleared the congressional plan but objected to the state legislative plan on the grounds that the division of the San Carlos Apache Tribe "raises concerns which will not allow us to conclude that the legislative plan does not have a discriminatory purpose or effect." The fragmentation of the tribe under the proposed plan, according to the district court, "has the effect of diluting the San Carlos Apache Tribal voting strength and dividing the Apache community of

interest."[60] The court also found that the congressional plan contained unacceptable population deviations, and pursuant to the agreement of the parties adopted congressional and legislative plans that complied with one person, one vote and kept the tribe in the same district, as well as a state legislative plan that cured the dilution of Indian voting strength by keeping the tribe in a single legislative district. Given its disposition of the case, the court found it unnecessary to determine whether the challenged plans had been adopted with a discriminatory purpose.[61]

D. Montana

(1) Big Horn County

The first Section 2 challenge in Montana was brought in 1983 in Big Horn County. The plaintiffs were members of the Crow and Northern Cheyenne Tribes and were represented by the ACLU. They contended that the at-large method of electing the members of the county commission and one of the school districts in the county allowed the white majority to control the outcome of elections and prevented Indian voters from electing candidates of their choice. At the time the complaint was filed, no Indian had ever been elected to the county commission or the school board, despite the fact that Indians were 41percent of the voting age population of the county.

Following a lengthy trial, the district court issued a detailed order in 1986 finding that the challenged at-large system diluted Indian voting strength in violation of Section 2. Among the court's findings were: "the right of Indians to vote has been interfered with, and in some cases denied, by the county;" "Indians who had registered to vote did not appear on voting lists;" "Indians who had voted in primary elections had their names removed from voting lists and were not allowed to vote in the subsequent general elections;" Indians were "refused voter registration cards by the county;" "evidence of official discrimination touching on the right to participate in elections concerned the failure of the county to appoint Indians to county boards and commissions;" "discrimination in the appointment of deputy registrars of voters and election judges limiting Indian involvement in the mechanics of registration and voting;" "in the past there were laws prohibiting voting precincts on Indian reservations and effectively prohibiting Indians from eligibility for positions such as deputy registrar;" "there is racial bloc voting in Big Horn County;" "there is evidence that race is a factor in the minds of voters in making voting decisions;" "[w]hen an Indian was elected Chairman of the Democratic Party, white members of the party walked out of the meeting;" "[u]nfounded charges of voter

fraud have been alleged against Indians and the state investigator who investigated the charges commented on the racial polarization in the county;" the size of the county "is huge (5,023 square miles), the roads are poor, and travel is time consuming;" "the use of staggered terms along with residential districts promotes head-to-head contests . . . making it more difficult for Indian supported candidates to successfully participate in the political process;" "Indians have lost land, had their economics disrupted, and been denigrated by the policies of the government at all levels;" there was "discrimination in hiring by the county;" "race is an issue and subtle racial appeals, by both Indians and whites, affect county politics;" "[i]ndifference to the concerns of Indian parents" by school board members; "the polarized nature of campaigns;" "a strong desire on the part of some white citizens to keep Indians out of Big Horn County government;" "the effects on Indians of being frozen out of county government remain and will continue to exist in years to come;" "English is a second language for many Indians, further hampering participation;" and a depressed socio-economic status that makes it "more difficult for Indians to participate in the political process and there is evidence linking these figures to past discrimination."

The court concluded that "this is precisely the kind of case where Congress intended that at-large systems be found to violate the Voting Rights Act."[62] Following the implementation of a remedial plan consisting of single member districts, an Indian (from a majority Indian district) was elected to the county commission for the first time in history.

(2) Legislative Redistricting

Earl Old Person, the chair of the Blackfeet Indian Tribe, and other tribal members in Montana brought suit in 1996 challenging the 1992 redistricting plans for the state house and senate. They contended that the plans diluted Indian voting strength in the area encompassed by the Blackfeet and Flathead Reservations (including portions of Flathead, Lake, Glacier, and Pondera Counties) where an additional majority Indian house district and a majority Indian senate district could be drawn.[63]

Since 1972, the Montana constitution has granted the exclusive power to conduct legislative redistricting to a Districting and Apportionment Commission. The commission is reconstituted every ten years in advance of the release of the federal census and consists of five members, four of whom are chosen by the majority and minority leaders of each house. The fifth member is selected by the four commissioners, and if they cannot agree, by the state supreme court. Upon the filing of the plan by the commission with the

secretary of state, the plan becomes law and the commission is dissolved.[64]

Based on the 1990 census, Indians were 6 percent of the total population and 4.8 percent of the voting age population (VAP) of Montana. While the state population increased by 1.6 percent between 1980 and 1990, the Indian population increased 27.9 percent. Approximately 63 percent of the Indian population lived on the state's seven Indian Reservations.[65]

The preexisting 1982 plan contained only one majority Indian district, House District 9 on the Blackfeet Reservation in Glacier County.[66] The 1982 plan also effectively fragmented the Indian population in other parts of the state by dividing the Fort Belknap Reservation between two senate districts, the Fort Peck Reservation among three senate districts, the Rocky Boy Reservation between two house districts, and the Blackfeet Reservation among four house districts. The Flathead Reservation was divided among eight house districts.

As a result of the growth in Indian population reflected in the 1990 census, three majority white districts under the 1982 plan had become majority Indian, HDs 20 (portions of Fort Peck), 99 (portions of Crow), and Senate District 50 ("SD") (portions of Crow and Northern Cheyenne).[67] Another district, HD 100 (portions of Crow and Northern Cheyenne), was approximately 50 percent Indian in light of the new census.

The commission appointed in 1990 consisted of five non-Indians. They held twelve hearings on redistricting around the state, each of which was usually preceded by an afternoon work or planning session. All the sessions were recorded on audio tapes, which were later transcribed for use at trial. The statements made by the commissioners during their planning sessions, as opposed to during the public meetings when they were more circumspect, can only be described as overtly racial and showed an intent to limit Indian political participation.

Commission members ridiculed the redistricting proposals submitted by tribal members as "idiotic" and "a bunch of crap." As one commissioner put it when he looked at a plan that would have created a majority Indian district in the area of the Rocky Boy and Ft. Belknap Reservations, "I can feel anger coming on and I might as well spew it here tonight . . . before tonight, I mean. Now, just to be really blunt, this is a bunch of crap." They called the tribes' demographer, whom they had never met, a "jackass," "some turkey from God-Knows-Where," a "dingaling," and an "S.O.B." One commissioner said that if "that bugger" shows

up at a meeting "I'll toss him in the trees someplace." When a staff member mistakenly gave some of the commissioners blank pieces of paper instead of a tribal redistricting proposal, one commissioner remarked, "I got a blank one too . . . . [t]his is typical of them Indians."[68]

In response to requests from tribal members that any districting plan provide equal electoral opportunities to Indian voters, commission members suggested that all the Indians in the state be packed in one district to minimize their voting strength. As one commissioner put it, "give them one District and we go from there." The Indians, according to another commissioner, didn't know what was going on: "you get somebody that's getting in there and stirring them up, yeah, they'll get to thinking hell's an icebox." Another commissioner declared that "[i]f the federal government wants to redistrict Montana according to the Indian Tribes and the Reservations, they are going to have to do it. I am not going to do it." When the commission felt obligated to draw a majority Indian district, one commissioner lamented that "[w]e're being had here, ladies and gentlemen." Another commissioner added, "[a]nd we can't do anything about it." Placing white residents in a majority Indian district would, according to one commissioner, "emasculate" white voters.[69]

The attitudes of members of the commission towards Indians were a reflection of a more general "white backlash" against Indians. The United States Commission on Civil Rights reported in 1981 that:

> During the second half of the seventies a backlash arose against Indians and Indian interests. Anti-Indian editorials and articles appeared in both the local and the national media. Non-Indians, and even a few Indians as well, living on or near Indian reservations organized to oppose tribal interests. Senator Mark Hatfield (R-Ore.) said during Senate hearings in 1977 said that '[w]e have found a very significant backlash [against Indians] that by any other name comes out as racism in all its ugly manifestations.'

(U.S. Comm. on Civil Rights 1, 1981) So called "White rights" groups have proliferated in Montana, including Montanans Opposed to Discrimination (MOD), Citizens Rights Organization (CRO), Interstate Congress for Equal Rights and Responsibilities (ICERR), and Citizens Equal Rights Alliance (CERA). In general, these organizations advocate that the states should have exclusive jurisdiction over all non-Indians and non-Indian lands wherever located. The organizations are also interested in eliminating or terminating the Indian reservations, and have clashed with the tribes over specific issues such as taxation, tribal sovereignty, hunting and fishing rights, water rights, and appropriation and development of tribal resources. Joe Medicine Crow, a Crow tribal historian and anthropologist, says the mentality of MOD is "do not give the Indians the opportunity to enjoy those rights that have been traditionally the white man's rights, don't let them have it."[70]

A political party that is gaining a foothold in Montana is the Constitution Party, which has a controversial, distinctly anti-Indian platform. As appears from its website,[71] its 2000 National Platform included: repeal of the Voting Rights Act; opposition to bilingual ballots; an end to all federal aid, except to military veterans; repeal of welfare; and abolishing the U.S. Department of Education.

In the 2000 General Election for the Montana legislature, there were eleven Constitution party candidates on the ballot. Where they faced candidates from both major parties, they did poorly. Where they faced only one major party candidate, they did better, with one candidate getting 25percent of the vote--except in HD 73 in Lake County, the home of the Flathead Reservation and where the only major party candidate was an Indian. There, the Constitution Party candidate got 49 percent of the total vote, 62 percent of the white vote, and came within fifty-four votes of being elected.[72]

Because of the polarization that exists, white politicians are often reluctant to openly campaign or solicit votes on the reservations for fear of alienating white voters. According to Joe MacDonald, one of the plaintiffs in the Old Person case and the president of the Salish-Kootenai College at Flathead, when U.S. Representative Pat Williams, who was chair of a house education committee, visited the tribal college he didn't want any publicity or even to attend a reception to meet members of the faculty. According to MacDonald, "[h]e slid in the side door, he and I went around the campus, [he] went to his car and he was gone."[73] Another plaintiff, Margaret Campbell, echoed MacDonald's comments:

> Non-Indians come to the Native Americans for their support, but they would prefer that . . . we do not support them publicly among the non-Indian community. For example, they don't bring us bumper stickers and huge yard signs, that sort of thing. . . . If a non-Indian candidate were to make it known that they had the broad support of the Native American community, it would be the kiss of death to their campaign.[74]

The plan ultimately adopted by the commission maintained the existing majority Indian districts and created one additional majority Indian district in the area of the Rocky Boy and Ft. Belknap Reservations. It did not, however, create the additional house and senate seats in the area of the Flathead and Blackfeet Reservations sought by the plaintiffs.

Following a trial, the district court dismissed the complaint on the grounds that the redistricting plan did not dilute Indian voting strength. It was of the view that white bloc voting was not legally significant, and that the number of legislative districts in which Indians constituted an effective majority was proportional to the Indian share of the voting age population of the state. It did note, however, "[t]he history of official

discrimination against American Indians during the 19th century and early 20th century by both the state and federal government."[75]

The district court also found that "Indians continue to bear the effects of past discrimination in such areas as education, employment and health, which, in turn, impacts upon their ability to participate effectively in the political process." The effects of discrimination included low Indian voter participation and turnout, and very few Indian candidates.[76]

As for plaintiffs' claim of purposeful discrimination, the court held that the challenged plan had not been adopted with a discriminatory purpose. The derisive and condescending comments made by the commissioners about Indians were dismissed as "moment[s] of levity."[77] Plaintiffs appealed and the court of appeals reversed and remanded for further proceedings.[78]

The court of appeals held that plaintiffs established the three primary factors identified in Thornburg v. Gingles as probative of vote dilution under Section 2 (geographic compactness and political cohesion of the minority group and legally significant white bloc voting), and that "in at least two recent elections in Lake County . . . there had been overt or subtle racial appeals." The court directed the district court to reconsider its ruling in light of its "clearly erroneous finding that white bloc voting was not legally significant," and its erroneous finding of "proportionality between the number of legislative districts in which American Indians constituted an effective majority and the American Indian share of the voting age population of Montana."[79]

As for the anti-Indian comments made by the commissioners, the appellate court acknowledged that they were "inflammatory," but declined to reverse the ruling of the district court that there was no discriminatory purpose in the adoption of the commission's plan.[80] An unwillingness of many local federal judges, who are, after all, political appointees, to find that members of their state or community committed acts of *purposeful* discrimination, and the unwillingness of appellate judges to reverse those decisions, underscore the wisdom of Congress in dispensing with any requirement of proving racial purpose to establish a violation of Section 2.

Prior to the decision of the court of appeals, a new commission was appointed by the legislature in 1999 to redistrict the state in anticipation of the 2000 census. The four appointed members could not agree on the fifth member, who would serve as chair, and accordingly the state supreme court did the appointing. It chose Janine Windy Boy, a Crow Indian who had been the lead plaintiff in the Big Horn County voting

rights lawsuit. Having an Indian for the first time on the commission would insure that the language of the commissioners would not be as "inflammatory" as it had been in the past. It would also help to ensure that Indians would be treated fairly in the redistricting process. The subsequent adoption of a redistricting plan creating a new majority Indian house district and a new majority Indian senate district in the area of the Flathead and Blackfeet Reservations would also render the Old Person lawsuit moot.

The Attorney General of Montana, Mike McGrath, who was also counsel for the defendants, appeared before the commission at its meeting in April 2001, to discuss the Old Person case. He publicly acknowledged that the existing redistricting plan violated Section 2. According to General McGrath:

> I think ultimately that we will not prevail in this litigation; that the Plaintiffs will indeed prevail in the litigation . . . I think the Ninth Circuit opinion is fairly clear and I think it's ultimately the state of Montana is going to have to draw a Senate district that is at least somewhat similar to that that the Plaintiffs have requested.[81]

Joe Lamson, another member of the commission, shared the views of General McGrath. He was of the opinion that the 1993 plan "did result in voter dilution of our Native American population in Montana. And that when you look at proportionality, they're certainly entitled to another Senate district." A third commissioner, Sheila Rice, who was a member of the state legislature when the existing plan was enacted, said that "I actually sat on that House Committee that reviewed this exact plan that was taken to Court--it must have been the 1993 session, and argued pretty strenuously that we were diluting the Native American population, and that we should redraw that district."[82]

The commission conceded the 1992 plan diluted Indian voting strength, and adopted a resolution to create "an additional majority Indian House District and an additional majority Indian Senate District in the region of Montana that is dealt with in Old Person, in recognition of the rights of Indians on the Blackfeet and Flathead Reservations under Section 2 of the Federal Voting Rights Act of 1965."[83]

A second trial was held in Old Person after the remand from the court of appeals, and the district court again dismissed the complaint. It held that the three Gingles factors continued to be met taking into account intervening elections in 1998 and 2000, and that the gap between the number of majority-minority districts to minority members' share of the relevant population had increased based on the 2000 census. It reaffirmed the prior findings that American Indians suffered from a history of discrimination, that Indians have a lower socio-economic status than whites, that these social and economic factors hinder the ability of Indians in Montana to participate fully in the political process, and that in at least two recent elections in Lake

County there had been overt or subtle racial appeals.

Despite these findings, the court ruled that three Indian preferred candidates (one white, one Indian who had no major party opposition in the general election, and another Indian from a majority Indian district) had been elected to the legislature from the Blackfeet-Flathead area. The court also emphasized the difficulty of redistricting only part of the state using the 2000 census, and "the very real prospect that comprehensive and long-term relief designed to address vote dilution throughout the State of Montana is in the offing within a year under the auspices of the Montana Districting and Apportionment Commission."[84]

Plaintiffs appealed once again, but this time the court affirmed. It affirmed all the court's prior findings showing vote dilution. In addition, and setting aside the finding of the district court once again, the panel held that Indians' share of majority-minority districts "is not proportional under either a four-county or a statewide frame of reference, [and that] the proportionality factor weighs in favor of a finding of vote dilution." But despite proof of the Gingles and other factors showing vote dilution, including the lack of proportionality, the panel concluded that Indian voting strength was not diluted because of "the absence of discriminatory voting practices, the viable policy underlying the existing district boundaries, the success of Indians in elections, and official responsiveness to Native American needs."[85] The court ignored the evidence presented by the plaintiffs of the resolution of the 2000 Districting and Apportionment Commission, and statements of its individual members, that the 1993 plan diluted Indian voting strength. But in any event, the 2000 redistricting would shortly render the case moot.

After holding a series of hearings around the state, the new commission submitted its redistricting plan to the legislature for comments on January 6, 2003. The plan provided for one hundred house districts, six of which were majority Indian, and fifty senate districts, three of which were majority Indian. An additional majority Indian house district (HD 1) was created that included parts of the Flathead and Blackfeet Indian Reservations. HD 1, when combined with the preexisting majority Indian house district on the Blackfeet Reservation (HD 85), created an additional majority Indian senate district (SD 1).[86] The districts for the house contained a total deviation of 9.85 percent[87]

Both the house and senate immediately condemned the proposed plans and demanded that the commission adopt new ones. The house, in a resolution passed on February 4, 2003, charged that "the 5% population deviation allowance contained in the plan was used for partisan gain," that the plan was "mean-

spirited," "unacceptable," and that "the legislative redistricting plan must be redone." It also condemned the creation of majority Indian districts as being "in blatant violation of the mandatory criterion that race may not be the predominant factor to which the traditional discretionary criteria are subordinated."[88] The senate leveled virtually identical charges, and concluded that "the legislative redistricting plan must be redone."[89]

The legislature then enacted HB 309, which the governor signed into law on February 4, 2003, which sought to invalidate the commission's plan and alter or amend the provisions of the state constitution. While Article V, § 14(1) of the state constitution provides that "[a]ll districts shall be as nearly equal in population as is practicable," HB 309 provided that the districts must be "within a plus or minus 1% relative deviation from the ideal population of a district." HB 309 further provided that "[t]he secretary of state may not accept any plan that does not comply with the [1% deviation] criteria."

On February 5, 2003, the commission formally adopted its plan for legislative redistricting and filed it with the secretary of state. The secretary of state, however, refused to accept it and on the same day filed a complaint against the commission in state court for declaratory judgment that the plan was unconstitutional and unenforceable for failure to comply with the population equality standard of HB 309.[90] Following a hearing, the state court ruled on July 2, 2003, that HB 309 was unconstitutional and that the secretary of state was required to accept the commission's plan. The secretary of state did not file a notice of appeal but accepted the commission's plan for filing. It thus became the state's redistricting plan, superceding the 1993 plan and rendering the plaintiffs' challenge to the prior plan moot. The Supreme Court, however, denied without comment a petition for a writ of certiorari seeking to vacate the final decision of the lower court on mootness grounds.

As a result of the litigation, which spanned eight years, and despite the concerted opposition of the legislature and secretary of state to the commission's redistricting plan, eight tribal members, as of the 2004 elections, are now members of the Montana state house and senate, the most Indian members of any state legislature. A recent report by the First American Education Project described the success of Native Members elected to the Montana State Legislature as "a testament [to] the power of Native voters at the smaller geographic and jurisdictional levels." (First American Education Project 7, 2004)

(3) Blaine County

Blaine County, located in north central Montana, is 45 percent Indian and home to the Fort Belknap

Reservation (Gros Ventre and Assiniboine). The county was sued in November 1999 for its use of at-large elections, which were alleged to dilute Indian voting strength in violation of Section 2 of the Voting Rights Act.[91] Both the district court and court of appeals agreed that the challenged system violated the statute. Indians were geographically compact and politically cohesive, while whites voted sufficiently as a bloc usually to defeat the candidates preferred by Indian voters.[92]

Turning to the totality of circumstances, the courts concluded: (1) there was a history of official discrimination against Indians, including "extensive evidence of official discrimination by federal, state, and local governments against Montana's American Indian population;" (2) there was racially polarized voting which "made it impossible for an American Indian to succeed in an at-large election;" (3) voting procedures, including staggered terms of office and "the County's enormous size [which] makes it extremely difficult for American Indian candidates to campaign county-wide," enhanced the opportunities for discrimination against Indians; (4) depressed socio-economic conditions existed for Indians; and, (5) there was a tenuous justification for the at-large system, in that at-large elections were not required by state law while "the county government depends largely on residency districts for purposes of road maintenance and appointments to County Boards, Authorities and Commissions."[93]

Blaine County was represented by the Mountain States Legal Foundation, which agreed to represent the defendants on the condition they allow it to challenge the constitutionality of Section 2 as applied in Indian country. Both the district court and the court of appeals rejected the Foundation's arguments and held that Section 2 was a valid exercise of congressional authority to enforce the Fourteenth and Fifteenth Amendments. In doing so, the courts relied upon the Supreme Court's recent "federalism" decisions, such as City of Boerne v. Flores,[94] which invalidated various acts of Congress on the grounds that they were not "congruent" and "proportionate," or appropriately tailored to remedy constitutional violation. The court of appeals noted that when Boerne "first announced the congruence-and-proportionality doctrine . . . it twice pointed to the VRA as the model for appropriate prophylactic legislation," and that "the Court's subsequent congruence-and-proportionality cases have continued to rely on the Voting Rights Act as the baseline for congruent and proportionate legislation."[95] The Supreme Court denied the county's petition for a writ of certiorari.[96]

(4) Other Litigation

Two other counties and a local school board in Montana were also sued for their use of at-large elections as diluting Indian voting strength, Rosebud County (Northern Cheyenne), Roosevelt County (Assiniboine and Sioux), and Ronan School District 30 (Flathead). Rather than face prolonged litigation, the three jurisdictions entered into settlement agreements adopting district elections.[97]

The difficulty Indians have experienced in getting elected to office was particularly evident in the Ronan school district. From 1972 to 1999, seventeen Indians had run for the school board, and only one, Ronald Bick, had been elected. Bick, who had no formal or announced tribal affiliation at the time, was elected to the board in 1990. However, when he ran for reelection in 1993, and after it became known that he had joined the Flathead nation, he was defeated. The settlement plan agreed to by the parties called for an increase in the size of the school board from five to seven members, and the creation of a majority Indian district that would elect two members to the school board. At the ensuing election held under the new plan, two Indians were elected from the majority Indian district.

E. Minnesota

(1) City of Prior Lake

Indian residents of a portion of the Shakopee Mdewakanton Sioux Reservation located within the city limits of Prior Lake, Minnesota, were historically allowed to vote in municipal elections and receive municipal services. In 1983, however, the city council passed a resolution excluding reservation land from the town, the effect of which was to deny reservation residents otherwise eligible from voting in municipal elections and from receiving municipal services. The tribe and several of its members brought suit alleging the de-annexation violated the constitution and the Voting Rights Act.

In ruling for the tribal plaintiffs, the court held the disputed portion of the reservation was a part of Prior Lake, and its residents were "citizens of Prior Lake" entitled to vote and receive city services.[98]

F. South Dakota

(1) Roberts and Marshall Counties

A Section 2 challenge was brought in South Dakota in 1984 by members of the Sisseton-Wahpeton Sioux Tribe in Roberts and Marshall Counties. Represented by the Native American Rights Fund, they claimed at-large elections for the Sisseton Independent School District diluted Indian voting strength. The trial court dismissed the complaint but the court of appeals reversed. It held the trial court failed to consider

"substantial evidence . . . that voting in the District was polarized along racial lines." The trial court had also failed to discuss the "substantial" evidence of discrimination against Indians in voting and office holding, the "substantial evidence regarding the present social and economic disparities between Indians and whites," the discriminatory impact of staggered terms of office and apportioning seats between rural and urban members on the basis of registered voters which underrepresented Indians, and the presence of only two poling places.[99] On remand, the parties reached a settlement utilizing cumulative voting for the election of school board members. (Wolfley 200, 1991)

(2) Shannon County

Joe American Horse, a tribal member and resident of the Pine Ridge Indian Reservation in Shannon County, attempted to register to vote prior to the November 1984, general election. His application was rejected, however, on the ground that it was received after the deadline for registration, despite the fact it was received by the auditor prior to the deadline that had been agreed upon by various county officials and publically announced. In a lawsuit filed by American Horse on his own behalf, and on behalf of others whose applications had been similarly rejected, the court ordered the rejected applications be accepted and that the applicants be allowed to vote in the upcoming elections.[100]

(3) Day County

The United States sued officials in Day County in 1999 for denying Indians the right to vote in elections for a sanitary district in the area of Enemy Swim Lake and Campbell Slough. Under the challenged scheme, only residents of several noncontiguous pieces of land owned by whites could vote, while residents of the remaining 87 percent of the land around the two lakes, which was owned by the Sisseton-Wahpeton Sioux Tribe and about 200 tribal members, were excluded from the electorate. In an agreement settling the litigation, local officials admitted Indians had been unlawfully denied the right to vote, and agreed upon a new sanitation district that included the Indian owned land around the two lakes.[101]

(4) Legislative Redistricting in 1996

Steven Emery, Rocky Le Compte, and James Picotte, residents of the Cheyenne River Sioux Reservation, and represented by the ACLU, filed suit in 2000 challenging the state's 1996 interim legislative redistricting plan. In the 1970s, a special task force consisting of the nine tribal chairs, four members of the legislature, and five lay people undertook a study of Indian/state government relations. One of the staff

reports of the commission concluded that "[w]ith the present arrangement of legislative districts, Indian people have had their voting potential in South Dakota diluted." The report recommended the creation of a majority Indian district in the area of Shannon, Washabaugh, Todd, and Bennett Counties. (Task Force on Indian-State Government Relations 17, 25, 1974) Under the existing plan, there were twenty-eight legislative districts, all of which were majority white and none of which had ever elected an Indian. Thomas Short Bull, a member of the Oglala Sioux Tribe and the executive director of the task force, said the plan gerrymandered the Rosebud and Pine Ridge Reservations by "divid[ing them] into three legislative districts, effectively neutralizing the Indian vote in that area." The legislature, however, ignored the task force's recommendation. According to Short Bull, "the state representatives and senators felt it was a political hot potato. . . . [T]his was just too pro-Indian to take as an item of action."[102]

After the release of the 1980 census, the South Dakota Advisory Committee to the U.S. Commission on Civil Rights made a similar recommendation that the legislature create a majority Indian district in the area of the Pine Ridge and Rosebud Reservations. The committee issued a report in which it said the existing districts "inherently discriminate against Native Americans in South Dakota who might be able to elect one legislator in a single member district." (South Dakota Advisory Comm. 35, 52 1980) The Department of Justice, pursuant to its oversight under Section 5, advised the state it would not preclear any legislative redistricting plan that did not contain a majority Indian district in the Rosebud/Pine Ridge area. The state bowed to the inevitable and in 1981 drew a redistricting plan creating for the first time in the state's history a majority Indian district, District 28, which included Shannon and Todd Counties and half of Bennett County.[103] Thomas Short Bull ran for the senate the following year from District 28 and was elected, becoming the first Indian ever to serve in the state's upper chamber.

The South Dakota legislature adopted a new redistricting plan after the release of the census in 1991. The plan divided the state into 35 districts and retained the majority Indian district, renumbered as District 27, in the Todd/Shannon/Bennett Counties area. The plan also provided, with one exception, that each district would be entitled to one senate member and two house members elected at-large from within the district. The exception was new House District 28. The 1991 legislation provided that "in order to protect minority voting rights, District No. 28 shall consist of two single-member house districts."[104] District 28A consisted of Dewey and Ziebach Counties and portions of Corson County, and included the Cheyenne River Sioux Reservation

and portions of the Standing Rock Sioux Reservation. District 28B consisted of Harding and Perkins Counties and portions of Corson and Butte Counties. According to 1990 census data, Indians were 60 percent of the voting age population (VAP) of House District 28A, and less than 4percent of the VAP of House district 28B.

Five years later, despite its pledge to protect minority voting rights, the legislature abolished House Districts 28A and 28B and required candidates for the house to run in District 28 at-large.[105] Tellingly, the repeal took place after an Indian candidate, Mark Van Norman, won the Democratic primary in District 28A in 1994. A chief sponsor of the repealing legislation was Eric Bogue, the Republican candidate who defeated Van Norman in the general election.[106] The reconstituted House District 28 contained an Indian VAP of 29%. Given the prevailing patterns of racially polarized voting, which members of the legislature were surely aware of, Indian voters could not realistically expect to elect a candidate of their choice in the new district.

The Emery plaintiffs claimed the changes in District 28 violated Section 2 of the Voting Rights Act, as well as Article III, Section 5 of the South Dakota Constitution, which mandated reapportionment every tenth year, but prohibited all interstitial reapportionment. The South Dakota Supreme Court had expressly held "when a Legislature once makes an apportionment following an enumeration no Legislature can make another until after the next enumeration."[107]

Plaintiffs analyzed the six legislative contests between 1992-1994 involving Indian and non-Indian candidates in District 28 held under the 1991 plan to determine the existence, and extent, of any racial bloc voting. Indian voters favored the Indian candidates at an average rate of 81percent, while whites voted for the white candidates at an average rate of 93 percent. In all six of the contests the candidate preferred by Indians was defeated.[108]

White cohesion also fluctuated widely depending on whether an Indian was a candidate. In the four head-to-head white-white legislative contests, where there was no possibility of electing an Indian candidate, the average level of white cohesion was 68 percent. In the Indian-white legislative contests, the average level of white cohesion jumped to 94 percent.[109] This phenomenon of increased white cohesion to defeat minority candidates has been called "targeting," and illustrates the way in which majority white districts operate to dilute minority voting strength.[110]

Before deciding the plaintiffs' Section 2 claim, the district court certified the state law question to the

South Dakota Supreme Court. That court accepted certification and held that in enacting the 1996 redistricting plan "the Legislature acted beyond its constitutional limits."[111] It declared the plan null and void and reinstated the preexisting 1991 plan. At the ensuing special election ordered by the district court, Tom Van Norman was elected from District 28A, the first Indian in history to be elected to the state house from the Cheyenne River Sioux Indian Reservation.

(5) Failure to Comply with Section 5

As a result of the 1975 amendments of the Voting Rights Act, two counties in South Dakota, Shannon and Todd, which are home to the Pine Ridge and Rosebud Indian Reservations respectively, became subject to Section 5 preclearance.[112] Eight counties in the state, because of their significant Indian populations, were also required to conduct bilingual elections--Todd, Shannon, Bennett, Charles Mix, Corson, Lyman, Mellette, and Washabaugh.[113]

William Janklow, the Attorney General of South Dakota, was outraged over the extension of Section 5 and the bilingual election requirement to his state. In a formal opinion addressed to the secretary of state, he derided the 1975 law as a "facial absurdity." Borrowing the States' Rights rhetoric of southern politicians who opposed the modern civil right movement, he condemned the Voting Rights Act as an unconstitutional federal encroachment that rendered state power "almost meaningless." He quoted with approval Justice Hugo Black's famous dissent in South Carolina v. Katzenbach (which held the basic provisions of the Voting Rights Act constitutional) that Section 5 treated covered jurisdictions as "little more than conquered provinces."[114] Janklow expressed the hope that Congress would soon repeal "the Voting Rights Act currently plaguing South Dakota." In the meantime, he advised the secretary of state not to comply with the preclearance requirement. "I see no need," he said, "to proceed with undue speed to subject our State's laws to a 'one-man veto' by the United States Attorney General."[115]

Although the 1975 amendments were never in fact repealed, state officials followed Janklow's advice and essentially ignored the preclearance requirement. From the date of its official coverage in 1976 until 2002, South Dakota enacted more than 600 statutes and regulations having an effect on elections or voting in Shannon and Todd Counties, but submitted fewer than ten for preclearance.

The Department of Justice, which has primary responsibility for enforcing Section 5, was surely aware of the failure of the state to comply with the preclearance requirement. It had, for example, sued the

state in 1978 and 1979 for its failure to submit for preclearance reapportionment and county reorganization laws affecting the covered counties.[116] But after that, the department turned a blind eye to the state's failure to comply with Section 5.

A number of the voting changes which South Dakota enacted after it became covered by Section 5, but which it refused to submit for preclearance, had the potential for diluting Indian voting strength. One was authorization for municipalities to adopt numbered seat requirements. A numbered seat provision, as the Supreme Court has noted, disadvantages minorities because it creates head-to-head contests and prevents a cohesive political group from single shot voting, or "concentrating on a single candidate."[117] Another unsubmitted change was the requirement of a majority vote for nomination in primary elections for United States senate, congressman, and governor.[118] A majority vote requirement can "significantly" decrease the electoral opportunities of a racial minority by allowing the numerical majority to prevail in all elections.[119] Still another voting change the state failed to submit was its 2001 legislative redistricting plan.

The 2001 plan divided the state into thirty-five legislative districts, each of which elected one senator and two members of the house of representatives.[120] No doubt due to the litigation involving the 1996 plan, the legislature continued the exception of using two subdistricts in District 28, one of which included the Cheyenne River Sioux Reservation and a portion of the Standing Rock Indian Reservation. The boundaries of the district that included Shannon and Todd Counties, District 27, were altered only slightly under the 2001 plan, but the demographic composition of the district was substantially changed. Indians were 87 percent of the population of District 27 under the 1991 plan, and the district was one of the most underpopulated in the state. Under the 2001 plan, Indians were 90 percent of the population, while the district was one of the most overpopulated in the state. As was apparent, Indians were more "packed," or over concentrated, in the new District 27 than under the 1991 plan. Had Indians been "unpacked," they could have been a majority in a house district in adjacent District 26.

Indeed, James Bradford, an Indian representative from District 27, proposed an amendment reconfiguring Districts 26 and 27 that would have retained District 27 as majority Indian and divided District 26 into two house districts, one of which, District 26A, would have had an Indian majority. Bradford's amendment was voted down fifty-one to sixteen. Thomas Short Bull criticized the way in which District 27

had been drawn because there were "just too many Indians in that legislative district," which he said diluted the Indian vote. Elsie Meeks, a tribal member at Pine Ridge and the first Indian to serve on the U.S. Commission on Civil Rights, said the plan "segregates Indians," and denied them equal voting power.[121]

Despite enacting a new legislative plan affecting Todd and Shannon Counties, which were covered by Section 5, the state refused to submit the 2001 plan for preclearance. Alfred Bone Shirt and three other Indian residents from Districts 26 and 27, with the assistance of the ACLU, sued the state in December 2001 for its failure to submit its redistricting plan for preclearance. The plaintiffs also claimed the plan unnecessarily packed Indian voters in violation of Section 2 and deprived them of an equal opportunity to elect candidates of their choice.

A three-judge court was convened to hear the plaintiffs' Section 5 claim. The state argued that since district lines had not been significantly changed insofar as they affected Shannon and Todd Counties, there was no need to comply with Section 5. The three-judge court disagreed. It held "demographic shifts render the new District 27 a change 'in voting' for the voters of Shannon and Todd counties that must be preclearcd under § 5."[122] The state submitted the plan to the Attorney General who preclearcd it, apparently concluding the additional packing of Indians in District 27 did not have a retrogressive effect.

The district court, sitting as a single-judge court, heard plaintiffs' Section 2 claim and in a detailed 144 page opinion invalidated the state's 2001 legislative plan as diluting Indian voting strength. The court found the plaintiffs had established the three Gingles factors. Turning to the totality of circumstances analysis, the court found there was "substantial evidence that South Dakota officially excluded Indians from voting and holding office." Indians in recent times have encountered numerous difficulties in obtaining registration cards from their county auditors, whose behavior "ranged from unhelpful to hostile." Indians involved in voter registration drives have regularly been accused of engaging in voter fraud by local officials, and while the accusations have proved to be unfounded they have "intimidated Indian voters." According to Dr. Dan McCool, the director of the American West Center at the University of Utah and an expert witness for the plaintiffs, the accusations of voter fraud were "part of an effort to create a racially hostile and polarized atmosphere. It's based on negative stereotypes, and I think it's a symbol of just how polarized politics are in the state in regard to Indians and non-Indians."[123]

Following the 2002 elections, which saw a surge in Indian political activity, the legislature passed

"laws that added additional requirements to voting," including a law requiring photo identification at the polls. Rep. Van Norman said that in passing the burdensome new photo requirement "the legislature was retaliating because the Indian vote was a big factor in new registrants and a close senatorial race." During the legislative debate on a bill that would have made it easier for Indians to vote, representatives made comments that were openly hostile to Indian political participation. According to one opponent of the bill, "I, in my heart, feel that this bill . . . will encourage those who we don't particularly want to have in the system." Alluding to Indian voters, he said "I'm not sure we want that sort of person in the polling place." Bennett County did not comply with the provisions of the Voting Rights Act enacted in 1975 requiring it to provide minority language assistance in voting until prior to the 2002 elections, and only then because it was directed to do so by the Department of Justice.[124]

The district court also found "[n]umerous reports and volumes of public testimony document the perception of Indian people that they have been discriminated against in various ways in the administration of justice." Thomas Hennies, Chief of Police in Rapid City, has said "I personally know that there is racism and there is discrimination and there are prejudices among all people and that they're apparent in law enforcement." Don Holloway, the sheriff of Pennington County, concurred that prejudice and the perception of prejudice in the community were "true or accurate descriptions."[125]

The court concluded that "Indians in South Dakota bear the effects of discrimination in such areas as education, employment and health, which hinders their ability to participate effectively in the political process." There was also "a significant lack of responsiveness on the part of elected officials to Indian concerns." Rep. Van Norman said in the legislature any bill that has "[a]nything to do with Indians instantly is, in my experience treated in a different way unless acceptable to all." "[W]hen it comes to issues of race or discrimination," he said, "people don't want to hear that." One member of the legislature even accused Van Norman of "being racist" for introducing a bill requiring law enforcement officials to keep records of people they pulled over for traffic stops.[126]

Some of the most compelling testimony in the Bone Shirt case, and which was credited by the district court, came from tribal members who recounted "numerous incidents of being mistreated, embarrassed or humiliated by whites." Elsie Meeks, for example, told about her first exposure to the non-Indian world and the fact "that there might be some people who didn't think well of people from the reservation." When she

and her sister enrolled in a predominantly white school in Fall River County and were riding the bus, "somebody behind us said . . . the Indians should go back to the reservation. And I mean I was fairly hurt by it . . . it was just sort of a shock to me." Meeks said that there is a "disconnect between Indians and non-Indians" in the state. "[W]hat most people don't realize is that many Indians, they experience this racism in some form from non-Indians nearly every time they go into a border town community. . . . [T]hen their . . . reciprocal feelings are based on that, that they know, or at least feel that the non-Indians don't like them and don't trust them."[127]

When Meeks was a candidate for lieutenant governor in 1998, she felt welcome "in Sioux Falls and a lot of the East River communities." But in the towns bordering the reservations, the reception "was more hostile." There, she ran into "this whole notion that . . . Indians shouldn't be allowed to run on the statewide ticket and this perception by non-Indians that . . . we don't pay property tax . . . that we shouldn't be allowed [to run for office.]" Such views were expressed by a member of the state legislature who said he would be "leading the charge . . . to support Native American voting rights when Indians decide to be citizens of the State by giving up tribal sovereignty and paying their fair share of the tax burden."[128]

Craig Dillon, a tribal member living in Bennett County, told of his experience playing on the varsity football team of the county high school. After practice, members of the team would go to the home of the mayor's son for "fun and games." The mayor, however, "interviewed" Dillon in his office to see if he was "good enough" to be a friend of his son's. Dillon says that he flunked the interview. "I guess I didn't measure up because . . . I was the only one that wasn't invited back to the house after football practice after that." He found the experience to be "pretty demoralizing."[129]

Lyla Young, who grew up in Parmalee, said that the first contact she had with whites was when she went to high school in Todd County. The Indian students lived in a segregated dorm at the Rosebud boarding school, and were bussed to the high school, then bussed back to the dorm for lunch, then bused again to the high school for the afternoon session. The white students referred to the Indians as "GI's," which stood for "government issue." Young said that "I just withdrew. I had no friends at school. Most of the girls that I dormed with didn't finish high school . . . . I didn't associate with anybody." Even today, Young has little contact with the white community. "I don't want to. I have no desire to open up my life or my children's life to any kind of discrimination or harsh treatment. Things are tough enough without inviting more." Testifying

in court was particularly difficult for her. "This was a big job for me to come here today. . . . I'm the only Indian woman in here, and I'm nervous. I'm very uncomfortable."[130]

The testimony of Young, Meeks, and the others illustrates the polarization that continues to exist between the Indian and white communities in South Dakota, which manifests itself in many ways, including in patterns of racially polarized voting.

As for the other 600 odd unsubmitted voting changes, Elaine Quick Bear Quiver and several other members of the Oglala and Rosebud Sioux Tribes in Shannon and Todd Counties, and again represented by the ACLU, brought suit against the state in August 2002, to force it to comply with Section 5. Following negotiations among the parties, the court entered a consent order in December 2002, in which it immediately enjoined implementation of the numbered seat and majority vote requirements absent preclearance, and directed the state to develop a comprehensive plan "that will promptly bring the State into full compliance with its obligations under Section 5."[131] The state made its first submission in April 2003, and thus began a process that is expected to take up to three years to complete.

(6) Charles Mix County

Another Section 2 case was filed in March 2002 by Indian plaintiffs against the at-large method of electing the board of education of the Wagner Community School District in Charles Mix County. The parties eventually agreed on a method of elections using cumulative voting to replace the at-large system, and a consent decree was entered by the court on March 18, 2003.[132] At the next election John Sully, an Indian, was elected to the board of education. A similar Section 2 suit against the city of Martin was dismissed by the district court and is now on appeal.[133]

In 2005, tribal members filed suit against the county alleging that the three districts for the county commission were malapportioned and had been drawn to dilute Indian voting strength. The total deviation among the districts was 19 percent, and almost certainly unconstitutional, while each had a majority white voting age population, despite the fact that Indians were 30 percent of the population of the county and a compact majority Indian district court easily be drawn. South Dakota law prohibited the county from redistricting until 2012.[134] In an effort to avoid court supervised redistricting following a finding of a one person, one vote or Voting Rights Act violation, the county requested the state legislature to pass legislation establishing a process for emergency redistricting. The legislature complied and passed a bill, which the

governor promptly signed, allowing a county to redistrict, with the permission of the governor and secretary of state, at any time it became "aware" of facts that called into question whether its districts complied with federal or state law.[135] Despite the fact that the new law applied to every county in the state, including Shannon and Todd, and was thus required to be precleared under Section 5 as well as the consent decree in the Quick Bear Quiver case, Charles Mix County immediately sought permission from the governor to draw a new plan. The plaintiffs in Quick Bear Quiver then filed a motion for a preliminary injunction before the three-judge court to prohibit the county from proceeding with redistricting absent compliance with Section 5. The court granted the motion.

In a strongly worded opinion, the court noted that state officials in South Dakota "for over 25 years . . . have intended to violate and have violated the preclearance requirements," and that the new bill "gives the appearance of a rushed attempt to circumvent the VRA."[136] Implementation of the new emergency redistricting bill was enjoined until the state complied with Section 5.

(7) Buffalo County

One of the most blatant schemes to disfranchise Indian voters was used in Buffalo County. The population of the county was approximately 2,000 people, 83 percent of whom were Indian, and members primarily of the Crow Creek Sioux Tribe. Under the plan for electing the three-member county commission, which had been in effect for decades, nearly all of the Indian population--some 1,500 people--were packed in one district. Whites, though only 17 percent of the population, controlled the remaining two districts, and thus the county government. The system, with its total deviation among districts of 218 percent, was not only in violation of one person, one vote, but had clearly been implemented and maintained to dilute the Indian vote and insure white control of county government.

Tribal members, represented by the ACLU, brought suit in 2003 alleging that the districting plan was malapportioned and had been drawn purposefully to discriminate against Indian voters. The case was settled by a consent decree in which the county admitted its plan was discriminatory and agreed to submit to federal supervision of its future plans under Section 5 of the Voting Rights Act through January 2013.[137]

(8) Cheyenne River Sioux Reservation

In 1986 Indian residents of the Cheyenne River Sioux Reservation in South Dakota launched a campaign to register Indian voters. The auditor of Dewey County, however, limited the number of application forms

given to voter registrars, who had to travel approximately eighty miles round trip to the auditor's office in the courthouse, to ten to fifteen apiece. The Indians filed suit under the Voting Rights Act and the court concluded the county auditor had discriminated against Indians by limiting the number of application forms, ordered that more forms be provided, and extended the deadline for voter registration for an additional week.[138]

The same year, Alberta Black Bull and other Indian residents of the reservation brought a successful Section 2 suit against Ziebach County because of its failure to provide sufficient polling places for school district elections. Prior to the lawsuit, Indians had to travel up to 150 miles round trip to vote. The district court ordered the school district to establish four new polling places on the reservation.[139]

G. Colorado

(1) Montezuma County

Members of the Ute Mountain Ute Tribe in Montezuma County, represented by the ACLU, brought a successful challenge in 1989 to the at-large method of electing their local school board. The court made extensive findings of past and continuing discrimination against Indians in voting and other areas, which are summarized below.

During much of the Nineteenth Century "[t]he battle cry in Colorado seemed to be to exterminate the Indians." The governor, for example, issued an appeal on August 10, 1864, for "the people to defend themselves and kill Indians." This anti-Indian sentiment precipitated a surprise attack three months later by the state volunteers on a Cheyenne and Arapahoe village at Sand Creek in eastern Colorado. "Newspapers of the day greeted reports of the massacre with unanimous approval." Citing the persistent efforts of whites to exterminate and remove the Utes and expropriate their land, the court said "[i]t is blatantly obvious" that Native Americans "have been the victims of pervasive discrimination and abuse at the hands of the government, the press, and the people of the United States and Colorado." The evidence revealed "a keen hatred for the Ute Indians and their way of life."[140]

Anti-Indian attitudes persisted in Colorado and Montezuma County into the Twentieth Century. Communities surrounding the Ute Reservation "treated Indians as second-class citizens. They were discouraged from attending public schools. Discrimination was rampant against Ute children. They were perceived to be unhealthy, unsanitary, and most of all, unwelcome." The plight of the Ute Mountain Utes

among Indian tribes was especially dire. In the 1960s "there were only just over 900 tribal members and their infant mortality rate was so high that their death as a viable cultural group could be predicted."[141]

The attitude of whites changed somewhat after the tribe began to receive funds from oil and gas leases, as well as revenue from various federal programs and judgements before the U.S. Court of Claims reimbursing the tribe for land that had been ceded to the United States in the late Nineteenth Century at prices "so inadequate as to be unconscionable." But despite the economic benefit to the surrounding community from this influx of new funds, "[s]harply divided interests and attitudes over Indian rights remained . . . and abuses abounded such as discrimination in law enforcement, health care, and employment as well as incidents of double pricing and disputes over hunting rights." Disputes over land claims remained. "Water rights and tribal sovereignty issues were hotly contested and the local populous made clear their continuing objections to the nonpayment of taxes by Indians. . . The public generally still harbored attitudes that Indians were lazy and not to be trusted." The numerous and existing divides "made it extremely difficult for the Indians to establish any alliances with the whites in the cultural and political arena."[142]

Indians were not allowed to serve on juries in Montezuma County until 1956. They were historically denied the right to vote in Colorado, and it was not until 1970 that the state constitution was amended to allow tribal members residing on the reservation to vote. Until the late 1980s or early 1990s, Utes were not allowed to register at the tribal headquarters at Towaoc, despite the fact the non-Indian population was allowed satellite registration at several communities in the county. Prior to the trial of the case in 1997, no Indian had ever been elected to public office in Montezuma County.[143]

The court concluded Indians were geographically compact, politically cohesive, and the candidates favored by Indians were usually defeated by whites voting as a bloc. The court also found "a history of discrimination-social, economic, and political, including official discrimination by the state and federal government," and a depressed socio-economic status caused in part by the past history of discrimination. As a remedy for the Section 2 violation, the court ordered into effect a single member district plan for election of school board members, containing a majority Indian district encompassing the reservation.[144]

VI

The "Reservation" Defense

Defendants in Indian voting rights cases frequently argue that Indians are mainly loyal to their tribes

and simply don't care about participating in elections run by the state. In the lawsuit over the 1996 interim redistricting plan in South Dakota, the state conceded Indians were not equal participants in elections in District 28, but argued it was the "reservation system" and "not the multimember district which is the cause of [the] 'problem' identified by Plaintiffs."[145] The argument overlooked the fact that the state, by historically denying Indians the right to vote, had itself been responsible for denying Indians the opportunity to develop a "loyalty" to state elections. As the court concluded in Bone Shirt, "the long history of discrimination against Indians has wrongfully denied Indians an equal opportunity to get involved in the political process."[146]

An alleged lack of Indian interest in state elections was also used by South Dakota to justify denying residents of the unorganized counties the right to vote or run for county office. In one case the state argued that a majority of the residents were "reservation Indians" who "do not share the same interest in county government as the residents of the organized counties." The court rejected the defense noting that a claim that a particular class of voters lacks a substantial interest in local elections should be viewed with "skepticism," because "'[a]ll too often, lack of a 'substantial interest' might mean no more than a different interest, and '[f]encing out' from the franchise a sector of the population because of the way they may vote.'" The court concluded Indians residing on the reservation had a "substantial interest" in the choice of county officials, and held the state scheme unconstitutional.[147] In a second case, the state argued that denying residents in unorganized counties the right to run for office in organized counties was justifiable because most of them lived on an "Indian Reservation and hence have little, if any, interest in county government." Again, the court disagreed. It held the "presumption" that Indians lacked a substantial interest in county elections "is not a reasonable one."[148]

The "reservation" defense has been similarly raised--and rejected--in other voting cases brought by Native Americans in the West.[149] It may be convenient and self-reassuring for a jurisdiction to blame the victims of discrimination for their condition, but it is not a defense to a challenge under Section 2.

Some Indians have undoubtedly felt their participation in state and federal elections would undermine their tribal sovereignty. But the importance of the Indian vote in recent elections has convinced most there is no downside to participating in elections that affect the welfare of the Indian community. In the 2002 election in South Dakota for U.S. Senator, Democrat Tim Johnson defeated Republican John Thune by only 524 votes, a margin of victory credited to the increase in the number of Indian voters. The increasing

awareness of the importance of the Indian vote is reflected in the dramatic growth in Indian participation in recent elections. In the 2000 presidential election, the average turnout for Buffalo, Dewey, Shannon, and Todd Counties in South Dakota was 42.7 percent. Turnout in the same counties in the 2004 election, which was driven almost exclusively by Indian voters, grew to 65.2 percent, an increase of 22.5 percent, while turnout for the state as a whole grew by only 9.9 percent. (First American Education Project 37, 2004). Similar increases in Indian turnout were reported for reservation areas in other states, including Arizona, Minnesota, Montana, New Mexico, and Wisconsin.

VII

The Need to Expand Section 5

As is apparent from the extensive findings of past and continuing discrimination against Indians in recently litigated cases in Indian country, Section 5 coverage needs to be significantly expanded to ensure the equal right to vote for all Native Americans. One straightforward way of doing that would be to extend Section 5 coverage to all jurisdictions currently required to provide minority language assistance in voting under Section 203 of the Voting Rights Act because of their significant Indian populations.

Eighty-one local jurisdictions in eighteen states are required to provide bilingual language assistance in voting to American Indians.[150] see table 1. Under the existing Section 5 "trigger," thirty-one of these jurisdictions are already covered by the preclearance requirement. Some, like Shannon and Todd Counties in South Dakota, Jackson County in North Carolina, and Apache, Coconino, Navajo, and Pinal Counties in Arizona, are covered because of their American Indian populations. The rest are covered because of the presence of non-Indian populations in the jurisdiction. For example, Indians in Arizona benefit from the protection of Section 5 because the entire state is covered due to its Hispanic population. Indians in Mississippi and Louisiana are protected because those states are covered in their entirety by Section 5 due to the history of discrimination against African Americans. Once a jurisdiction is covered by Section 5, and for whatever reason, the courts have applied the protection of preclearance to all racial or language minorities.[151]

However, if coverage were extended to all eighty-one of the language minority jurisdictions, Indians living in an additional fifty counties would enjoy the protection afforded by Section 5. see table 2. Although such an extension would not capture all of the problematic jurisdictions in Indian country, because not all

counties with sizeable native populations necessarily meet the criteria for Section 203 coverage, its benefit to Indians would be direct and palpable. More than doubling the number of local jurisdictions with sizeable Indian populations covered by Section 5 would be a significant improvement.

The expansion of Section 5 in Indian country would promote the fundamental purpose of Section 5, which is "to shift the advantage of time and inertia from the perpetrators of the evil [of discrimination in voting] to its victims."[152] The bulk of litigation enforcing Section 2 in Indian country, particularly since its amendment in 1982, has been brought by the Indian community, but only with the assistance of national civil rights organizations such as the ACLU, the National Indian Youth Council, the Native American Rights Fund, the Indian Law Resource Center, and legal services. Local Indian communities simply lack the resources to bring such litigation on their own. Requiring them to enforce the vote denial and vote dilution standards of Section 2 is a prescription for non-enforcement and the perpetuation of discrimination in voting.

Litigation is not only expensive but can drag on for years. As Attorney General Katzenbach explained to Congress in 1965 in urging passage of the Voting Rights Act, "[l]itigation on a case-by-case basis simply cannot do the job." And even when a case is finally won, "local officials intent upon evading the spirit of the law are adept at devising new discriminatory techniques not covered by the letter of the judgment."[153] The oversight of state and local voting practices provided by Section 5, as well as its undeniable deterrent effect, argue strongly for the expansion of preclearance in Indian country.

The "inequalities in political opportunities that exist due to vestigial effects of past purposeful discrimination," and which the Voting Rights Act was designed to eradicate, still persist throughout Indian country.[154] Of all the modern legislation enacted to redress these problems, the Voting Rights Act provides the most effective means of advancing the goals of self-development and self-determination that are central to the survival and prosperity of the Indian community in the United States.

TABLE 1: AMERICAN INDIAN LANGUAGES: Currently there are 81 local jurisdictions across 18 states required to provided minority language assistance in voting pursuant to Section 203 because of their American Indian populations. Of these 81 jurisdictions, 31 are already covered under Section 5:

State	Jurisdiction Covered by Sec. 203	Covered by Sec. 5
1. Alaska	6 census areas or boroughs (Bethel, Dillingham, Kenai, North Slope, Wade Hampton, Yukon-Koykuk)	All (6)
2. Arizona	9 counties (Apache, Coconino, Gila, Graham, Maricopa, Navajo, Pima, Pinal, Yuma	All (9)
3. California	2 counties (Imperial and Riverside)	None
4. Colorado	2 counties (La Plata, Montezuma)	None
5. Florida	3 counties (Broward, Collier, Glades)	Collier (1)
6. Idaho	5 counties (Bannock, Bingham, Caribou, Owyhee, Power)	None
7. Louisiana	1 parish (Allen)	All (1)
8. Mississippi	9 counties (Attala, Jackson, Jones, Kemper, Leake, Neshoba, Newton, Scott, Winston)	All (9)
9. Montana	2 counties (Big Horn and Rosebud)	None
10. Nebraska	1 county (Sheridan)	None
11. Nevada	5 counties (Elko, Humbolt, Lyon, Nye, White Pine)	None
12. New Mexico	11 counties (Bernallilo, Catron, Cibola, McKinley, Rio Arriba, San Juan, Sandoval, Sante Fe, Socorro, Taos, Valencia)	None
13. North Carolina	1 county (Jackson)	Jackson (1)
14. North Dakota	2 counties (Richland and Sargent)	None
15. Oregon	1 county (Malheur)	None
16. South Dakota	18 counties (Bennett, Codington, Day, Dewey, Grant, Gregory, Haakon, Jackson, Lyman, Marshall, Meade, Mellette, Roberts, Shannon, Stanley, Todd, Tripp, Ziebach)	Shannon, Todd (2)
17. Texas	2 counties (El Paso and Maverick)	All (2)
18. Utah	1 county (San Juan)	None
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	81 Local Jurisdictions	31 currently covered

TABLE 2: List of 50 additional Section 203 American Indian jurisdictions in 12 states that would be covered by Section 5 using Section 203 as a trigger:

State	Counties
1. California	2 counties (Imperial and Riverside)
2. Colorado	2 counties (La Plata, Montezuma)
3. Florida	2 counties (Broward, Glades)
4. Idaho	5 counties (Bannock, Bingham, Caribou, Owyhee, Power)
5. Montana	2 counties (Big Horn and Rosebud)
6. Nebraska	1 county (Sheridan)
7. Nevada	5 counties (Elko, Humbolt, Lyon, Nye, White Pine)
8. New Mexico	11 counties (Bernallilo, Catron, Cibola, McKinley, Rio Arriba, San Juan, Sandoval, Sante Fe, Socorro, Taos, Valencia)
9. North Dakota	2 counties (Richland and Sargent)
10. Oregon	1 county (Malheur)
11. South Dakota	16 counties (Bennett, Codington, Day, Dewey, Grant, Gregory, Haakon, Jackson, Lyman, Marshall, Meade, Mellette, Roberts, Stanley, Tripp, Ziebach)
12. Utah	1 county (San Juan)
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	50 Local Jurisdictions

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ENDNOTES

142 U.S.C. § 1973aa-1a(e).

242 U.S.C. § 1973.

3Morton v. Mancari, 417 U.S. 535, 554 n.24 (1974) (the preference in BIA hiring was "political rather than racial in nature").

4The Supreme Court has held that Indians would be entitled to the protection of a state law prohibiting discrimination on the basis of "race or color," Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 76 (1955), while the courts in a variety of contexts have held that Indians, in their capacity as a racial group, were entitled to the protection of the constitution and federal civil rights laws, for example, in legislative redistricting, Klahr v. Williams, 339 F. Supp. 922, 927 (D.Ariz. 1972), jury selection, United States v. Iron Moccasin, 878 F.2d 226 (8th Cir. 1989), and public education. Natonabah v. Board of Education, 355 F. Supp. 716, 724 (D.N.Mex. 1973).

5Three of the counties in Arizona--Apache, Navajo, and Coconino--were allowed to "bail out" from Section 5 coverage after the court concluded that the state's literacy test had not been discriminatorily applied against American Indians. Apache County v. United States, 256 F. Supp. 903, 913 (D.D.C. 1966). The state of Alaska, with its substantial Alaskan Native population, was also allowed to bail out and for similar reasons. Alaska v. United States, Civ. No. 101-66 (D.D.C. Aug. 17, 1966). As a result of subsequent amendments to the act, both Alaska and Arizona were "recaptured" by Section 5.

6S.Rep. No. 94-295, 94th Cong., 1st. Sess. 9 (1975), 1975 U. S. C. C. A. N. 775.

728 C.F.R. pt. 51, app. (1990).

842 U.S.C. § 1973aa-1a.

928 C.F.R. pt. 55, app. (1990).

10Cong. Rec. H4711 (daily ed. June 2, 1975) (statement by Rep. Rodino).

11Cong. Rec. H4825 (daily ed. June 3, 1975) (statement of Rep. Drinan).

12339 F. Supp. at 927, cited in Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm., 94th Cong., 1st Sess., Appendix 1225-30 (1975) (hereinafter "1975 House Hearings").

13400 U.S. 112, 147 (1970) (Douglas, J., concurring), cited in Cong. Rec. H4716 (daily ed. June 2, 1975) (statement of Rep. Edwards).

14417 F. Supp.13, 16 (D.Ariz. 1975), cited in 1975 House Hearings, Appendix 1225-30, and in Cong. Rec. H4709 (daily ed. June 2, 1975) (statement of Rep. Young).

15H.Rep. No. 94-196, 94th Cong., 1st Sess. 30 (1975).

16Cong. Rec. S13603 (daily ed. July 24, 1975) (statement of Sen. Scott).

17United States v. Kagama, 118 U.S. 375, 382 (1886).

18Elk v. Wilkins, 112 U.S. 94, 102 (1884).

1925 U.S.C. §§ 331-58.

20Draper v. United States, 164 U.S. 240, 246 (1896).

21Act of Nov. 6, 1919, ch. 95, 41 Stat. 350.

228 U.S.C. § 1401 (a)(2).

23Buckanaga v. Sisseton Independent School District, 804 F.2d 469, 474 (8th Cir. 1986).

24Little Thunder v. South Dakota, 518 F.2d 1253, 1255-57 (8th Cir. 1975).

25United States v. South Dakota, 636 F.2d 241, 244-45 (8th Cir. 1980).

26 Harrison v. Laveen, 67 Ariz. 337, 196 P.2d 456, 463 (1948).

27Allen v. Merrell, 352 U.S. 889 (1956), and Act of Feb. 14, 1957, ch. 38, 1957 Utah Laws 89-90. See also Allen v. Merrell, 353 U.S. 932 (1957) (vacating the state court decision as moot).

28Article IX, Section 2, Constitution of Montana (1932).

29Mont. L. 1937, p. 527.

30Mont. L. 1975, ch. 205.

31Mont. L. 1937, p. 523.

32Cuthair v. Montezuma-Cortez, Colorado School Dist., 7 F.Supp.2d 1152, 1161-62 (D.Col. 1998).

3325 U.S.C. § 461 et seq.

34House Concurrent Resolution No. 108 of the 83d Congress, August, 1953.

3518 U.S.C. § 1162; 28 U.S.C. § 1360.

36For example, The Relocation Act of 1956 (P.L. 959).

3782 Stat. 79.

38See, for example, S.Rep. No. 501, 91st Cong., 1st Sess. 21, 53 (1969); H.R. Rep. No 907, 93d Cong., 2d Sess. 1 (1974); H.R. Rep. No. 1026, 94th Cong., 2d Sess. 15 (1976); H.R. Rep. No. 1308, 95th Cong., 2d Sess. 4 (1978)..

3942 U.S.C. § 1973.

40Civ. No. R 70-0144 HEC (D.Nev. 1979), cited in H.Rep. No. 227, 97th Cong., 1st Sess. 16 (1981).

41No. 79-0-380 (D.Neb. 1979), cited in H.Rep. No. 227 at 19.

42Civ. No. 79-507 (D.N.M. 1979), cited in H.Rep. No. 227 at 19.

43Civ. No. 78-C-101 (E.D.Wis. 1978), cited in H.Rep. No. 227 at 19.

44Windy Boy v. County of Big Horn, 647 F. Supp. 1002 (D.Mont. 1986).

45Allen v. State Board of Elections, 393 U.S. 544, 569 (1969).

46United States v. Thurston County, Nebraska, Civ. No. 78-0-380 (D.Neb. May 9, 1979).

47Stabler v. County of Thurston, Nebraska, 8: CV93-00394 (D.Neb. Aug. 29, 1995), slip op. at 14-6.

48Stabler v. County of Thurston, 129 F.3d 1015 (8th Cir. 1997).

49Sanchez v. King, 550 F. Supp. 13 (D.N.M. 1982), aff'd, 459 U.S. 801 (1983).

50Sanchez v. King, Civ. No. 82-0067 (D.N.Mex. Aug. 8, 1984), slip op. at 20.

51Id. at 25.

52Id. at 26-7.

53Id. at 28.

54Id. at 28-9.

55Id. at 30-2, 35, 50, 65, 67, 69.

56King v. Sanchez, 459 U.S. 801 (1982).

57See, Largo v. McKinley Consolidated School District, Civ. No. 84-1751 (D.N.M. March 21, 1984); Estevan v. Grants-Cibola County School District, Civ. No. 84-1752 (Dec. 17, 1984); Tso v. Cuba Independent School District, Civ. No. 85-1023 (D.N.M. May 18, 1987); Bowannie v. Bernalillo School District, Civ., No. 88-0212 (D.N.M. Nov. 23, 1988); Felipe v. Cibola County Commission, Civ. No. 85-0301 (D.N.M. Feb. 18, 1987).

58Kirk v. San Juan College Board, Civ. No. 86-1503 (D.N.M. Feb. 1987).

59Casuse v. City of Gallup, 746 P.2d 1103 (N.M. 1987).

60Goddard v. Babbitt, 536 F. Supp. 538, 541 (D. Ariz. 1982).

61A resident of Holbrook Unified School District No. 3 in Navajo County filed a Section 2 challenge to the at-large method of electing the school board as diluting Indian voting strength. Although Indians were 42 percent of the population of the school district, the complaint alleged that "Native Americans have been unsuccessful in electing a member to the Board . . . because of racially polarized voting." The defendants filed a motion to dismiss, which the district court denied because of "insufficient evidence in the record" to support the motion. The record does not reflect further activity in the case.

62Windy Boy v. County of Big Horn, 647 F. Supp. at 1007-22.

63Plaintiffs also challenged redistricting in the area encompassed by the Fort Peck, Fort Belknap, and Rocky Boy Reservations, but those claims were later abandoned.

64Article V, Section 14, Constitution of Montana.

65Old Person v. Cooney, No. CV-96-004-GF (D.Mont. Oct. 27, 1998), slip op. at 4-5.

66Id. at 8, 11-12.

67Id. at 5, 11-13.

68Old Person v. Cooney, Pl. Exs. 38, 44, 45.

69Id.

70Windy Boy v. County of Big Horn, Tr. Trans. 113.

71See: http://www.constitutionparty.com/ustp-p1.html.

72Old Person v. Cooney, Report of Steven P. Cole, p. 18, Table 1; p. 20, Table 3.

73Old Person v. Cooney, Testimony of Joe MacDonald, T. Vol. I, p. 178.

74Old Person v. Cooney, Testimony of Margaret Campbell, T. Vol. IV, p. 650.

75Old Person v. Cooney, slip op. at 39.

76Id. at 42, 44.

77Id. at 51.

78Old Person v. Cooney, 230 F.3d 1113, 1131 (9th Cir. 2000).

79Id. at 1121, 1127, 1129, 1130-31.

80Id. at 1130.

81Old Person v. Cooney, on remand sub nom. Old Person v. Brown, Pl. Ex. 3, p. 14.

82Id. at 20, 28.

83Id., Expert Report for Susan Byorth Fox, Attachment 1.

84Old Person v. Brown, 182 F.Supp.2d 1002, 1012 (D.Mont. 2002).

85Old Person v. Brown, 312 F.3d 1036, 1039, 1046, 1050 (9th Cir. 2002).

86Old Person v. Brown, Response to Appellants' Petition for Rehearing and Rehearing En Banc, Exhibit (Adopted House and Senate District, December 2002).

87Joint Legislative Committee on Districting and Apportionment, Minority Report on SR 2 and HR 3 Regarding the Recommendation to the Montana Districting and Apportionment Commission 2 (January 29, 2003) (hereinafter "Minority Report on SR 2 and HR 3").

88House Resolution No. 3, February 4, 2003.

89Senate Resolution No. 2, February 4, 2003.

90Brown v. Montana Districting and Reapportionment Commission, No. ADV-2003-72 (Mont. 1st Jud. Dist. Ct. Lewis & Clark County).

91United States v. Blaine County, Montana, No. CV 99-122-GF-DWM (D.Mont.).

92United States v. Blaine County, Montana, 363 F.3d 897, 900, 909-11 (9th Cir. 2004).

93Id. at 913-14.

94521 U.S. 507 (1997).

95Blaine County, 363 F.3d at 904-05.

96Blaine County, Montana v. United States, 125 S. Ct. 1824 (2005).

97Alden v. Rosebud County Board of Commissioner, Civ. No. 99-148-BLG (D.Mont. May 10, 2000); United States v. Roosevelt County Board of Commissioners, No. 00-CV-54 (D.Mont. March 24, 2000); Matt v. Ronan School District, Civ. No. 99-94 (D.Mont. Jan. 13, 2000).

98Shakopee Mdewakanton Sioux Community v. City of Prior Lake, Minnesota, 771 F.2d 1153 (8th Cir. 1985).

99Buckanaga v. Sisseton Ind. School Dist., 804 F.2d at 473-76.

100American Horse v. Kundert, Civ. No. 84-5159 (D.S.D. Nov. 5, 1984).

101United States v. Day County, South Dakota, No. CV 99-1024 (D.S.D. June 16, 2000).

102Bone Shirt v. Hazeltine, 336 F.Supp.2d 976, 981 (D.S.D. 2004).

103Bone Shirt, 336 F.Supp.2d at 981.

104An Act to Redistrict the Legislature, ch. 1, 1991 S.D. Laws 1st Spec. Sess. 1, 5 (codified as amended at S.D.C.L. §§ 2-2-24 through 2-2-31).

105An Act to Eliminate the Single-member House Districts in District 28, ch. 21, 1996 S.D. Laws 45 (amending S.D.C.L. § 2-2-28).

106Minutes of House State Affairs Committee, Jan. 29, 1996, p. 5.

107In re Legislative Reapportionment, 246 N.W. 295, 297 (S.D. 1933).

108Emery v. Hunt, Civ. No. 00-3008 (D.S.D.), Report of Steven P. Cole, Tables 1 & 2.

109Id., Tables 1 & 3.

110See Clarke v. City of Cincinnati, 40 F.3d 807, 457 (6th Cir. 1994) ("[w]hen white bloc voting is 'targeted' against black candidates, black voters are denied an opportunity enjoyed by white voters, namely, the opportunity to elect a candidate of their own race").

111Emery v. Hunt, 615 N.W.2d 590, 597 (S.D. 2000).

11241 Fed. Reg. 784 (Jan. 5, 1976).

11341 Fed.Reg. 30002 (July 20, 1976).

114383 U.S. 301, 328 (1966).

1151977 S.D. Op. Atty. Gen. 175; 1977 WL 36011 (S.D.A.G.).

116United States v. Tripp County, South Dakota, Civ. No. 78-3045 (D.S.D. Feb. 6, 1979) (ordering state to submit reapportionment plan for preclearance); United States v. South Dakota, Civ. No. 79-3039 (D.S.D. May 20, 1980) (enjoining implementation of law revising system of organized and unorganized counties absent preclearance).

117Rogers v. Lodge, 458 U.S. 613, 627 (1982).

118Ch. 59, 1966 S.D.Laws 104; ch. 110, 1985 S.D. Laws 295.

119City of Rome, Georgia v. United States, 446 U.S. 156, 183-84 (1980).

120S.D.C.L. § 2-2-34.

121Bone Shirt, 336 F.Supp.2d at 985.

122Bone Shirt v. Hazeltine, 200 F.Supp.2d 1150, 1154 (D.S.D. 2002).

123Bone Shirt, 336 F.Supp.2d at 1019, 1025-26.

124Id. at 1026 (comments of Rep. Stanford Addelstein), 94.

125Id. at 1030.

126Id. at 1041, 1046.

127Id. at 1032, 1036.

128Id. at 1035-36, 1046 (comments of Rep. John Teupel).

129Id. at 1032.

130Id. at 1033.

131Quick Bear Quiver v. Hazeltine, Civ. No. 02-5069 (D.S.D. December 27, 2002), slip op. at 3.

132Weddell v. Wagner Community School District, Civ. No. 02-4056 (D.S.D. Mar. 18, 2003).

133Wilcox v. City of Martin, Civ. No. 02-5021 (D.S.D.).

134SDCL 7-8-10.

135House Bill 1265.

136Quick Bear Quiver, July 13, 2005, slip op. at 7, 13.

137Kirkie v. Buffalo County, S.D., Civ. No. 03-3011 (D.S.D. Feb. 12, 2004).

138Fiddler v. Sieker, No. 85-3050 (D.S.D. Oct. 24, 1986).

139Black Bull v. Dupree School District, Civ. No. 86-3012 (D.S.D. May 14, 1986).

140Cuthair, 7 F.Supp.2d at 1156-57, 1160.

141Id. at 1159-60.

142Id. at 1160-61.

143Id. at 1161-62.

144In addition to the vote dilution and vote denial litigation discussed above, the United States has brought a number of suits to enforce the bilingual election provisions of the Voting Rights Act. See United States v. County of San Juan, New Mexico, Civ. No. 79-508 JB (D.N.Mex. April 8, 1980) (consent order); United States v. San Juan County, Utah, Civ. No. C-83-1287 (D.Utah Jan. 11, 1983) (consent order); United States v. McKinley County, New Mexico, 941 F. Supp. 1062 (D.N.Mex. 1996); United States v. Arizona, Civ. No. 88-1989 (D.Ariz. 1989, 1993, 1995) (consent decrees and order of dismissal); United States v. New Mexico and Sandoval County, New Mexico, Civ. No. 88-1457 (D.N.Mex. 1990, 1994, 1997) (settlement and consent orders); United States v. Cibola County, New Mexico, Civ. No. 93-1134 (D.New Mex. 1994, 2004) (consent decrees); United States v. Socorro County, New Mexico, Civ. No. 93-1244 (D.New Mex. 1994) (consent decree); United States v. Bernalillo County, New Mexico, Civ. No. 98-156 (D.New Mex. 1998, 2003) (consent decrees).

145Emery v. Hunt, State Defendants' Response, p. 26.

146Bone Shirt, 336 F.Supp.2d at 1022.

147Little Thunder, 518 F.2d at 1255-56.

148United States v. South Dakota, 636 F.2d at 244-45.

149See, for example, Windy Boy v. County of Big Horn, 647 F. Supp. at 1021 ("[r]acially polarized voting and the effects of past and present discrimination explain the lack of Indian political influence in the county, far better than existence of tribal government"); Cuthair v. Montezuma-Cortez, Colorado School Dist., 7 F.Supp.2d at 1161 (the alleged "reticence of the Native American population of Montezuma County to integrate into the non-Indian population" was "an obvious outgrowth of the

discrimination and mistreatment of the Native Americans in the past"); United States v. Blaine County, Montana, 363 F.3d at 911. 2004) (rejecting the argument that low Indian voter participation was a defense to a vote dilution claim).

150Fed. Reg., Vol. 67, No. 144 (July 26, 2002).

151For example, in City of Port Arthur, Texas v. United States, 517 F. Supp. 987, 1023-24 (D.C.D.C. 1981), aff'd 459 U.S. 159 (1982), where the state was covered because of its Hispanic population, the Court denied preclearance to proposed voting changes because of their discriminatory impact on black voters.

152South Carolina v. Katzenbach, 383 U.S. at 328.

153Hearings on S. 1564 before the Senate Comm. on the Judiciary, 89th Cong., 1st Sess., pt. 1, 14 (1965).

154Gingles, 478 U.S. at 69.

APPENDIX TO THE STATEMENT OF LAUGHLIN MCDONALD: "THE VOTING RIGHTS ACT OF INDIAN COUNTRY: SOUTH DAKOTA, A CASE STUDY" *AMERICAN INDIAN LAW REVIEW,* 29 AM. INDIAN L. REV. 43

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***43** THE VOTING RIGHTS ACT IN INDIAN COUNTRY: SOUTH DAKOTA, A CASE STUDY

Laughlin McDonald [FNa1]

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The problems that Indians continue to experience in South Dakota in securing an equal right to vote strongly support the extension of the special provisions of the Voting Rights Act scheduled to expire in 2007. They also demonstrate the ultimate wisdom of Congress in making permanent and nationwide the basic guarantee of equal political participation contained in the act. [FN1]

I. South Dakota's Refusal to Comply with Section 5

Ten years after its enactment in 1965, Congress amended the Voting Rights Act to include American Indians, to expand the geographic reach of the special preclearance provisions of Section 5, and to require certain jurisdictions to provide bilingual election materials to language minorities. As a result of the amendments, Shannon and Todd Counties in South Dakota, home to the Pine Ridge and Rosebud Indian Reservations respectively, became subject to preclearance. [FN2] Further, eight counties in the state, because of their significant Indian populations, were required to conduct bilingual elections-Todd, Shannon, Bennett, Charles Mix, Corson, Lyman, Mellette, and Washabaugh. [FN3]

William Janklow, at that time Attorney General of South Dakota, was outraged over the extension of Section 5 and the bilingual election requirement to his state. In a formal opinion addressed to the Secretary of State, he derided the 1975 law as a "facial absurdity." Borrowing the states' rights rhetoric of southern politicians who opposed the modern civil rights movement, he condemned the Voting Rights Act as an unconstitutional federal encroachment that rendered state power "almost meaningless." He quoted with approval Justice Hugo Black's famous dissent in South Carolina v. Katzenbach, [FN4] arguing that Section 5 treated covered jurisdictions as "little more than conquered ***44** provinces." [FN5] Janklow expressed hope that Congress would soon repeal "the Voting Rights Act currently plaguing South Dakota." In the meantime, he advised the Secretary of State not to comply with the preclearance requirement. "I see no need," he said, "to proceed with undue speed to subject our State's laws to a 'one-man veto' by the United States Attorney General." [FN6]

Although the 1975 amendments were never in fact repealed, state officials followed Janklow's advice and essentially ignored the preclearance requirement. From the date of its official coverage in 1976 until 2002, South Dakota enacted more than six hundred statutes and regulations having an effect on elections or voting in Shannon and Todd Counties, but submitted fewer than ten for preclearance.

II. How the Special Provisions Work

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The Voting Rights Act of 1965 was a complex, interlocking set of permanent provisions that applied nationwide, along with special provisions that applied only in jurisdictions that had used a "test or devise" for voting and in which registration and voting were depressed. The most controversial of the special provisions was Section 5, [FN7] which covered most of the South where discrimination against blacks in voting had been most persistent and flagrant.

Section 5 requires "covered" jurisdictions to preclear any changes in their voting practices or procedures and prove that they do not have a discriminatory, or retrogressive, purpose or effect. A voting change is deemed to be retrogressive if it diminishes the "effective exercise" of minority political participation compared to the preexisting practice. [FN8] Preclearance can be obtained by making an administrative submission to the Attorney General or by bringing a declaratory judgment action in the federal court in the District of Columbia. The purpose of the preclearance requirement, as explained by the Supreme Court, was "to shift the advantages of time and inertia from the perpetrators of the evil [of discrimination in voting] to its victims." [FN9] The majority of the Supreme Court acknowledged that Section 5 was an uncommon exercise of congressional power, but found that it was justified by the "insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." [FN10]

***45** The 1975 amendments extended the protections of the act to "language minorities," defined as American Indians, Asian-Americans, Alaskan Natives, and persons of Spanish Heritage. [FN11] The amendments also expanded the geographic coverage of Section 5 by including in the definition of a "test or device" the use of English-only election materials in jurisdictions where more than 5% of the voting age citizen population was comprised of a single-language minority group. [FN12] As a result of this new definition, the preclearance requirement was extended to counties in California, Florida, Michigan, New Hampshire, New York, South Dakota, and the State of Texas. [FN13]

The 1975 amendments also required certain states and political subdivisions to provide voting materials in languages other than English. [FN14] While there are several tests for "coverage," the requirement is imposed upon jurisdictions with significant language minority populations who are limited-English proficient and where the illiteracy rate of the language minority is higher than the national illiteracy rate. Covered jurisdictions are required to furnish voting materials in the language of the applicable minority group as well as in English. Jurisdictions covered by the bilingual election requirement include the entire states of California, New Mexico, and Texas, and several hundred counties and townships in Alaska, Arizona, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, and Washington. [FN15]

Indians, as a "cognizable racial group," were undoubtedly already covered by the permanent provisions of the 1965 Voting Rights Act which prohibited discrimination on the basis of "race or color." [FN16] In a 1955 decision, for example, the Supreme Court acknowledged that an Indian would be entitled to the protection of a state law prohibiting discrimination on the basis of "race or color." [FN17] In a variety of contexts, courts have held that Indians were a racial group entitled to the protection of the constitution and federal civil rights laws. ***46** e.g., in legislative redistricting, [FN18] in jury selection, [FN19] in employment, [FN20] in public education, [FN21] in access to services, [FN22] etc. In addition, a number of jurisdictions which had substantial Native American populations were covered by the special preclearance provisions of the 1965 act, including the State of Alaska and four counties in Arizona. [FN23] The 1975 amendments, however, expanded the geographic reach of Section 5 and made the coverage of Indians explicit.

III. The Reasons for Extending Coverage

During hearings on the 1975 amendments, Rep. Peter Rodino, chair of the House Judiciary Committee, said that members of language minority groups, including American Indians, related "instances of discriminatory plans, discriminatory annexations, and acts of physical and economic intimidation." [FN24] According to Rodino, "[t]he entire situation of these uncovered jurisdictions is tragically reminiscent of the earlier and, in some respects, current problems experienced by blacks in currently covered areas." [FN25] Rep. Robert Drinan noted similarly during the floor debate that there was "evidence that American Indians do suffer from extensive infringement of their voting rights," and that the Department of Justice "has been involved in thirty-three cases involving discrimination against

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Indians since 1970." [FN26] House members also took note of various court decisions documenting voting discrimination against Native ***47** Americans, including Klahr v. Williams, [FN27] Oregon v. Mitchell, [FN28] and Goodluck v. Apache County. [FN29]

The House report that accompanied the 1975 amendments of the Act found "a close and direct correlation between high illiteracy among [language minority] groups and low voter participation." [FN30] The illiteracy rate among American Indians was 15.5%, compared to a nationwide illiteracy rate of only 4.5% for Anglos. The report concluded that these disparities were "the product of the failure of state and local officials to offer equal educational opportunities to members of language minority groups." [FN31]

During debate in the Senate, Senator William Scott read into the record a report prepared by the Library of Congress, "Prejudice and Discrimination in American History," which concluded that:

Discrimination of the most basic kind has been directed against the American Indian from the day that settlers from Europe set foot upon American shores. . . . [A]s late as 1948 certain Indians were still refused the right to vote. The resulting distress of Indians is as severe as that of any group discriminated against in American society. [FN32]

Discrimination against Indians has not only been severe, it has been unique. Even during the days of slavery, blacks, who were regarded as valuable property, were never subjected to the kind of extermination policies that were often visited upon tribal members in the West. [FN33]

The first laws enacted by the Dakota Territory involving Indians were distinctly racist. They praised the "indomitable spirit of the Anglo-Saxon," and ***48** described Indians as "red children" and the "poor child" of the prairie. [FN34] Four years later, the legislature described Indians as the "revengeful and murderous savage." [FN35]

Territorial laws (and later state laws) restricted voting and office-holding to free white males and citizens of the United States. [FN36] Indians who sustained tribal relations, received support from the government, or held untaxable land were prohibited from voting in any state election. [FN37] The establishment of precincts on Indian reservations was forbidden, [FN38] and as election judges and clerks were required to have the "qualifications of electors," Indians were effectively denied the right to serve as election officials. [FN39]

South Dakota discriminated against Indians in a variety of other ways. Indians were prohibited from entering ceded lands without a permit. [FN40] It was a crime to harbor or keep on one's premises or within any village settlement of white people any reservation Indians "who have not adopted the manners and habits of civilized life." [FN41]

Jury service was restricted to "free white males." [FN42] The "intermarriage of white persons with persons of color" was prohibited. [FN43] Further, it was a crime to provide instruction in any language other than English. [FN44]

South Dakota also played a leading role in breaking various treaties between tribes and the United States. The legislature sent a stream of resolutions and memorials to Congress urging it to extinguish Indian title to land and remove the Indians to make way for white settlement. In 1862, it asked Congress to ***49** extinguish title "to the country now claimed and occupied by the Brule Sioux Indians," [FN45] and to extinguish title to land occupied by the Chippewa Indians. [FN46] Four years later, it requested the Secretary of War to establish a military post to protect "the colonization of the Black Hills." [FN47] In 1868, it proposed the removal of Dakota Indians and exclusion from "habitation of the Indians that portion of Dakota known as the Black Hills." [FN48] On December 31, 1870, it renewed its request for the removal of Chippewa Indians from ceded lands. [FN49] In 1873, it again asked Congress to open Indian lands, including the Black Hills, to white settlement. [FN50] As a result of the intense pressure from the territorial government and white miners and settlers, and the United States's capitulation to it, the Black Hills and other traditional tribal lands were finally taken from the Indians. [FN51] The Supreme Court, commenting on the expropriation of the Black Hills from the Sioux in 1877, said that "[a] more ripe and rank case of dishonorable dealing will never, in all probability, be found in our history." [FN52] Shortly after the turn of the century, South Dakota, by then a state, asked Congress to open portions of the Rosebud Reservation to white settlement. [FN53]

Despite passage of the Indian Citizenship Act of 1924, [FN54] which granted full rights of citizenship to Indians,

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South Dakota officially excluded Indians from voting and holding office until the 1940s. [FN55] Even after the repeal of state law denying Indians the right to vote, as late as 1975 the state prohibited Indians from voting in elections in counties that were "unorganized" under state law. [FN56] The three unorganized counties were Todd, Shannon, and Washabaugh, whose residents were overwhelmingly Indian. The state also prohibited residents of the unorganized counties from holding county office until as late as 1980. [FN57]

***50** For most of the twentieth century, voters were required to register in person at the office of the county auditor. [FN58] Getting to the county seat was a hardship for Indians who lacked transportation, particularly for those in unorganized counties who were required to travel to another county to register. Moreover, state law did not allow the auditor to appoint a tribal official as a deputy to register Indian voters in their own communities. [FN59] There was one exception, however. State law required the tax assessor to register property owners in the course of assessing the value of their land. Thus, taxpayers were automatically registered to vote, while nontaxpayers, many of whom were Indian, were required to make the trip to the courthouse to register in person. [FN60] Mail-in registration was not fully implemented in South Dakota until 1973. [FN61]

IV. Depressed Socioeconomic Status and Reduced Political Participation

One of the many legacies of discrimination against Indians is a severely depressed socioeconomic status. According to the 2000 census, the unemployment rate for Indians in South Dakota was 23.6%, compared to 3.2% for whites. [FN62] Unemployment rates on the reservations were even higher. In 1997, the unemployment rate on the Cheyenne River Sioux Reservation was 80%. At the Standing Rock Indian Reservation it was 74%. [FN63] The average life expectancy of Indians is shorter than that of other Americans. According to a report drafted by the South Dakota Advisory Committee to the U.S. Commission on Civil Rights, "Indian men in South Dakota . . . usually live only into their mid-50s." [FN64] Infant mortality in Indian Country "is double the national average." [FN65]

Native Americans experience a poverty rate that is five times the poverty rate for whites. The 2000 census reported that 48.1% of Indians in South Dakota were living below the poverty line, compared to 9.7% of whites. Sixty-one percent of Native American households received incomes below $20,000, ***51** compared to 24.4% of white households. The per capita income of Indians was $6,799 compared to $28,837 for whites. [FN66]

Of Native Americans twenty-five years of age and over, 29% have not finished high school, while 14% of whites are without a high school diploma. The drop-out rate among Indians aged sixteen through nineteen is 24%, four times the drop-out rate for whites. Nearly one-fourth of Indian households live in crowded conditions, compared to 1.6% for whites. Approximately 21% of Indian households lack telephones, compared to 1.2% of white households. Native American households are three times as likely as white households to be without access to vehicles; 17.9% of Native American households are without access to vehicles versus 5.4% of white households. [FN67]

The link between depressed socioeconomic status and reduced political participation is direct. As the Supreme Court has recognized, "political participation tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes." [FN68] Numerous appellate and trial court decisions, including those from Indian country, are to the same effect.

In a case from South Dakota involving the Sisseton Independent School District, the Court of Appeals for the Eighth Circuit concluded that "[l]ow political participation is one of the effects of past discrimination." [FN69] Similarly, in a case involving tribal members in Thurston County, Nebraska, the court held that "disparate socio-economic status is causally connected to Native Americans' depressed level of political participation." [FN70] Finally, the Court of Appeals for the Ninth Circuit held that "lower . . . social and economic factors hinder the ability of American Indians in Montana to participate fully in the political process." [FN71]

Given the socioeconomic status of Indians in South Dakota, it is not surprising that their voter registration and political participation have been severely depressed. As late as 1985, only 9.9% of Indians in the state were ***52** registered to vote. [FN72] The South Dakota Advisory Committee to the U.S. Commission on Civil Rights soberly concluded in a 2000 report that:

For the most part, Native Americans are very much separate and unequal members of society . . .[who] do not fully participate in local, State, and Federal elections. This absence from the electoral process results in a lack of

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political representation at all levels of government and helps to ensure the continued neglect and inattention to issues of disparity and inequality. [FN73]

V. Indian Voting Rights Litigation

Despite the application of the Voting Rights Act to Indians, both in its enactment in 1965 and extension in 1975, relatively little litigation to enforce the Act, or the constitution, was brought on behalf of Indian voters in the West until fairly recently. Indian country was largely bypassed by the extensive voting rights litigation campaign that was waged elsewhere, particularly in the South, after the amendment of Section 2 of the Voting Rights Act in 1982 to incorporate a discriminatory "results" standard. [FN74]

Section 2, one of the original provisions of the 1965 Act, was a permanent, nationwide prohibition on the use of voting practices or procedures that "deny or abridge" the right to vote on the basis of race or color. The Supreme Court subsequently held in Mobile v. Bolden [FN75] that proof of a discriminatory purpose, as was the case for a constitutional violation, was also required for a violation of Section 2. Two years later Congress responded to Mobile v. Bolden by amending Section 2 and dispensing with the requirement of proving that a challenged practice was enacted, or was being maintained, with a discriminatory purpose. [FN76] Congress also made explicit that Section 2 protected the equal right of minorities "to elect representatives of their choice."

The Supreme Court construed Section 2 for the first time in Thornburg v. Gingles, [FN77] and simplified the test for proving a violation of the statute by identifying three factors as most probative of minority vote dilution: geographic compactness, political cohesion, and legally significant white bloc voting. [FN78] The ***53** ultimate test under Section 2 is whether a challenged practice, based on the totality of circumstances, "interacts with social and historical conditions to create an inequality in the opportunities enjoyed by [minority] and white voters." [FN79] The amendment of Section 2 and Gingles were critical in facilitating what has accurately been described as a "quiet revolution" in minority voting rights and office holding. [FN80]

The lack of enforcement of the Voting Rights Act in Indian Country was the result of a combination of factors. They included a lack of resources and access to legal assistance by the Indian community, lax enforcement of the Voting Rights Act by the Department of Justice, the isolation of the Indian community, and the debilitating legacy of years of discrimination by the federal and state governments.

The first challenge under amended Section 2 in South Dakota was brought in 1984 by members of the Sisseton-Wahpeton Sioux Tribe in Roberts and Marshall Counties. Represented by the Native American Rights Fund, they claimed that the at-large method of electing members of the board of education of the Sisseton Independent School District diluted Indian voting strength. The trial court dismissed the complaint, but the Court of Appeals for the Eighth Circuit reversed. It held that the trial court failed to consider "substantial evidence . . . that voting in the District was polarized along racial lines." [FN81] The trial court had also failed to discuss the "substantial" evidence of discrimination against Indians in voting and office holding, the "substantial evidence regarding the present social and economic disparities between Indians and whites." [FN82] the discriminatory impact of staggered terms of office and apportioning "seats between rural and urban members on the basis of registered voters " [FN83] which underrepresented Indians, and "the presence of only two polling places." [FN84] On remand, the parties reached a settlement utilizing cumulative voting for the election of school board members. [FN85]

***54** In 1986, Alberta Black Bull and other Indian residents of the Cheyenne River Sioux Reservation brought a successful Section 2 suit against Ziebach County because of its failure to provide sufficient polling places for school district elections. [FN86] The same year, Indian plaintiffs on the reservation secured an order requiring the auditor of Dewey County to provide Indians additional voter registration cards and extend the deadline for voter registration. [FN87]

Some thirteen years later, in 1999, the United States sued officials in Day County for denying Indians the right to vote in elections for a sanitary district in the area of Enemy Swim Lake and Campbell Slough. Under the challenged scheme, only residents of several noncontiguous pieces of land owned by whites could vote, while residents of the remaining 87% of the land around the two lakes, which was owned by the Sisseton-Wahpeton Sioux Tribe and about two hundred tribal members, were excluded from the electorate. In an agreement settling the litigation, local officials admitted that Indians had been unlawfully denied the right to vote, and agreed upon a new sanitation district

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that included the Indian owned land around the two lakes. [FN88]

Steven Emery, Rocky Le Compte, and James Picotte, residents of the Cheyenne River Sioux Reservation, and represented by the ACLU's Voting Rights Project, filed suit in 2000 challenging the state's 1996 interim legislative redistricting plan. In the 1970s, a special task force consisting of the nine tribal chairs, four members of the legislature, and five lay people undertook a study of Indian/state government relations. One of the staff reports of the commission concluded that "[w]ith the present arrangement of legislative districts, Indian people have had their voting potential in South Dakota diluted." [FN89] The report recommended the creation of a majority Indian district in the area of Shannon, Washabaugh, Todd, and Bennett Counties. [FN90] Under the existing plan, there were twenty-eight legislative districts, all of which were majority white and none of which had ever elected an Indian. [FN91] Thomas Short Bull, a member of the Oglala Sioux Tribe and the executive director of the task force, said that the plan gerrymandered the Rosebud and Pine Ridge Reservations by "divid[ing them] into three legislative districts, effectively neutralizing the Indian vote in that area." [FN92] The legislature, however, ignored the task force's recommendation. *55 According to Short Bull, "the state representatives and senators felt it was a political hot potato . . . . [T]his was just too pro-Indian to take as an item of action." [FN93]

Prior to the 1980s round of redistricting, the South Dakota Advisory Committee to the U.S. Commission on Civil Rights made a similar recommendation that the legislature create a majority Indian district in the area of the Pine Ridge and Rosebud Reservations. The Committee issued a report in which it said that the existing districts "inherently discriminate against Native Americans in South Dakota who might be able to elect one legislator in a single member district." [FN94] The Department of Justice, pursuant to its oversight under Section 5, advised the state that it would not preclear any legislative redistricting plan that did not contain a majority Indian district in the Rosebud/Pine Ridge area. The state bowed to the inevitable and in 1981 drew a redistricting plan creating for the first time in the state's history a majority Indian district, District 28, which included Shannon and Todd Counties and half of Bennett County. [FN95] Thomas Short Bull, an early proponent of equal voting rights for Indians, ran for the senate the following year from District 28 and was elected, becoming the first Indian ever to serve in the state's upper chamber.

The South Dakota legislature adopted a new redistricting plan in 1991. [FN96] The plan divided the state into thirty-five districts and provided, with one exception, that each district would be entitled to one senate member and two house members elected at-large from within the district. The exception was new House District 28. The 1991 legislation provided that "in order to protect minority voting rights, District No. 28 shall consist of two single-member house districts." [FN97] District 28A consisted of Dewey and Ziebach Counties and portions of Corson County, and included the Cheyenne River Sioux Reservation and portions of the Standing Rock Sioux Reservation. District 28B consisted of Harding and Perkins Counties and portions of Corson and Butte Counties. According to 1990 census data, Indians were 60% of the voting age population (VAP) of House District 28A, and less than 4% of the VAP of House district 28B.

Five years later, despite its pledge to protect minority voting rights, the legislature abolished House Districts 28A and 28B and required candidates for *56 the House to run in District 28 at-large. [FN98] Tellingly, the repeal took place after an Indian candidate, Mark Van Norman, won the Democratic primary in District 28A in 1994. A chief sponsor of the repealing legislation was Eric Bogue, the Republican candidate who defeated Van Norman in the general election. [FN99] The reconstituted House District 28 contained an Indian VAP of 29%. Given the prevailing patterns of racially polarized voting, which members of the legislature were surely aware of, Indian voters could not realistically expect to elect a candidate of their choice in the new district.

The Emery plaintiffs claimed that the changes in District 28 violated Section 2 of the Voting Rights Act, as well as Article III, Section 5 of the South Dakota Constitution. The state constitution provided that:

An apportionment shall be made by the Legislature in 1983 and in 1991, and every ten years after 1991. Such apportionment shall be accomplished by December first of the year in which the apportionment is required. If any Legislature whose duty it is to make an apportionment shall fail to make the same as herein provided, it shall be the duty of the Supreme Court within ninety days to make such apportionment. [FN100]

The constitution thus contained both an affirmative mandate and an implied prohibition. It mandated reapportionment in 1983, 1991 and in every tenth year thereafter, and it also prohibited all interstitial

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reapportionment. The South Dakota Supreme Court had expressly held that "when a Legislature once makes an apportionment following an enumeration no Legislature can make another until after the next enumeration." [FN101] Any reapportionment that occurred outside of the authority granted by the state Constitution was therefore invalid as a matter of state law. [FN102]

Pronouncements by the South Dakota Legislative Research Council were to the same effect. According to a 1995 memorandum prepared by the Council, "[i]n the absence of a successful legal challenge, ***57**Article III, section 5 of the South Dakota Constitution precludes any redistricting before 2001." [FN103] In another memorandum prepared in 1998, the Council reiterated that "[u]nder the provisions of Article III, section 5, the Legislature is, however, restricted to redistricting only once every ten years." [FN104] Despite the prohibitions of the state constitution and the views of the research council, the legislature adopted the mid-census plan abolishing majority Indian District 28A.

Dr. Steven Cole, an expert witness for the Emery plaintiffs, analyzed the six legislative contests involving Indian and non-Indian candidates in District 28 held under the 1991 plan between 1992-1994 to determine the existence, and extent, of any racial bloc voting. Indian voters favored the Indian candidates at an average rate of 81%, while whites voted for the white candidates at an average rate of 93%. In all six of the contests the candidate preferred by Indians was defeated. [FN105]

Dr. Cole also analyzed one countywide contest involving an Indian candidate, the 1992 general election for treasurer of Dewey County. Indian cohesion was 100%, white cohesion was 95%, and again the Indian-preferred candidate was defeated. [FN106]

There were five white-white legislative contests from 1992-1998, four of which were head-to-head contests and one of which was a vote-for-two contest. All of the contests showed significant levels of polarized voting. For the six seats filled in the five contests, the candidates preferred by Indians lost four times. Notably, the Indian-preferred white candidate(s) won only in majority Indian District 28A. Schrempp, the white candidate, was preferred by Indian voters in District 28A in the 1992 and 1996 general elections and won both times. In the 1998 general election, however, he ran for state senate in District 28. Although he was again preferred by Indian voters, running in a district in which Indians were 29% of the VAP, he lost. This sequence of elections demonstrates in an obvious way the manner in which at-large elections in District 28 dilute or submerge the voting strength of Indian voters. [FN107]

***58** White cohesion also fluctuated widely depending on whether or not an Indian was a candidate. In the four head-to-head white-white legislative contests, where there was no possibility of electing an Indian candidate, the average level of white cohesion was 68%. In the Indian-white legislative contests, the average level of white cohesion jumped to 94%. [FN108] This phenomenon of increased white cohesion to defeat minority candidates has been called "targeting," and illustrates the way in which majority white districts operate to dilute minority voting strength. [FN109]

The vote-for-two election for the house in 1998, the first such election held after the repeal of District 28A, also showed a remarkable divergence between Indian and white voters. The candidate with the least amount of Indian support (Wetz, with 8% of the Indian vote) got the highest amount of support from white voters (70%). The candidate with the next lowest support from Indian voters (Klaudt) received the second highest white support. [FN110]

The plaintiffs' Section 2 claim was strong. They met the basic requirements set out in Gingles for proof of vote dilution: they were sufficiently geographically compact to constitute a majority in a single member district; they were politically cohesive; and whites voted as a bloc usually to defeat the candidates of their choice. In addition, other "totality of circumstances" factors probative of vote dilution identified in Gingles and the senate report that accompanied the 1982 amendments were present. Indians had a depressed socioeconomic status. There was an extensive history of discrimination in the state, including discrimination that impeded the ability of Indians to register and otherwise participate in the political process. The history of Indian and white relations in South Dakota was, in the words of the South Dakota Advisory Committee, one of "broken treaties, and policies aimed at assimilation and acculturation that severed Indians of their language, customs, and beliefs." [FN111] Voting was

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polarized. District 28 was also large, i.e., twice the size of District 28A, making it much more difficult for poorly financed Indian candidates to campaign.

But before the Section 2 vote dilution claim could be heard, the district court certified the state law question to the South Dakota Supreme Court. That court ***59** accepted certification and held that in enacting the 1996 redistricting plan "the Legislature acted beyond its constitutional limits." [FN112] It declared the plan null and void and reinstated the preexisting 1991 plan. At the ensuing special election ordered by the district court, Tom Van Norman was elected from District 28A, the first Indian in history to be elected to the state house from the Cheyenne River Sioux Indian Reservation.

Another Section 2 case was filed in March 2002 by Indian plaintiffs against the at-large method of electing the board of education of the Wagner Community School District in Charles Mix County. The parties eventually agreed on a method of elections using cumulative voting to replace the at-large system, and a consent decree was entered by the court on March 18, 2003. [FN113] At the next election John Sully, an Indian, was elected to the board of education. A similar Section 2 suit against the city of Martin is pending. [FN114]

One of the most blatant schemes to disfranchise Indian voters was employed in Buffalo County. The population of the county was approximately 2000 people, 83% of whom were Indian, and members primarily of the Crow Creek Sioux Tribe. Under the plan for electing the three-member county commission, which had been in effect for decades, nearly all of the Indian population-some 1500 people-were packed in one district. Whites, though only 17% of the population, controlled the remaining two districts, and thus the county government. The system, with its total deviation among districts of 218%, was not only in violation of one person, one vote, but had clearly been implemented and maintained to dilute the Indian vote and insure white control of county government. Tribal members, represented by the ACLU, brought suit in 2003 alleging that the districting plan was malapportioned and had been drawn purposefully to discriminate against Indian voters. The case was settled by a consent decree in which the county admitted that its plan was discriminatory and agreed to submit to federal supervision of its future plans under Section 5 of the Voting Rights Act through January 2013. [FN115]

VI. The Unsubmitted Voting Changes

A number of the voting changes which South Dakota enacted after it became covered by Section 5, but which it refused to submit for preclearance, had the potential for diluting Indian voting strength. One was authorization for municipalities to adopt numbered seat requirements. A numbered seat ***60** provision, as the Supreme Court has noted, disadvantages minorities because it creates head-to-head contests and prevents a cohesive political group from single-shot voting, or "concentrating on a single candidate." [FN116] Another unsubmitted change was the requirement of a majority vote for nomination in primary elections for United States senate, congressman, and governor. [FN117] A majority vote requirement can "significantly" decrease the electoral opportunities of a racial minority by allowing the numerical majority to prevail in all elections. [FN118] Still another voting change the state failed to submit was its 2001 legislative redistricting plan.

The 2001 plan divided the state into thirty-five legislative districts, each of which elected one senator and two members of the house of representatives. [FN119] No doubt due to the litigation involving the 1996 plan, the legislature continued the exception of using two subdistricts in District 28, one of which included the Cheyenne River Sioux Reservation and a portion of the Standing Rock Indian Reservation. The boundaries of the district that included Shannon and Todd Counties, District 27, were altered only slightly under the 2001 plan, but the demographic composition of the district was substantially changed. Indians were 87% of the population of District 27 under the 1991 plan, and the district was one of the most underpopulated in the state. Under the 2001 plan, Indians were 90% of the population, while the district was one of the most overpopulated in the state. As was apparent, Indians were more "packed," or over-concentrated, in the new District 27 than under the 1991 plan. Had Indians been "unpacked," they could have been a majority in a house district in adjacent District 26.

Indeed, James Bradford, an Indian representative from District 27, proposed an amendment reconfiguring Districts 26 and 27 that would have retained District 27 as majority Indian and divided District 26 into two house districts, one of which, District 26A, would have had an Indian majority. Bradford's amendment was voted down fifty-one to sixteen. [FN120] Thomas Short Bull criticized the way in which District 27 had been drawn because there were "just too many Indians in that legislative district," which he said diluted the Indian vote. [FN121] Elsie Meeks, a tribal

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member at Pine Ridge and the first Indian to serve on the U.S. Commission on Civil Rights, said that the plan "segregates Indians," and denies them equal voting power. [FN122]

***61** Despite enacting these admitted changes in voting-a new legislative plan affecting Todd and Shannon Counties, which were covered by Section 5-the state refused to submit the 2001 plan for preclearance. Alfred Bone Shirt and three other Indian residents from Districts 26 and 27, with the assistance of the ACLU, sued the state in December 2001 for its failure to submit its redistricting plan for preclearance. The plaintiffs also claimed that the plan unnecessarily packed Indian voters in violation of Section 2 and deprived them of an equal opportunity to elect candidates of their choice.

A three-judge court was convened to hear the plaintiffs' Section 5 claim. The state argued that since district lines had not been significantly changed insofar as they affected Shannon and Todd Counties, there was no need to comply with Section 5. The three-judge court disagreed. It held that "demographic shifts render the new District 27 a change 'in voting' for the voters of Shannon and Todd counties that must be precleared under [Section] 5." [FN123] The state submitted the plan to the Attorney General, who precleared it, apparently concluding that the additional packing of Indians in District 27 did not have a retrogressive effect.

The district court, sitting as a single-judge court, heard plaintiffs' Section 2 claim and in a detailed 144-page opinion invalidated the state's 2001 legislative plan as diluting Indian voting strength. The court found that Indians were geographically compact and could constitute a majority in an additional House district in the area of the Pine Ridge and Rosebud Indian Reservations. Indians were politically cohesive, as a significant number of Indians usually voted for the same candidates, shared common beliefs, ideals, and concerns, and had organized themselves politically and in other areas. The court also found that plaintiffs established the third Gingles factor, i.e., that whites voted as a bloc usually to defeat the candidates favored by Indians. [FN124]

Turning to the totality of circumstances analysis required by Section 2, the court found there was "substantial evidence that South Dakota officially excluded Indians from voting and holding office." [FN125] Indians in recent times have encountered numerous difficulties in obtaining registration cards from their county auditors, whose behavior "ranged from unhelpful to hostile." [FN126] Indians involved in voter registration drives have regularly been accused of engaging in voter fraud by local officials, and while the accusations have proved to be ***62** unfounded, they have "intimidated Indian voters." [FN127] According to Dr. Dan McCool, the director of the American West Center at the University of Utah and an expert witness for the plaintiffs, the accusations of voter fraud were "part of an effort to create a racially hostile and polarized atmosphere. It's based on negative stereotypes, and I think it's a symbol of just how polarized politics are in the state in regard to Indians and non-Indians." [FN128]

Following the 2002 elections, which saw a surge in Indian political activity, the legislature passed laws that added additional requirements to voting, including a law requiring photo identification at the polls. [FN129] Representative Van Norman said that in passing the burdensome new photo requirement, "the legislature was retaliating because the Indian vote was a big factor in new registrants and a close senatorial race." [FN130] During the legislative debate on a bill that would have made it easier for Indians to vote, representatives made comments that were openly hostile to Indian political participation. According to one opponent of the bill, "I, in my heart, feel that this bill . . . will encourage those who we don't particularly want to have in the system." Alluding to Indian voters, he said "I'm not sure we want that sort of person in the polling place." [FN131] Bennett County did not comply with the provisions of the Voting Rights Act enacted in 1975 requiring it to provide minority language assistance in voting until prior to the 2002 elections, and only then because it was directed to do so by the Department of Justice. [FN132]

The district court also found that "[n]umerous reports and volumes of public testimony document the perception of Indian people that they have been discriminated against in various ways in the administration of justice." [FN133] Thomas Hennies, Chief of Police in Rapid City, has stated publically that "I personally know that there is racism and there is discrimination and there are prejudices among all people and that they're apparent in law enforcement." [FN134] Don Holloway, the sheriff of Pennington County, concurred that prejudice and the perception of prejudice in the community were "true or accurate descriptions." [FN135]

***63** The court concluded that "Indians in South Dakota bear the effects of discrimination in such areas as education, employment and health, which hinders their ability to participate effectively in the political process."

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[FN136] There was also "a significant lack of responsiveness on the part of elected officials to Indian concerns." [FN137] Representative Van Norman noted that in the legislature any bill that has "[a]nything to do with Indians instantly is, in my experience treated in a different way unless acceptable to all." "[W]hen it comes to issues of race or discrimination," he said, "people don't want to hear that." One member of the legislature even accused Van Norman of "being racist" for introducing a bill requiring law enforcement officials to keep records of people they pulled over for traffic stops. [FN138]

Indians in South Dakota, as found by the district court, "have also been subject to discrimination in lending." [FN139] Monica Drapeau, a business owner in Martin, said that she was unable to obtain a loan from the local Blackpipe State Bank, even though other banks in the state readily loaned her money. [FN140] Blackpipe was later sued by the United States and agreed to end its policy of refusing to make secured loans subject to tribal court jurisdiction and agreed to pay $125,000 to the victims of its lending policies. [FN141]

Some of the most compelling testimony in the Bone Shirt case, and which was credited by the district court, came from tribal members who recounted "numerous incidents of being mistreated, embarrassed or humiliated by whites." [FN142] Elsie Meeks, for example, told about her first exposure to the non-Indian world and the fact "that there might be some people who didn't think well of people from the reservation." When she and her sister enrolled in a predominantly white school in Fall River County and were riding the bus, "somebody behind us said . . . the Indians should go back to the reservation. And I mean I was fairly hurt by it . . . it was just sort of a shock to me." Meeks said that there is a "disconnect between Indians and non-Indians" in the state. "[W]hat most people don't realize is that many Indians, they experience this racism in some form from non-Indians nearly every time they go into a border town community. . . . [T]hen their . . . reciprocal feelings are based on that, that ***64** they know, or at least feel that the non-Indians don't like them and don't trust them." [FN143]

When Meeks was a candidate for lieutenant governor in 1998, she felt welcome "in Sioux Falls and a lot of the East River communities." But in the towns bordering the reservations, the reception "was more hostile." There, she ran into "this whole notion that . . . Indians shouldn't be allowed to run on the statewide ticket and this perception by non-Indians that . . . we don't pay property tax . . . that we shouldn't be allowed [to run for office.]" [FN144] Such views were expressed by a member of the state legislature who said that he would be "leading the charge . . . to support Native American voting rights when Indians decide to be citizens of the state by giving up tribal sovereignty and paying their fair share of the tax burden." [FN145]

Craig Dillon, a tribal member living in Bennett County, told of his experience playing on the varsity football team of the county high school. After practice, members of the team would go to the home of the mayor's son for "fun and games." The mayor, however, "interviewed" Dillon in his office to see if he was "good enough" to be a friend of his son's. Dillon says that he flunked the interview. "I guess I didn't measure up because . . . I was the only one that wasn't invited back to the house after football practice after that." He found the experience to be "pretty demoralizing." [FN146]

Monica Drapeau said that one of the reasons she didn't want to attend the public school in Winner was because of the racial tension that existed there. White students often called Indians "prairie niggers" and made other derogatory comments. [FN147]

Arlene Brandis, a tribal member at Rosebud, remembers walking to and from school in Tripp County. "Cars would drive by and they would holler at us and call us names . . . like dirty Indian, drunken Indian, and say why don't you go back to the reservation." [FN148]

Lyla Young, who grew up in Parmalee, said that the first contact she had with whites was when she went to high school in Todd County. The Indian students lived in a segregated dorm at the Rosebud boarding school, and were bussed to the high school, then bussed back to the dorm for lunch, then bused again to the high school for the afternoon session. The white students referred to the Indian ***65** students as "GI's," which stood for government issue. "I just withdrew. I had no friends at school. Most of the girls that I dormed with didn't finish high school . . . . I didn't associate with anybody," Young said. Even today, Young has little contact with the white community. "I don't want to. I have no desire to open up my life or my children's life to any kind of discrimination or harsh treatment. Things are tough enough without inviting more." Testifying in court was particularly difficult for her.

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"This was a big job for me to come here today. . . . I'm the only Indian woman in here, and I'm nervous. I'm very uncomfortable." [FN149]

The testimony of Young, Meeks, and the others illustrates the polarization that continues to exist between the Indian and white communities in South Dakota, which manifests itself in many ways, including in patterns of racially polarized voting.

The district court, based upon proof of the three Gingles factors and the totality of circumstances, concluded that the state's legislative plan violated Section 2. Bryan Sells, the lead ACLU lawyer for the plaintiffs in Bone Shirt, said that "no impartial observer of the political process in South Dakota could reach a conclusion other than that of the district court, that the 2001 plan diluted Indian voting strength." [FN150]

As for the other six hundred odd unsubmitted voting changes, Elaine Quick Bear Quiver and several other members of the Oglala and Rosebud Sioux Tribes in Shannon and Todd Counties, and again represented by the ACLU's Voting Rights Project, brought suit against the state in August 2002 to force it to comply with Section 5. [FN151] Following negotiations among the parties, the court entered a consent order in December 2002, in which it immediately enjoined implementation of the numbered seat and majority vote requirements absent preclearance, and directed the state to develop a comprehensive plan "that will promptly bring the State into full compliance with its obligations under Section 5." [FN152] The state made its first submission in April 2003, and thus began a process that is expected to take up to three years to complete.

Many jurisdictions in the South also failed to comply with Section 5 in the years following their coverage. But in none was the failure so deliberate and prolonged as in South Dakota. [FN153]

***66 VII. The "Reservation" Defense**

The state conceded in the lawsuit over the 1996 interim redistricting plan that Indians were not equal participants in elections in District 28, but argued that it was the "reservation system" and "not the multimember district which is the cause of [the] 'problem' identified by Plaintiffs." [FN154] According to defendants, Indians' loyalty was to tribal elections; they simply didn't care about participating in elections run by the state. The argument overlooked the fact that the state, by historically denying Indians the right to vote, had itself been responsible for denying Indians the opportunity to develop a "loyalty" to state elections. As the court concluded in Bone Shirt, "the long history of discrimination against Indians has wrongfully denied Indians an equal opportunity to get involved in the political process." [FN155]

Factually, however, defendants were incorrect. While Indian political participation was undoubtedly depressed, Indians did care about state politics. Indians were candidates for the House and Senate in 1992 and 1994, and received overwhelming support from Indian voters. An Indian ran for Treasurer of Dewey County in 1992 and received 100% of the Indian vote. Indians have also run for and been elected to other offices in District 28A. If Indians didn't care about state politics they would not have run for office nor would they have supported the Indian candidates.

Undoubtedly, more Indians would have run for office had they believed that the state system was fair and provided them a realistic chance of being elected. As one court has explained, the lack of minority candidates "is a likely result of a racially discriminatory system." [FN156] As another court has said, white bloc voting "undoubtedly discourages [minority] candidates because they face the certain prospect of defeat." [FN157]

The Cheyenne River Sioux have made a decision to conduct elections for the Tribe and the state at the same time, a measure designed to increase Indian participation in state elections. The Sisseton-Wahpeton litigation, the suits brought by Indians in 1986 protesting the failure of county officials to provide sufficient polling places for elections and voter registration cards, the challenge ***67** to the 1996 legislative redistricting, the Section 5 enforcement law suit, the challenge to the 2001 redistricting plan, and the dilution claims filed in Charles Mix County, the city of Martin, and Buffalo County further show that Indians do care about participating in state and local elections.

The state's "reservation" defense was not new. An alleged lack of Indian interest in state elections was also advanced as a defense by South Dakota in the cases that involved denying residents of the unorganized counties the

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right to vote or run for county office. In the first case, the state sought to justify denying residents in unorganized counties the right to vote for officials in organized counties on the ground that a majority of the residents were "reservation Indians" who "do not share the same interest in county government as the residents of the organized counties." [FN158] The court rejected the defense, noting that a claim that a particular class of voters lacks a substantial interest in local elections should be viewed with "skepticism," because "'[a]ll too often, lack of a 'substantial interest' might mean no more than a different interest, and '[f]encing out' from the franchise a sector of the population because of the way they may vote."' The court concluded that Indians residing on the reservation had a "substantial interest" in the choice of county officials, and held the state scheme unconstitutional. [FN159]

In the second case, the state argued that denying residents in unorganized counties the right to run for office in organized counties was justifiable because most of them lived on an "Indian Reservation and hence have little, if any, interest in county government." [FN160] Again, the court disagreed. It held that the "presumption" that Indians lacked a substantial interest in county elections "is not a reasonable one." [FN161]

The "reservation" defense has been raised-and rejected-in other voting cases brought by Native Americans in the West. In a suit by Crow and Northern Cheyenne in Big Horn County, Montana, the county argued that Indian dual sovereignty, not at-large voting, was the cause of reduced Indian participation in county politics. The court disagreed, noting that Indians had run for office in recent years and were as concerned about issues relating to their welfare as white voters. According to the court, "[r]acially polarized voting and the effects of past and present discrimination explain the lack of Indian political influence in the county, far better than existence of tribal government." [FN162]

***68** Similarly, in a case in Montezuma County, Colorado, the court found that Indian participation in elections was depressed and noted "the reticence of the Native American population of Montezuma County to integrate into the non-Indian population." [FN163] But instead of counting this "reticence" against a finding of vote dilution, the court concluded that it was "an obvious outgrowth of the discrimination and mistreatment of the Native Americans in the past." [FN164] Further, in a case from Montana involving Indians in Blaine County, most of whom resided on the Fort Belknap Reservation, the court rejected the argument that low voter participation was a defense to a vote dilution claim. The court reasoned that:

> if low voter turnout could defeat a section 2 claim, excluded minority voters would find themselves in a vicious cycle: their exclusion from the political process would increase apathy, which in turn would undermine their ability to bring a legal challenge to the discriminatory practices, which would perpetuate low voter turnout, and so on. [FN165]

South Dakota's claims that Indians didn't care about state politics was familiar for another reason. It was virtually identical to the argument that whites in the South made in an attempt to defeat challenges brought by blacks to election systems that diluted black voting strength. "It's not the method of elections," they said in cases from Arkansas to Mississippi, "black voters are just apathetic." But as the court held in a case from Marengo County, Alabama, "[b]oth Congress and the courts have rejected efforts to blame reduced black participation on 'apathy.'" [FN166] The real cause of the depressed level of political participation by blacks in Marengo County was:

> racially polarized voting; a nearly complete absence of black elected officials; a history of pervasive discrimination that has left Marengo County blacks economically, educationally, socially, and politically disadvantaged; polling practices that have impaired the ability of blacks to register and participate actively in the electoral process; election features that enhance the opportunity for dilution; and considerable unresponsiveness on the part of some public bodies. [FN167]

***69** The court could have been writing about Indians in South Dakota.

In a case from Mississippi, the court rejected a similar "apathy" defense. "Voter apathy," it said, "is not a matter for judicial notice." [FN168] According to the court, "[t]he considerable evidence of the socioeconomic differences between black and white voters in Attala County argues against the . . . reiteration that black voter apathy is the reason for generally lower black political participation." [FN169] It is convenient and reassuring for a jurisdiction to blame the victims of discrimination for their condition, but it is not a defense to a challenge under Section 2.

The basic purpose of the Voting Rights Act is "to banish the blight of racial discrimination in voting." [FN170] To

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argue, as South Dakota and other states have frequently done, that the depressed levels of minority political participation preclude a claim under Section 2 would reward jurisdictions with the worst records of discrimination by making them the most secure from challenge under the act. Congress could not have intended such an inappropriate result. In Gingles the Court said that:

The essence of a [Section] 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives. [FN171]

There can be no serious doubt that social and historical conditions, whatever their causes, have created a condition under which at-large voting and other election practices dilute the voting strength of Indian voters.

VIII. Conclusion

The history of voting rights in South Dakota strongly supports the extension of the special provisions of the Voting Rights Act, and demonstrates the wisdom of Congress in making permanent and nationwide the basic guarantee of equal political participation contained in the Act. Unfortunately, however, the difficulties Indians experience in participating effectively in state and local *70 politics and electing candidates of their choice are not restricted to South Dakota. A variety of common factors have coalesced to isolate Indian voters from the political mainstream throughout the West: past discrimination, polarized voting, overt hostility of white public officials, cultural and language barriers, a depressed socioeconomic status, inability to finance campaigns, difficulties in establishing coalitions with white voters, a lack of faith in the state system, and conflicts with non-Indians over issues such as water rights, taxation, and tribal jurisdiction.

President Nixon, in a special message to congress in 1970, gave a grim assessment of the status of Native Americans in the United States:

The First Americans-the Indians-are the most deprived and most isolated minority group in our nation. On virtually every scale of measurement-employment, income, education, health-the condition of the Indian people ranks at the bottom.

This condition is the heritage of centuries of injustice. From the time of their first contact with European settlers, the American Indians have been oppressed and brutalized, deprived of their ancestral lands and denied the opportunity to control their own destiny. [FN172]

Recent voting rights litigation in South Dakota and other western states shows that the conditions described by President Nixon have not been significantly ameliorated.

In a recent suit invalidating at-large elections in Montezuma County, Colorado, brought by residents of the Ute Mountain Ute Reservation, for example, the court found: a "history of discrimination-social, economic, and political, including official discrimination by the state and federal government;" a "strong" pattern of racially polarized voting; depressed Indian political participation; a "depressed socio-economic status of Native Americans;" and a lack of Indian elected officials. [FN173]

In a case from Nebraska involving Omaha and Winnebago Indians, the court found "legally significant" white bloc voting, a "lack of success achieved by Native American candidates," that Indians "bear the effects of social, economic, and educational discrimination," that Indians had a "depressed level of political *71 participation," there was a lack of "interaction" between Indians and whites, and there was "overt and subtle discrimination in the community." [FN174]

In another case brought by residents of the Crow and Northern Cheyenne Reservations in Montana, the court found "recent interference with the right of Indians to vote," "the polarized nature of campaigns," "official acts of discrimination that have interfered with the rights of Indian citizens to register and to vote," "a strong desire on the part of some white citizens to keep Indians out of Big Horn County government," polarized "voting patterns," the continuing "effects on Indians of being frozen out of county government," and a depressed socioeconomic status that makes it "more difficult for Indians to participate in the political process." [FN175]

As is apparent, the "inequalities in political opportunities that exist due to vestigal effects of past purposeful discrimination," and which the Voting Rights Act was designed to eradicate, still persist throughout the West.

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[FN176] The Voting Rights Act, including the special preclearance requirement of Section 5, are still urgently needed in Indian Country. Of all the modern legislation enacted to redress the problems facing American Indians, [FN177] the Voting Rights Act provides the most effective means of advancing the goals of self-development and self-determination that are central to the survival and prosperity of the Indian community in the United States.

IX. Addendum: The Voting Rights Act of 1965: What Expires in 2007 and What Does Not

A. What Does Not Expire

1. The Ban on "Tests or Devices," 42 U.S.C. § 1973aa

The Voting Rights Act [FN178] bans the use of any "test or device" for registering or voting in any federal, state, or local election. A "test or device" includes literacy, understanding, or interpretation tests, educational or knowledge requirements, good character tests, proof of qualifications by "vouchers" from third parties, or registration procedures or elections conducted solely in English ***72** where a single language minority comprises more than 5% of the voting age population of the jurisdiction. [FN179] "Language minorities" are defined as American Indians, Asian Americans, Alaskan Natives, and those of Spanish heritage. [FN180] The ban on tests or devices is nationwide and permanent.

2. The "Results" Standard of Section 2, 42 U.S.C. § 1973

Section 2 of the Voting Rights Act [FN181] prohibits the use of any voting procedure or practice which "results" in a denial or abridgement of the right to vote on account of race or color or membership in a language minority. Section 2 applies nationwide and is permanent.

3. Voter Assistance, 42 U.S.C. § 1973aa-6

By amendment in 1982, the Voting Rights Act [FN182] provides that any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or union. The voter assistance provision is nationwide and permanent.

4. Court Appointment of Federal Examiners, 42 U.S.C. § 1973a

In any action to enforce the voting guarantees of the fourteenth or fifteenth amendments a court may, pursuant to Section 3(a) of the Act, [FN183] appoint federal examiners to register voters. The federal examiner provision is nationwide and permanent, although it is rarely, if ever, used today.

5. Civil and Criminal Penalties, 42 U.S.C. §§ 1973i and 1973j

Sections 11 and 12 of the Act [FN184] authorize the imposition of civil and criminal sanctions on those who interfere with the right to vote, fail to comply with the Act, or commit voter fraud. These provisions are permanent and nationwide.

6. Pocket Trigger, 42 U.S.C. § 1973a(c)

Section 3(c) of the Act, [FN185] the so-called "pocket trigger," requires a court which has found a violation of voting rights protected by the fourteenth or ***73** fifteenth amendments as part of any equitable relief to require a jurisdiction for an "appropriate" period of time to preclear its proposed new voting practices or procedures. The preclearance process provided for in § 1973a(c) is similar to that described in the discussion below of Section 5 of the Act. [FN186] There is no expiration date for the pocket trigger.

7. Presidential Elections, 42 U.S.C. § 1973aa-1

By amendments in 1970, [FN187] Section 202 of the Act abolished durational residency requirements and

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established uniform standards for absentee voting in presidential elections. These provisions are permanent and nationwide.

B. What Does Expire

1. Section 4 Coverage Formula, 42 U.S.C. § 1973b

Section 4(b) of the Act [FN188] contains a formula defining jurisdictions subject to, or "covered" by, special remedial provisions of the Act. The special provisions are discussed below. Jurisdictions are covered if they used a "test or device" for voting and less than half of voting age residents were registered or voted in the 1964, 1968, or 1972 presidential elections. Coverage is determined by the attorney general and the director of the census, and is not judicially reviewable. Coverage, and with it the application of the special provisions, is set to expire in August 2007.

2. Section 5 Preclearance, 42 U.S.C. § 1973c

Section 5, [FN189] known as the "preclearance" requirement, is one of the special provisions of Act whose application is triggered by the coverage formula in Section 4(b). Section 5 requires covered jurisdictions to get approval, or preclearance, from federal authorities (either the attorney general or the federal court for the District of Columbia) prior to implementing any changes in their voting laws or procedures. The jurisdiction has the burden of proving that a proposed change does not have the purpose and would not have the effect of denying or abridging the right to vote on account of race or color or membership in a language minority. Jurisdictions covered by Section 5 are: Alabama, Alaska, Arizona, California (5 counties), Florida (5 counties), Georgia, Louisiana, Michigan (2 towns), Mississippi, New Hampshire (10 towns), New *74 York (3 counties), North Carolina (40 counties), South Carolina, South Dakota (2 counties), Texas, Virginia. U.S. Department of Justice, Section 5 Covered Jurisdictions (Jan. 28, 2002). Section 5, unless extended, will expire in August 2007.

3. Assignment of Federal Examiners and Poll Watchers by the Attorney General, 42 U.S.C. § § 1973d, e, f & k

The attorney general can assign federal examiners to covered jurisdictions pursuant to Sections 6(b), 7, 9, and 13(a) of the Act, [FN190] to list qualified applicants who are thereafter entitled to vote in all elections. The attorney general is also authorized by Section 8 of the Act [FN191] to appoint federal poll-watchers in places to which federal examiners have been assigned. These provisions are set to expire in August 2007.

4. Bilingual Voting Materials Requirement, 42 U.S.C. § 1973aa-1a

Certain states and political subdivisions are required by 42 U.S.C. § 1973aa-1a to provide voting materials in languages other than English. While there are several tests for "coverage," the requirement is imposed upon jurisdictions with significant language minority populations who are limited-English proficient and where the illiteracy rate of the language minority is higher than the national illiteracy rate. Covered jurisdictions are required to furnish voting materials in the language of the applicable minority group as well as in English. Jurisdictions required to provide bilingual election procedures for one or more language minorities include the entire states of California, New Mexico, and Texas, and several hundred counties and townships in Alaska, Arizona, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, and Washington. [FN192] The bilingual voting materials requirement is scheduled to expire in August 2007.

[FNa1]. Director, Voting Rights Project, American Civil Liberties Union Foundation, Atlanta, Georgia. B.A. 1960, Columbia University; LL.B. 1965, University of Virginia School of Law.

[FN1]. The permanent provisions of the act and the special provisions scheduled to expire in 2007 are set out in the attached addendum.

[FN2]. 41 Fed. Reg. 784 (Jan. 5, 1976).

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[FN3]. 41 Fed. Reg. 30,002 (July 20, 1976).

[FN4]. 383 U.S. 301 (1966).

[FN5]. Id. at 328 (Black, J., dissenting).

[FN6]. 77 S.D. Op. Att'y Gen. 175 (1977).

[FN7]. 42 U.S.C. § 1973c (2000).

[FN8]. Beer v. United States, 425 U.S. 130, 151 (1976).

[FN9]. Katzenbach, 383 U.S. at 328.

[FN10]. Id. at 309.

[FN11]. 42 U.S.C. § 1973aa-1a(e) (2000).

[FN12]. S. Rep. No. 94-295, at 9 (1975), reprinted in 1975 U.S. C.C.A.N. 774, 775.

[FN13]. 28 C.F.R. pt. 51, app. (1990).

[FN14]. 42 U.S.C. § 1973aa-1a.

[FN15]. 28 C.F.R. pt. 55, app. (1990).

[FN16]. 42 U.S.C. § 1973.

[FN17]. Rice v. Sioux City Mem'l Park Cemetery, 349 U.S. 70, 76 (1955).

[FN18]. Kiabr v. Williams, 339 F. Supp. 922, 927 (D. Ariz. 1972); Goodluck v. Apache County, 417 F. Supp. 13 (D. Ariz. 1975).

[FN19]. United States v. Iron Moccasin, 878 F.2d 226 (8th Cir. 1989); United States v. Raszkiewicz, 169 F.3d 459, 464 (7th Cir. 1999).

[FN20]. Poolaw v. City of Anadarko, Okla., 660 F.2d 459 (10th Cir. 1981).

[FN21]. Navajo v. Bd. of Educ., 355 F. Supp. 716, 724 (D. N. Mex. 1973).

[FN22]. Scott v. Eversole Mortuary, 522 F.2d 1110, 1112 (9th Cir. 1975).

[FN23]. Three counties in Arizona-Apache, Navajo, and Coconino-were allowed to "bail out" from Section 5 coverage after the court concluded that the state's literacy test had not been discriminatorily applied against American Indians. Apache County v. United States, 256 F. Supp. 903, 913 (D.D.C. 1966). The state of Alaska, with its substantial Alaskan Native population, was also allowed to bail out and for similar reasons. Alaska v. United States, No. 101-66 (D.D.C. Aug. 17, 1966). As a result of subsequent amendments to the act, both Alaska and Arizona were "recaptured" by Section 5.

[FN24]. 121 Cong. Rec. 16,244 (1975) (statement by Rep. Rodino).

[FN25]. Id.

[FN26]. 121 Cong. Rec. 16,262 (1975) (statement of Rep. Drinan).

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[FN27]. Klahr, 339 F. Supp. at 927 (finding that legislative redistricting in Arizona had been adopted for the purpose of diluting Indian voting strength), cited in Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm., 94th Cong., app. at 1225-30 (1975) [hereinafter 1975 House Hearings].

[FN28]. 400 U.S. 112, 147 (1970) (Douglas, J., concurring) (noting that literacy "tests have been used at times as a discriminatory weapon against . . . American Indians"), cited in 121 Cong. Rec. 16,245 (1975) (statement of Rep. Edwards).

[FN29]. Goodluck, 417 F. Supp. at 14 (finding that a county redistricting plan had been adopted to diminish Indian voting strength), cited in 1975 House Hearings, supra note 27, app. at 1225-30; 121 Cong. Rec. 16,250 (1975) (statement of Rep. Young).

[FN30]. H. Rep. No. 94-196, at 30 (1975).

[FN31]. Id.

[FN32]. 121 Cong. Rec. 13,603 (1975) (statement of Sen. Scott).

[FN33]. This bleak chapter in American history has been recounted in many places, including in Dee Alexander Brown, Bury My Heart at Wounded Knee: An Indian History of the American West (1970).

[FN34]. 1862 Dakota Terr. Laws Preface.

[FN35]. Memorial and Joint Resolution Regarding the Appointment of an Indian Agent, ch. 38, 1866 Dakota Terr. Laws 551.

[FN36]. See, e.g., Act of Jan. 14, 1864, ch. 19, 1864 Dakota Terr. Laws 51; Civil Code § 26, 1866 Dakota Terr. Laws 1, 4 (providing that Indians cannot vote or hold office); Act of Mar. 8, 1890, ch. 45, 1890 S.D. Laws 118.

[FN37]. Act of Mar. 8, 1890, ch. 45, 1890 S.D. Laws 118.

[FN38]. Act of Mar. 12, 1895, ch. 84, 1895 Dakota Terr. Laws 88.

[FN39]. Dakota Terr. Comp. L. § § 1442-1443 (1887).

[FN40]. Act to Prevent Indians From Trespassing on Ceded Lands, ch. 46, 1862 Dakota Terr. Laws 319.

[FN41]. Act Prohibiting the Harboring of Indians Within the Organized Counties, ch. 19, 1866 Dakota Terr. Laws 482.

[FN42]. Act Respecting Jurors, ch. 52, 1862 Dakota Terr. Laws 374; see also Act of Mar. 5, 1901, ch. 168, 1901 S.D. Laws 270 (providing for the selection of jurors from tax lists).

[FN43]. Act Regulating Marriages, ch. 59, 1862 Dakota Terr. Laws 390; see also Act of Mar. 14, 1913, ch. 226, 1913 S.D. Laws 406 (prohibiting the "intermarriage, or illicit cohabitation" of members of the white and colored races).

[FN44]. Act of Mar. 11, 1921, ch. 203, 1921 S.D. Laws 307.

[FN45]

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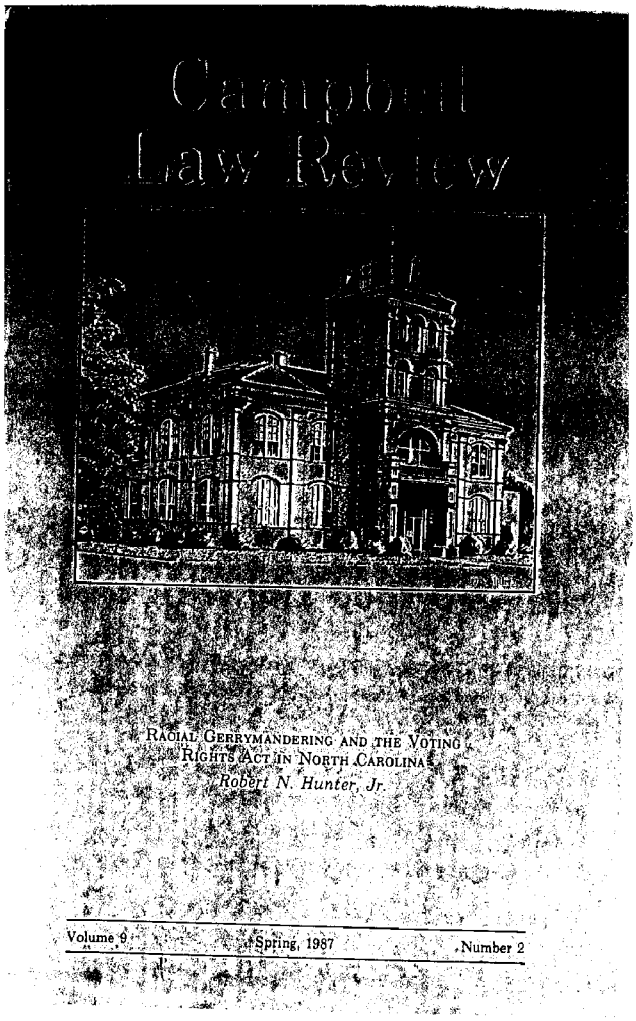
APPENDIX TO THE STATEMENT OF ROBERT HUNTER: "RACIAL GERRYMANDERING AND THE VOTING RIGHTS ACT IN NORTH CAROLINA." *CAMPBELL LAW REVIEW,* 9 CAMPBELL L. REV. 255



RACIAL GERRYMANDERING AND THE VOTING RIGHTS ACT IN NORTH CAROLINA

ROBERT N. HUNTER, JR.*

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I. INTRODUCTION

The recent United States Supreme Court decision of *Gingles v. Thornburg*,[1] is the definitive judicial interpretation of the 1982 amendments to the Voting Rights Act.[2] The case involves an individual's right to vote and recognizes political and racial groups' right to equitable representation in the electoral process. The purpose of this article is to examine the *Gingles* in decision in light of

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* B.A. 1969; J.D. 1973, University of North Carolina. Mr. Hunter is Chairman of the North Carolina Board of Elections and a member of the firm of Hunter, Hodgman, Greene, Donaldson, Cooke & Elam in Greensboro, North Carolina. Mr. Hunter was the original attorney for the intervenors in the *Gingles* case, and for the plaintiffs in Pugh v. Hunt, a companion cases to *Gingles*.—*Ed.*

1. 106 S. Ct. 2752 (1986).

2. 42 U.S.C. §§ 1973, 1973b, & 1973c (1982).

the right to vote in North Carolina. The article first focuses on the history of North Carolina's election laws, which initially secured the right to vote for all its citizens and subsequently restricted the franchise, first directly and later through the use of electoral mechanisms. The article will then examine the legal history of federal court decisions securing mathematical equality in voting power for racial and political minorities prior to the *Gingles* decision. In order to understand this decision, it is important to remember that in the midst of the *Gingles* litigation, Congress amended the Voting Rights Act to ease the plaintiff's burden of proof in demonstrating discrimination under section 2. The article will briefly examine the compromise which Congress made in its amendments and the criticisms of the compromise. After examining the Congressional debate, the article will illustrate the impact of the amendment on the *Gingles* decision and on future section 2 litigation in North Carolina. *Gingles* foreshadows radical reforms in North Carolina election procedures which will have startling effects upon partisan political fortunes in city hall as well as the superior court bench.

II. HISTORY OF THE RIGHT TO VOTE IN NORTH CAROLINA

A. *State Voting Abuses*

The history of the expansion of the right to vote in North Carolina begins in the post-Civil War period when the state legislature passed a series of laws known as "The Black Codes," which defined the legal rights of newly emancipated slaves.[3] As in other Southern states, the right to vote was not among these state-secured rights. Following this enactment, ratification of the fourteenth amendment was submitted to the legislature and rejected in 1866. As a direct result of these actions, Congress enacted a harsh plan of reconstruction, which disenfranchised former opponents and provided for the registration of former slaves.[4] In North Carolina, pro-

3. An Act Concerning Negroes and Persons of Color or of Mixed Blood, 1866 Pub. Laws of N. C. 99, ch. 40.

4. Military Reconstruction Act of March 2, 1867, ch. 153, 14 Stat. 428. The Act passed over President Johnson's veto and divided the Southern states into five military districts. The commanding officer of each district was charged with protecting persons and property and had the authority to try all offenders before military tribunals when he judged the local courts inadequate. Zeigler, *Reassessment of the Younger Doctrine in Light of the Legislative History of the Reconstruction*, 1983 DUKE L.J. 987, 1009 n.152.

visional Governor William Holden, with the assistance of federal commissioners, began to enroll former slaves by affidavit[5] for the purpose of electing a constitutional convention which first met in early 1868. Its most controversial provision was adoption of the suffrage and eligibility for office provision (now article VI of the present Constitution).[6] This article, which gave all citizens the state constitutional right to vote and hold office, was specifically required by Congress in the Reconstruction Acts as a condition for North Carolina's readmission to the Union.[7] Article VI also provided the opposition with its most potent political argument against the newly proposed constitution.[8]

Following the election of 1868, the Constitution and the fourteenth amendment were ratified in North Carolina and a new general assembly controlled by the Republicans passed the Shoffner Act[9] which allowed the governor to declare martial law in areas of insurrection. After the murders of black office-holders in Alamance and Caswell counties, together with Klan-inspired voter intimidation, Governor Holden declared martial law and suspended the writ of habeas corpus.[10] Following this "Kirk-Holden War,"[11] the Democrats regained control of the legislature in 1870 and succeeded in impeaching and convicting Governor Holden.[12]

Klan activities throughout the South[13] led in part to the pas-

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5. *See* H. LEFLER & A. NEWSOME, NORTH CAROLINA, THE HISTORY OF A SOUTHERN STATE 488-89 (1973).

6. N.C. CONST. of 1868, art. VI, §§ 1 & 4.

7. Reconstruction Act of 1868, ch. 70, 40 Cong. 2d Sess.

8. 1868 CONVENTION JOURNAL, REPORT OF THE COMMITTEE ON SUFFRAGE AND ELIGIBILITY TO OFFICE 232.

9. Passed in December 1869, the Act empowered the governor to place a county under martial law if necessary to protect life and property. H. LEFLER & A. NEWSOME, NORTH CAROLINA, THE HISTORY OF A SOUTHERN STATE 496 (1973).

10. This illustrates the seriousness of the situation since North Carolina was the only Southern state not to suspend the writ during the Civil War.

11. The Kirk-Holden War occurred in 1870 and acquired its name when Governor Holden placed Alamance and Caswell Counties under the rule of Colonel George W. Kirk who was aided by approximately 1000 soldiers. As a result, citizens were placed in jails under military arrest and Kirk and Holden refused "to recognize writs of habeas corpus for their release issued by state judges." LEFLER & NEWSOME, *supra* note 9, at 496.

12. LEFLER & NEWSOME, *supra* note 9, at 498.

13. LEFLER & NEWSOME, *supra* note 9, at 497. The Ku Klux Klan was the most effective political weapon in the arsenal of the majority. Its secret meetings, mystic signs, nightly visitations, warnings, whippings, and occasional murders spread terror among the Negroes and their white leaders. The Klan was especially

sage of the fifteenth amendment prohibiting the denial or abridgement of the right to vote.[14] In addition, Congress began investigating Klan-inspired violence in the South, including North Carolina, where 260 Klan "visitations" were documented.[15] These activities led to the passage of federal acts of which part remain in force today: the Civil Rights Act of 1870,[16] the Enforcement Act of 1870,[17] the Force Act of 1870,[18] and the Ku Klux Klan Act[19] (also known as the Anti-Lynching Act). Various violations of these acts led to 981 indictments in Raleigh in 1872.[20]

Following the return of the legislature to Democratic control, another constitutional convention was held in 1875.[21] This body established residency requirements for voting and, most significantly, placed the responsibility for county government in the hands of the legislature rather than allowing for home rule. This insured white Democratic control in eastern North Carolina. By virtue of the constitutional amendments of 1875[22] and a legislative act in 1876,[23] the majority was able to remain in power electorally by a series of election mechanisms to aid and insure its continued control. Democratic legislatures elected Democratic justices of the peace, who chose Democratic election officials. These officials were able to disqualify Republican voters by using technical name, age or residence requirements or enforcing legal regulations for challenging voters.[24] Following adoption of this constitution, the Democrats won both state and national elections in 1876, marking an

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active during election time and was highly effective in deterring Republicans and poorly-educated Negroes from voting. *Id.*

14. *Id.*. at 499.

15. *Id.* at 495.

16. Civil Rights Act of 1870, 16 Stat. 140, *as amended by* Act of 1871, 16 Stat. 433 (current version at 42 U.S.C. §§ 1971(a), 1983, 1985(3) (1982)).

17. Enforcement Act of 1870, ch. 144, 16 Stat. 140.

18. Force Act of 1870, ch. 99, 16 Stat. 433.

19. Civil Rights Act of 1871, 17 Stat. 13.

20. LEFLER & NEWSOME, *supra* note 9, at 499.

21. *Id.* at 500. This constitutional convention was composed of fifty-eight Conservatives, fifty-eight Republicans, and three Independents.

22. N.C. CONST. of 1868, art. VII (1875).

23. An Act to Establish County Governments, 1876-77 Pub. Laws of N.C 226, ch. 141. The Act provided that the general assembly should elect justices of the peace for each township in which any city or incorporated town was located, with an additional justice of the peace for every thousand residents in the city or township. The justices of the peace for each county, who served six-year terms, then met and elected the county board of commissioners for two-year terms.

24. LEFLER & NEWSOME, *supra* note 9, at 543.

end to Reconstruction.[25] Upon the withdrawal of federal troops in 1877, black and minority party activity diminished, and the two-party competition which had divided voters on realistic social, economic and political issues ended. The Republicans in the west lost their ability to select local magistrates and county officials, as did the blacks in eastern North Carolina, since these officials were now selected by the legislature in Raleigh.

During this period, the opposition Republican party trailed the Democratic majority party in statewide elections by slim margins of only 6,000 to 20,000 votes. The division of the state into three parties in the election of 1892 foreshadowed a return to power of the Republicans and Populists by fusion coalitions in 1894. The fusion coalition dealt directly with election law issues calling for "pure election laws," a nonpartisan judiciary, and restoring county self-government.[26] Fusion rule led to increased political activity by blacks due in part to fairer administration of election laws and the return of self-rule to county governments. The increasing role of blacks in state government became a theme of partisan conflict. However, blacks' record of success in elections to the general assembly was never greater than fifteen percent.[27] Fusion success continued in 1896 with the election of Governor Russell whose administration and patronage included the appointment of blacks to minor federal positions. Election law reform during this period introduced the concept of bipartisan county election boards to insure honest elections.[28]

In reaction to the political success of the fusionists, the Democratic party, under the direction of Furnifold M. Simmons, began a white supremacy campaign. In addition to overt racial appeals of the basest kind, an organization of red shirts would parade through black communities and intimidate voters at Republican rallies. These tactics were successful in the election of 1898 and helped place the general assembly back in Democratic control. The majority began a series of election law alterations to end the role of blacks in the election process. Following a proposal adopted in other Southern states known as the "Mississippi Plan," the legislature proposed a literacy test which included an understanding

25. *Id.*, at 500.
26. *Id.*, at 550.
27. *Id.*, at 551.
28. *See* N.C. GEN. STAT. § 163-41 (1982); *see also* Mullen v. Murrow, 123 N.C. 733, 31 S.E. 1003 (1898).

clause, a poll tax, and a grandfather clause as state constitutional amendments to be ratified in the election of 1900.[29] In addition, the legislature placed county government back in the hands of state government and required a new registration of voters. In its platform for the election of 1900, the Democratic Party also adopted proposals for a direct statewide primary. The suffrage amendments carried by a vote of 182,217 to 128,285. Thirty-one "white" counties in the central and western part of the state voted against it. The counties with a heavy black population gave the amendment a huge majority. This could mean either that blacks did not vote or that their ballots were counted for the amendment regardless of how they were cast. Precinct registrars were arrested on various charges of misconduct in connection with the election. With the passage of the suffrage amendment, the majority eliminated 50,000 Republican voters from the rolls, confirmed the Democratic dominance of the state and strengthened the one-party system. Blacks ceased to vote in large numbers. In order to compete, the Republican party adopted a similar white supremacy platform and banned blacks from participation in its affairs after 1902.

The changing fortunes of blacks in politics were also mirrored in court decisions. In 1903, the United States Supreme Court held sections of the Force Act of 1870 to be unconstitutional.[30] Subsequent to the first wave of disenfranchisement, along with the adoption of a primary system in North Carolina, a majority vote run-off provision was included in 1915.[31] The use of the grandfather clause continued until overturned in 1915 by the United States Supreme Court.[32] In 1955, in response to increased minority party voting, the legislature enacted the "Jonas" rules for counting crossover votes—rules designed to hinder minority party success.[33] The literacy test and an understanding clause remained a part of North Carolina law well into the 1970s.[34]

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29. N.C. CONST. of 1900, art. VI, § 4. The "grandfather clause" reserved the right to vote to male persons who did not meet the new educational requirements if they had registered according to the old section prior to December 1, 1908.

30. James v. Bowman, 190 U.S. 127 (1903).

31. 1915 N.C. Sess. Laws ch. 101.

32. Guinn v. United States, 238 U.S. 347 (1915).

33. 1955 N.C. Sess. Laws 750, ch. 812, § 2. The "Jonas Rule" was so named because the state legislature adopted a law requiring the counting of straight party ballot choices in lieu of candidate choice. However, this rule was overturned in Hendon v. N.C. State Bd. of Elections, 710 F.2d 177 (4th Cir. 1983).

34. In Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959),

The totality of Democratic dominance remained well into the 1960s until the election of Governor Jim Holshouser and Senator Jesse Helms in 1972. No blacks were elected to the General Assembly until 1970.[35] Only a handful of Republicans were elected to the General Assembly during this period.[36]

Blacks' record of success and the electoral history are important for several reasons. First, it illustrates the history of official voting discrimination which lasted for over 120 years in North Carolina. Second, it illustrates the continual resort to unfair election mechanisms designed by a majority to insure electoral success. Election devices such as the literacy test and the poll tax were adopted at the turn of the century for specific partisan purposes. Although these devices may appear to have been racially or partisanly neutral, their implementation was not. The Reconstruction Congresses in 1870 assumed that the surest way to guarantee blacks equality was to guarantee them the right to vote. Through the use of discriminatory election techniques, this assurance was eliminated.

B. *Federal Responses*

In the 1950s, with this history in mind, the federal government began to attack electoral mechanisms which impeded the fifteenth amendment guarantee. Modern enforcement of the fifteenth amendment began with passage of the Civil Rights Act of 1957,[37] which empowered the United States Attorney General to litigate to secure voting rights to citizens deprived of the right on the basis of race or color. In addition, the Act established the Civil Rights Commission and empowered it to enumerate discriminatory mechanisms which abridge the right to vote. The Civil Rights Act of

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the United States Supreme Court affirmed a North Carolina Supreme Court decision upholding literacy requirements. *See also* Bazemore v. Bertie County Bd. of Elections, 254 N.C. 398, 119 S.E.2d 637 (1961). The literacy requirement was only recently repealed by the North Carolina General Assembly. N.C. GEN. STAT. § 163-58, *repealed by* 1985 N.C. Sess. Laws ch. 563, § 3.

35. The first black elected to the general assembly since 1900 was in 1969, when Henry Frye, from Guilford County, was elected to the house. Less than five percent of either chamber was composed of blacks until the election of 1984.

36. Since 1966, Republican party membership in the general assembly has been between five percent and thirty percent in the house, and between two percent and thirty percent in the senate.

37. Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (codified as amended at 42 U.S.C. §§ 1971, 1975, 1975a-1975e, 1995 (1982)).

1960[38] granted oversight responsibility to the Attorney General to retain and review state voting statistics in order to establish the presence of a pattern or practice of racial discrimination. If a pattern was established, the Attorney General could attack the practice in court by seeking the appointment of federal registrars to remedy registration inequities. In 1964, as a precursor of the Voting Rights Act, Congress passed Title I of the Civil Rights Act of 1964,[39] which established a presumption of literacy, prohibited local officials from employing new registration devices, and set forth an expedited procedure for judicial resolution of voting rights cases.

Frustrated by the case-by-case approach of judicial resolution of abuses, and the ingenuity of local officials in avoiding the impact of judicial rulings, Congress passed the Voting Rights Act of 1965.[40] The purpose of the Act was to ensure racial and language minority groups, primarily in the South, the right to register to vote in federal and state elections. Congress suspended the use of literacy tests and other devices in any state or political subdivision where such a test or device was in effect on November 1, 1964, and where less than fifty percent of voting age persons were registered for or voted in the 1964 presidential elections.[41] The rationale for this formula or "trigger," was that low voter registration and participation resulted from the use of these tests and devices. Second, to insure that the old devices would not be replaced by new ones, the administrative remedy of section 5 of the Act was devised. This required any county or political subdivision in a "covered" jurisdiction to submit or "preclear" any election-related practice or procedure which it sought to enact or administer if it was different from a practice in force on November 1, 1964. The reviewing authority was to be the United States Attorney General or the United States District Court for the District of Columbia. Forty of North Carolina's one hundred counties were covered by these provisions.[42] In addition, federal examiners could be sent to election

38. Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (codified as amended at 42 U.S.C. §§ 1971, 1974-1974e, 1975d (1982)).

39. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 214 (codified as amended at 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h-6 (1982)).

40. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1982)).

41. 42 U.S.C. §§ 1973b & 1973c (1982).

42. These counties were: Jackson, Cleveland, Camden, Northampton, Gates, Hertford, Bertie, Chowan, Gaston, Union, Anson, Scotland, Robeson, Wake,

districts for the purpose of increasing registration.

It was not until 1969[43] and 1971[44] that the scope of the Act was reviewed by the United States Supreme Court. The first regulations under the Act providing guidance for state officials were issued on September 10, 1971.[45] The scope of review allowed by these regulations is breathtakingly broad. It includes such changes as abolition of a probate judge's duties,[46] adoption of campaign restrictions on public university personnel,[47] and alterations in precinct boundaries.[48] Because of the slow implementation of the Act and because Congress wanted the Act to have some effect during the 1980 state and federal redistricting procedure, in 1975, Congress extended the Act until 1982.

Through regulatory enactment and judicial interpretation in *Beer v. United States*,[49] the standard for section 5 review was established. The jurisdiction seeking preclearance has the burden of demonstrating to the satisfaction of the reviewing authority that the proposed enactment does not have the effect *or* purpose of denying or abridging the right to vote on account of race or color. Unlike section 5, section 2 of the Voting Rights Act is nationwide in scope and as originally enacted was to give statutory basis for a litigant to protect his fifteenth amendment guarantees. As originally enacted it merely tracked the fifteenth amendment's guarantee.[50]

Bladen, Cumberland, Harnett, Lee, Guilford, Rockingham, Caswell, Person, Granville, Vance, Franklin, Halifax, Nash, Edgecombe, Wilson, Wayne, Lenoir, Greene, Pitt, Onslow, Craven, Beaufort, Martin, Washington, Perquimans, and Pasquotank.

43. Allen v. Bd. of Elections, 398 U.S. 544 (1969).

44. Perkins v. Matthews, 400 U.S. 379 (1971).

45. 28 C.F.R. § 51 (1971).

46. Huffman v. Bullock County, 528 F. Supp. 703 (M.D. Ala. 1981).

47. Dougherty County, Ga., Bd. of Educ. v. White, 439 U.S. 32 (1978).

48. Perkins v. Matthews, 400 U.S. 379 (1971).

49. 425 U.S. 130 (1976).

50. The previous section 2 standards read as follows:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any state or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in Section 1973b(f)(2) of this title.

42 U.S.C. § 1973 (1976).

III. DEVELOPMENT OF THE FEDERAL GUARANTEE OF EQUAL VOTING POWER AND GROUP VOTING RIGHTS

The evolution of federal case law guaranteeing equal voting power for individuals over the past twenty-five years shows a pattern of greater enfranchisement of classes, and federal judicial protection of the franchise against demonstrable abuses. This pattern has paralleled the development of legislation to guarantee the right to vote. These evolutionary changes have had profound effects in the composition of the North Carolina General Assembly.

Prior to 1964, the general assembly was apportioned on the basis of a county unit system. Each county had at least one house representative, regardless of population, and the balance of twenty members was apportioned roughly on the basis of population. The state senate was similarly apportioned.

The end for this system of apportionment began with the enunciation of the one-person, one-vote standard in *Gray v. Sanders*,[51] which invalidated Georgia's county unit system for nomination of its senatorial candidates. In its decision, the Supreme Court utilized the notion of equal voting power: "Once the class of voters is chosen . . . we see no constitutional way by which equality of voting power may be evaded."[52] The one-person, one-vote concept was first extended to congressional redistricting in *Wesberry v. Sanders*,[53] and then to state legislative reapportionment in *Reynolds v. Sims*.[54] North Carolina's reapportionment system was held constitutionally infirm in *Drum v. Seawell*.[55]

Early in the history of equal voting power litigation, plaintiffs were aware that even though a voter might be accorded an equally weighted vote, the majority party might employ other electoral mechanisms to cancel out votes through one of many kinds of devices which are known as "gerrymandering." Gerrymandering is roughly defined as drawing election districts along lines (often unnatural ones) to achieve partisan advantage or some other unfair objective.[56] *Gomillion v. Lightfoot*,[57] held the use of gerrymander-

51. 372 U.S. 368 (1963).
52. *Id.* at 381.
53. 376 U.S. 1 (1964).
54. 377 U.S. 533 (1964).
55. 249 F. Supp. 877 (M.D.N.C. 1965), *aff'd.*, 383 U.S. 831 (1966).
56. There are at least twelve different methods identified in political science literature used by a majority to overcome a minority:

(1) Packing the voting strength of a group to insure that much of [its voting strength] is wasted in districts which are won by lopsided mar-

ing devices constitutionally justiciable if it was racially discriminatory.

It was in *Reynolds* that the Court first approved multimember districting as an electoral device which could be utilized by a state legislature and not be mathematically discriminatory. "One body could be composed of single-member districts while the other could have at least some multimember districts."[58] Subsequently,

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gins—in particular, packing [its] strength to a greater extent than is true of the voting strength of a group controlling the district.

(2) Fragmenting or submerging the voting strength of a group to create districts in which that group will constitute a permanent (or near-certain) minority.

(3) Reducing the reelection likelihood of some of a group's incumbents by altering district boundaries to put two or more incumbents from the group into the same district.

(4) Reducing the election (or reelection) likelihood of some of a group's representatives by altering district boundaries to cut up old districts to make it impossible for these incumbents to continue to represent the bulk of their former constituents.

(5) Reducing the election (or reelection) chances of group representatives in marginal/competitive districts by, wherever practicable, reducing that group's voting strength in these districts.

(6) Enhancing the election (or reelection) chances of representatives of the group in control of the [re]districting process by preserving old district lines for its own incumbents to the greatest extent practicable, so as to benefit from name-recognition and other advantages of incumbency status (such as previous campaign organizations and personal-contact networks).

(7) Enhancing the election (or reelection) chances of representatives of the group in control of the [re]districting process by manipulating district boundaries . . . to shoreup the controlling group's voting strength in previously marginal/competitive districts.

(8) Manipulating district boundaries so as to create an advantage in the open seats (i.e., seats with no incumbent running) for the group controlling the districting.

(9) Unnecessarily disregarding compactness standards in drawing district lines.

(10) Unnecessarily disregarding city, town, and county boundaries in drawing district lines.

(11) Unnecessarily disregarding communities of interest in drawing district lines.

(12) Unnecessarily disregarding equal population standards in drawing district lines.

Grofman, *Criteria for Districting: A Social Science Perspective*, 33 U.C.L.A. L. REV. 77, 117 (1985).

57. 364 U.S. 339 (1960).

58. 377 U.S. at 577.

in *Fortson v. Dorsey*,[59] the Court refused to invalidate multimember districts which were mathematically equal in population based upon an equal protection attack that Georgia's system of some single and some multimember districts treated voters differently. However, the Court recognized the potential for invidious use of multimember districting and stated, "[i]t might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."[60] *Whitcomb v. Chavis*,[61] presented the first racially based challenge to the multimember districts. Black voters in Marion County, Indiana, were placed in a large, white and predominately Republican multimember county district. They challenged the multimember districting apportionment on the basis of the Court's holding in *Fortson*. The plaintiffs challenged the districting on two grounds. First, multimember districts granted voters residing in these districts greater voting power than in single-member districts because of their ability to weigh a vote or to vote for more combinations of candidates than in similar single-member districts. This was proved by a mathematical equation, which attempted to quantify voting power as the ability to cast a "critical" vote.[62] Although the Court recognized the theory was arithmetically correct, it rejected the challenge on the basis that it did not have any real-life political impact.[63]

The second challenge to multimember districting was the unequal treatment given voters in a multimember district compared to single-member districts. Voters in multimember districts were represented by more legislators (since delegations are elected at-large), and these legislators tended to vote as groups in legislative bodies, which was tantamount to giving the voters who voted for these candidates greater legislative influence.[64] The Court rejected both these claims as unproven, but then examined evidence in the record which might have sustained a challenge, such as the success minorities have had in access to party slating procedures, party political participation, and equal opportunity to register and vote.[65]

59. 379 U.S. 433 (1965).
60. *Id.* at 439.
61. 403 U.S. 124 (1971).
62. *Id.* at 145-46. A "critical" vote is a tie-breaking vote. *See id.* at 145 n.23.
63. *Id.* at 146.
64. *Id.*
65. *Id.* at 149-53.

After finding the political processes were open to the challengers and, finding no evidence of intentional racial bias in selecting the multimember device, the Court dismissed the challenge, stating that no racial or political minority had a right to be elected in proportion to its population.[66]

The first case of constitutional dimension to find invidious the use of multimember districting was *White v. Regester*.[67] *White* involved a challenge by blacks and Mexican-Americans to the use of multimember districts in Dallas and Bexar Counties, Texas. In *White*, the Supreme Court approved evidentiary criteria which could be used by a challenger to establish lack of equal access to the political process.[68] The case marked a departure from litigation which examined the mathematically discriminatory proofs of vote dilution and replaced these inquiries with an examination of qualitative issues to prove vote dilution. The Supreme Court reviewed the evidence of the history of official discrimination and affirmed the district court.[69]

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66. *Id.* at 160.

67. 412 U.S. 755 (1973).

68. *Id.* at 765-66.

69. The following quote from the Supreme Court's opinion is illustrative of evidence of official discrimination:

> With due regard for these standards, the District Court first referred to the history of official racial discrimination in Texas, which at times touched the right of Negroes to register and vote and to participate in the democratic processes. It referred also to the Texas rule requiring a majority vote as a prerequisite to nomination in a primary election and to the so-called "place" rule limiting candidacy for legislative office from a multimember district to a specified "place" on the ticket, with the result being the election of representatives from the Dallas multimember district reduced to a head-to-head contest for each position. These characteristics of the Texas electoral system, neither in themselves improper nor invidious, enhanced the opportunity for racial discrimination, the District Court thought. More fundamentally, it found that since Reconstruction days, there have been only two Negroes in the Dallas County delegation to the Texas House of Representatives and that these two were the only two Negroes ever slated by the Dallas Committee for Responsible Government (DCRG), a white-dominated organization that is in effective control of Democratic Party candidate slating in Dallas County. That organization, the District Court found, did not need the support of the Negro Community to win elections in the county, and it did not therefore exhibit good-faith concern for the political and other needs and aspirations of the Negro community. The court found that as recently as 1970 the DCRG was relying upon "racial campaign tactics in white precincts to defeat candidates who had the overwhelming support

In *Zimmer v. McKeithen*,[70] the Fifth Circuit formulated judicial standards for weighing the factors outlined in *White*:

> [W]here a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multimember or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot provisions and the lack of provision for at-large candidates running from particular geographical subdistricts. The fact of dilution is established upon proof of the existence of an aggregate of these factors . . . all

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of the black community."

. . . .

Surveying the historic and present condition of the Bexar County Mexican-American community, which is concentrated for the most part on the west side of the city of San Antonio, the court observed, based upon prior cases and the record before it, that the Bexar community, along with other Mexican-Americans in Texas, had long "suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics and others." The bulk of the Mexican-American community in Bexar County occupied the Barrio, an area consisting of about 28 contiguous census tracts in the city of San Antonio. Over 78% of Barrio residents were Mexican-Americans, making up 29% of the county's total population. The Barrio is an area of poor housing; its residents have low income and a high rate of unemployment. The typical Mexican-American suffers a cultural and language barrier that makes his participation in community processes extremely difficult, particularly, the court thought, with respect to the political life of Bexar County. "[A] cultural incompatibility . . . conjoined with the poll tax and the most restrictive voter registration procedures in the nation have operated to effectively deny Mexican-Americans access to the political processes in Texas even longer than the Blacks were formally denied access by the white primary." . . . The residual impact of this history reflected itself in the fact that Mexican-American voting registration remained very poor in the county and that only five Mexican-Americans since 1880 have served in the Texas Legislature from Bexar County. Of these, only two were from the Barrio area. The District Court also concluded from the evidence that the Bexar County legislative delegation in the House was insufficiently responsive to Mexican-American interests.

White v. Regester, 412 U.S. at 766-69 (footnotes and citations omitted).

70. 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom*, East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976) (per curiam).

these factors need not be proved in order to obtain relief.[71]

Following the *Zimmer* case, two dozen vote dilution cases were decided by the lower courts before the Supreme Court altered the legal standard set forth in *White*.

The test of vote dilution after *Zimmer* focused upon disproportionate impact as evidenced by the *White* factors, all of which must be objectively demonstrated, as proof of racial gerrymandering. The constitutional basis for these challenges was the fourteenth and fifteenth amendments. In 1976, the Supreme Court held in *Washington v. Davis*,[72] that official action would not be held unconstitutional solely because it resulted in a racially disproportionate impact. There also had to be proof that a discriminatory purpose was a motivating factor.[73] In *Arlington Heights v. Metro Housing Development Corp.*,[74] the Court outlined the evidence which a court could examine to reach a discriminatory purpose finding, such as historical background of the decision to redistrict, sequence of events leading up to the challenged action, substantive departures from past factors, and contemporary statements of the decision makers.[75]

The Fifth Circuit, in *Nevett v. Sides*,[76] attempted to reconcile the *Zimmer* factors with the new fourteenth and fifteenth amendment standards laid out in *Washington* to illustrate that proof of the *Zimmer* factors could demonstrate discriminatory purpose as well as discriminatory impact.[77] This approach was rejected by the Supreme Court in *City of Mobile v. Bolden*:[78]

> [B]ecause the appellees had proved an "aggregate" of the *Zimmer* factors, the Court of Appeals concluded that a discriminatory purpose had been proved. That approach, however, is inconsistent with our decisions in *Washington v. Davis*, . . . and *Arlington Heights*. . . . Although the presence of the indicia relied on in *Zimmer* may afford some evidence of a discriminatory purpose, satisfaction of those criteria is not of itself sufficient proof of such a purpose. The so-called *Zimmer* criteria upon which the District Court and the Court of Appeals relied were most assuredly insuf-

71. *Id.* at 1305 (footnotes omitted).
72. 426 U.S. 229 (1976).
73. *Id.* at 239-42.
74. 429 U.S. 252 (1977)
75. *Id.* at 267-68.
76. 571 F.2d 209 (5th Cir. 1978), *cert. denied*, 446 U.S. 951 (1980).
77. *Id.* at 228-29.
78. 446 U.S. 55 (1980).

> ficient to prove an unconstitutionally discriminatory purpose in the present case.[79]

It is with this formulation that the legislative history of the section 2 amendments begins. In amending section 2, Congress had to modify the purpose test developed in *Bolden*, *Washington*, and *Arlington Heights* to obtain the results test previously established in *White*.

IV. LEGISLATIVE BACKGROUND SURROUNDING THE *GINGLES* CASE

A. *State Legislative History of Redistricting*

Pursuant to its federal constitutional duty as required by *Reynolds v. Sims* and sections 3 and 5 of article II of the North Carolina Constitution, the North Carolina General Assembly, in July 1981, passed acts reapportioning its senate and house chambers.[80] The initial redistricting plan differed little from the apportionment of members established in the 1971 redistricting.[81] The only change in the House of Representatives was to add a representative to Mecklenburg County and to eliminate a representative from eastern North Carolina. All urban counties in the state were composed of at-large, multimember districts, due in part to the state constitutional requirement passed in 1968,[82] that no county could be divided or subdivided in the creation of a legislative district. On September 16, 1981, the *Gingles* plaintiffs filed suit alleging that a twenty percent population disparity between legislative districts violated the one-person, one-vote requirement, that multimember districts diluted the voting strength of black citizens, and that the North Carolina constitutional provisions requiring no division or subdivision of counties had not been submitted to the Justice Department for clearance pursuant to section 5 of the Voting Rights Act.[83]

On November 25, 1981, in state court in Iredell County, *Pugh v. Hunt* was filed by Republican voters and was subsequently removed to United States District Court for the Eastern District of North Carolina.[84] The *Pugh* plaintiffs, in addition to claims made

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79. *Id.* at 72-73.
80. 1981 N.C. Sess. Laws chs. 771, 800 & 821.
81. N.C. CONST. art. II, §§ 3(3) & 5(3).
82. 1971 N.C. Sess. Laws ch. 483.
83. Plaintiff's complaint, Gingles v. Edmisten, 590 F. Supp. 345 (E.D.N.C. 1984).
84. No. 81-1966 (E.D.N.C. filed Nov. 25, 1981).

by racial minorities, also alleged that multimember districts were partisanly designed to submerge Republican voters as well as black voters. A similar suit was filed in Indiana and announced the same day as *Gingles*, alleging partisan election gerrymandering there.[85]

Thirteen years after its ratification and one week after initiation of the *Gingles* suit, the state submitted the 1968 constitutional amendment to the United States Department of Justice for preclearance. Following the state's submission, the general assembly reconvened on October 29, 1981, to reconsider its redistricting enactments. The house amended its reapportionment plan, drastically altering its legislative makeup to reduce the twenty percent population disparity.[86] The senate declined to alter its plan.

On November 30, 1981, by letter, the United States Attorney General interposed an objection, pursuant to section 5, to the North Carolina constitutional amendment prohibiting subdivisions of counties in creating legislative districts.[87] On December 7, 1981, he objected to the state senate and congressional reapportionment plans.[88] On January 20, 1982, he objected to the revised state house apportionment plans.[89] In each of the letters, the Attorney General stated that his objection was based "upon the use of large multimember districts . . . [which] submerges cognizable minority population concentrations into larger white electorates."[90] Following the rejection of the state house plan by the Department of Justice in October 1981, the state senate and house committees on redistricting met in January of 1982 and adopted redistricting "criteria."

On January 23, 1982, Representative Joe Hege (R-Davidson) presented a plan for redistricting the state into single-member districts which included majority black districts in seven areas of North Carolina. This Republican plan was followed by other plans submitted at a public hearing on February 4, 1982. The North Car-

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85. Davis v. Bandemer, 106 S. Ct. 2797 (1986). For a discussion of this case see Hess, *Beyond Justiciability: Political Gerrymandering After Davis v. Bandemer*, 9 CAMPBELL L. REV. 207 (1987).

86. H.B. 1201, Reg. Sess., 1981 House Journal 732.

87. Letter from U.S. Assistant Attorney General William Bradford Reynolds to Alex Brock (November 30, 1981).

88. Letter from U.S. Assistant Attorney General William Bradford Reynolds to Alex Brock (December 7, 1981).

89. Letter from U.S. Assistant Attorney General William Bradford Reynolds to Alex Brock (January 20, 1982).

90. *Id.*

olina Black Lawyers Association submitted a senate redistricting plan with three black majority districts, and a house redistricting plan with ten black majority single-member districts. On February 11, 1982, the North Carolina General Assembly ratified chapters 4 and 5 of the Session Laws of the First Extra Session.[91] By letter of April 19, 1982, the United States Attorney General interposed an objection to this plan also.[92] The legislature convened for the fourth time to draft a redistricting plan on April 26, 1982. Single-member reapportionment plans were introduced again by the Republicans in the house and senate, but were not adopted. The adopted plan provided for black majority districts in the section 5 covered counties of Guilford and Cumberland, but provided for no black majority districts in the other sixty noncovered counties which included Mecklenburg, Forsyth, Wake and Durham Counties.[93] These plans were precleared and the election of 1982 proceeded.

The significance of the legislative chronology for the *Gingles* and *Pugh* plaintiffs was that where the state had the burden of proving that multimember, at-large districting did not have the purpose *or* effect of racial discrimination, it could not make such a showing for the Attorney General. However, the plaintiffs were then faced with the task of shouldering the burden of proof under the existing *Bolden* standard, that these districts did have the purpose *and* effect of racial discrimination, though the plaintiffs did have a record where they could argue intentional discrimination pursuant to the test articulated in *Arlington Heights*[94] and required by *Bolden*. Finally, it became obvious that despite continued appeals, the general assembly would not draw single-member minority districts unless forced to do so by the Attorney General or the federal courts; and when this requirement was made, they would "swallow the smallest pill."

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91. 1981 N.C. Sess. Laws 6, chs. 4 & 5 (1st Extra Sess. 1982).

92. Letter from United States Assistant Attorney General William Bradford Reynolds to Alex Brock (April 19, 1982).

93. 1981 N.C. Sess. Laws 15, chs. 1 & 2 (2d Extra Sess. 1982).

94. In *Arlington Heights* the Supreme Court noted, "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 429 U.S. at 266. Among the specific considerations are the historical background of an action, the sequence of events leading to a decision, the existence of departures from normal procedure, legislative history, and the impact of a decision upon minority groups. 429 U.S. at 266-68.

B. Legislative History of the 1982 Amendments to the Voting Rights Act

The legislative history of the amendments to the Voting Rights Act have a unique North Carolina perspective, given the position on the amendments held by the late Senator John East. Senator East's view of the amendments was marked:

> Fundamental—indeed radical—changes in the way our democracy works will surely come about if Congress passes S. 1992. This measure would not only extend the extraordinary requirements of the Voting Rights Act of 1965, but would also place new, severe, and unconstitutional restraints on local governments throughout the country. Before the Senate acts on this bill, members should take adequate time to consider both the need to extend the Act and the . . . unparalleled power to alter the character of local and state government in the hands of the Federal Government.[95]

Senator East was a vocal opponent of the amended sections of the statute and offered many amendments to the bill to codify the intent standard. The ultimate result of his efforts was to clarify Congress' intent to alter the Supreme Court's ruling in *Bolden*, and to illustrate to the Supreme Court and the district courts that Congress clearly understood the impact which these amendments would have on multimember districts.

The House version of the section 2 amendments was aimed at substituting the intent test for the results test directly. "Section 2 of H.R. 3112 will amend Section 2 of the Act to make clear that proof of discriminatory purpose or intent is not required in cases brought under that provision. Many of these discriminatory laws have been in effect since the turn of the century."[96] The House report described in detail that the change was specifically designed to include "not only voter registration requirements and procedures, but also methods of election and electoral structures, practices and procedures which discriminate."[97] Discriminatory election structures can minimize and cancel out minority voting strength as much as prohibiting minorities from registering and

95. SUBCOMM. ON THE CONSTITUTION OF THE SENATE COMM. ON THE JUDICIARY, 97th CONG., 2D SESS., VOTING RIGHTS ACT, REPORT ON S.1992, 43 (Comm. Print 1982), *reprinted in* S. REP. No. 417, 97th Cong., 2d. Sess. 201 (1982) (Minority Views Senator East).

96. H.R. REP. No. 227, 97th Cong., 1st Sess. 29 (1981).

97. *Id.*

voting. Numerous empirical studies based on data collected from many communities have found a strong link between at-large elections and lack of minority representation. The House version of amended section 2 read as follows:

> No voting qualification or prerequisite to voting or standard practice or procedure shall be imposed or applied by any State or political subdivision in any manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2). The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section.[98]

After passage of the House bill, the proponents of the intent test had the opportunity to make their case in hearings conducted by the subcommittee on the Constitution, chaired by Senator East. The record of the hearings disclosed a strong difference of opinion over the House version. The proponents of the intent test focused in on several key objections. First, they pointed out that the effects test has no "core value" by which a district court may reach a decision, as does the constitutionally based intent test. Second, absent a showing of a constitutional violation, the intent test would transfer legislative decisions on reapportionment and forms of government completely to the federal judiciary. Third, minority groups would be able to obtain proportionality of representation, a remedial objective which, like numerical quotas in other cases involving racial discrimination, is impermissible. Finally, adoption of a results test would actually diminish a minority's political influence rather than enhance it, since the number of legislators it could influence would be reduced.

Criticism of the House version of section 2 also focused on maintaining the status quo established in *Bolden*. Critics maintained that section 2 is merely a codification of the fifteenth amendment and that an alteration of the standard would incorporate expanded notions of civil rights into law. They contended that the House test enacted an unknown standard which would invite attack on any apportionment system or election device where a minority group failed to achieve a result which, at a minimum, did not equal its proportion of the general population. Under the House version, proportional representation, when combined with

98. *Id.* at 30.

only a single *Zimmer* factor, such as historic de jure or de facto discrimination, would be sufficient to establish a section 2 violation. Therefore, a prima facie case could easily be established which a party could not successfully rebut by evidence of nonracial motivation or other nonracial reasons. In sum, the Senate opposition felt replacement of the *Bolden* standard would lead to a major legal assault on cities with at-large voting systems, resulting in a federal guarantee of equal results and not equal opportunity.[99] These objections were heard again by the Supreme Court in *Gingles*.

In response to these criticisms, the subcommittee stated that the results test was a new test, not merely a reformulation of the *White* and *Zimmer* standards. Therefore, the decision in the end would be unpredictable and contradictory since the standard of review in district court cases concerning racial discrimination is "clearly erroneous." Disparate results would necessarily be obtained from a loosely formulated equitable approach.

In the formal Judiciary Committee proceedings, Senator East offered amendments which would have eliminated the use of multimember districts as a criteria for voting rights challenges under section 2. This approach was rejected. Subsequently, a "compromise" was agreed upon as suggested by Senator Dole, which gave some additional assurances to the critics of the results test that proportional representation would not be the sole criteria for a violation of the Act while still holding that a different standard other than the constitutional intent test was the standard intended by the committee. With the Dole amendment, section 2 was altered to read as follows:

> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the state or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the state or political subdivision is one circumstance which may be considered; *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the

99. S. REP. No. 417, 97th Cong., 2d Sess. 345 (1982).

population.[100]

In establishing a violation, the committee listed a series of typical factors which the plaintiffs could show, depending upon the kind of rule challenged to prove a section 2 violation. These included:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
> 6. whether political campaigns have been characterized by overt or subtle racial appeals;
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of the plaintiff's evidence to establish a violation are:

> [W]hether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.
>
> [W]hether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous. While these enumerated factors will often be the most relevant ones, in some cases other factors will be indicative of the alleged dilution.[101]

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100. Voting Rights Act Amendments of 1982, 42 U.S.C. § 1973(b)(2) (1982) (emphasis in original).

101. S. REP. No. 417, 97th Cong., 2d Sess. 28-29 *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 206-07.

In addition to the typical factors, Congress included a disclaimer in the Act to insure that it was not instructing the district courts to establish a quota system for offices. The interplay between the disclaimer and vote polarization became evident in *Gingles* as the key elements needing judicial definition.

V. THE *GINGLES* CASE

A. *The District Court Decision*

The district court decision in *Gingles v. Edmisten*[102] was the first case to apply newly amended section 2 of the Act. At the time of the trial, the legislature had modified its reapportionment plan to conform to the one-man, one-vote standard, and had precleared its redistricting plan pursuant to section 5 of the Voting Rights Act for the forty North Carolina counties which the Act covers.[103] However, there remained sixty noncovered counties including legislative multimember districts in Mecklenburg, Forsyth, Wake, Durham, Wilson, Edgecombe, Nash and the northeast counties, all of which contained either submerged or fractured minority populations which could have composed single-member districts. It is this question upon which the litigation focused. The chief elements of proof at trial were extensive stipulations of fact primarily composed of census and governmental statistical data, lay witness testimony to demonstrate the continued lack of minority political involvement, demonstrative evidence showing the location of minority group members within the multimember districts, and substantial use of expert testimony.[104] Expert testimony was employed to illustrate the use of racial appeals in political campaigns, the history of official discrimination, and voting patterns in elections which were racially polarized.

Cognizant of its importance as the first trial utilizing amended section 2, the court began its opinion by articulating its understanding of congressional intent in passage of amended section 2 in five carefully reasoned postulates. The court first found that the "fundamental purpose of the amendment to section 2 was to remove intent as a necessary element of racial vote dilution claims brought under the statute."[105] Second, "[i]n determining whether,

102. 590 F. Supp. 345 (E.D.N.C. 1984).
103. *Id.* at 350-51.
104. *Id.* at 345.
105. *Id.* at 353 (footnote omitted).

'based on the totality of circumstances,' a state's electoral mechanism does so 'result' in racial vote dilution, the Congress intended that courts should look to the interaction of the challenged mechanism with those historical, social and political factors generally suggested as probative of dilution . . . ."[106] Third, the court pointed out that "Congress also intended that amended Section 2 be interpreted and applied in conformity with the general body of pre-*Bolden* racial vote dilution jurisprudence that applied the *White v. Regester* test . . . ."[107] This included the consideration that "the demonstrable unwillingness of substantial numbers of the racial majority to vote for any minority race candidate or any candidate identified with the minority race interest is the linchpin of vote dilution by districting."[108] Fourth, the court stated, "Amended section 2 embodies a congressional purpose to remove all vestiges of minority race to vote dilution perpetuated on or after the amendment's effective date by state or local electoral mechanisms."[109] Finally, the court found that by "enacting amended Section 2, Congress made a deliberate political judgment that . . . national policy respecting minority voting rights could no longer await the securing of those rights by normal political processes"[110] regardless of "several risks to fundamental political values."[111] These five points by the court underscore the issues which were raised by the Attorney General and ultimately decided by the Supreme Court. The key considerations were, of course: What is vote polarization and what role does the success of black candidates have in defeating a claim of vote dilution?

The district court found that in each of the challenged districts there were concentrations of voters sufficient to draw black majority, single-member districts.[112] The court then examined the *Zimmer* factors and found that North Carolina had a history of official discrimination against black citizens in voting matters, and that the effects of racial discrimination continue in public facilities, education, employment, housing and health. The court further found that the existence of racial appeals in political campaigns continued, and other voting procedures existed that lessened the

106. *Id.* at 354.
107. *Id.* at 354-55.
108. *Id.* at 355 (citations omitted).
109. *Id.* (citations omitted).
110. *Id.* at 357.
111. *Id.*
112. *Id.* at 358.

opportunity of black voters to elect candidates of their choice, including the majority vote runoff requirement and lack of subdistrict residency requirements. As well, the court noted the lack of sustained success in electing black candidates.[113] The importance of these findings for future section 2 litigation in North Carolina cannot be underestimated in light of the Supreme Court's opinion. The presence of these factors when combined with racially polarized voting supplies plaintiffs with the elements necessary to establish a prima facie case. Since several of the factors have been judicially determined, future litigation of these facts may not be necessary in each section 2 case. However, counsel for the plaintiffs will have to introduce similar evidence to support the *Zimmer* findings of fact.

After an exhaustive review of these findings, the court then turned to the "linchpin" issue of voter polarization which if connected to other findings of fact would lead to the conclusion that multimember districts resulted in lessened electoral opportunity for blacks.[114] The court adopted the definition of racially polarized voting supplied by the plaintiff's expert witness, Dr. Bernard Grofman. Dr. Grofman found that the results of an individual election would have been different depending upon whether it had been held among only white voters or only black voters in particular elections.[115] To statistically analyze the voting behavior in these districts, Dr. Grofman took fifty-three elections in the challenged districts in which a black candidate ran for office, and examined racial voting patterns by two methods: "extreme case analysis" and "ecological regression analysis."[116] The extreme case analysis studied voting in racially segregated precincts; the regression analysis used both racially segregated and racially mixed precincts and provided any corrective measure necessary to reflect the fact that voters within the two groups might behave differently.[117] In its examination of both methods, the court found racially polarized voting in each election studied. In each election, the degree of polarization was both statistically[118] and substantively significant.[119]

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113. *Id.* at 359-67.
114. *Id.* at 367.
115. *Id.* at 368.
116. *Id.* at 367 n.29.
117. *Id.*
118. "Statistically significant" in this context means not a random mathematical event. *See id.* at 368.
119. "Substantive" as used by the district court denotes legally actionable

In addition to the discussion regarding vote polarization, the court, in passing, commented twice on the role that proportionality has in voting dilution cases. The court defined vote dilution as follows:

> The essence of racial vote dilution . . . is this: that primarily because of the interaction of substantial and persistent racial polarization in voting patterns (racial bloc voting) with a challenged electoral mechanism, a racial minority with distinctive group interests that are *capable* of aid or amelioration by government is effectively denied the political power to further those interests that numbers alone would presumptively . . . give it in a voting constituency not racially polarized . . . .
>
> . . . .
>
> The mere fact that blacks constitute a voting or population minority in a multi-member district does not alone establish that vote dilution has resulted from the districting plan. . . . Nor does the fact that blacks have not been elected under a challenged districting plan in numbers proportional to their percentage of the population.[120]

The court noted that this was "the limit of the intended meaning of the disclaimer in Section 2 that 'nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.' "[121]

This brief discussion on the part of the court led the appeal points for both the United States Solicitor General and the North Carolina Attorney General. Racially polarized voting is probative of vote dilution only insofar as it is outcome determinative. In other words, where blacks consistently lose elections, because no whites or few whites will vote for them, the voting is racially polarized. Where blacks win because of bloc voting and single-shot voting by blacks, combined with substantial support from whites, then racial polarization does not have any legal significance.[122]

The district court also examined the success of black candidates in elections, comparing the relative success that blacks in Durham County house races had (a black candidate was elected in every election since 1973) with the lack of success which black candidates had in North Carolina House District 8, where no black

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vote dilution. *See id.*

120. *Id.* at 355 (emphasis supplied) (citations omitted).

121. *Id.* at 355 n.13.

122. Brief for Appellant at 40-41, Thornburg v. Gingles, 106 S. Ct. 2752 (1986).

candidate had ever been elected.[123] They examined elections in each jurisdiction and found both racially polarized voting and a diminished likelihood of success that a black candidate would have over a white counterpart in the districts.[124] Based upon these findings, the court concluded a violation was found in each of the districts, including Durham, where black candidates had enjoyed relative success.[125]

The court found the redistricting plans adopted in April of 1982 in violation of the Act and ordered the state to redraw the legislative districts.[126] The general assembly complied by drawing single-member districts in all jurisdictions.[127] Following the judgment however, the state appealed.

The appeal stated as its purpose: "Insofar as the lower federal courts have viewed racial bloc voting as the linchpin of vote dilution, it is imperative that this Court formulate a standard by which that condition can be established."[128] The United States Solicitor General concurred, stating that in some of the challenged districts violations were found where blacks had sustained electoral success and, therefore, the court must have utilized a legal standard of section 2 which guaranteed electoral success. Secondly, the court's definition of racial bloc voting as mere differences in the election outcome if the election was held among the black and white communities was fundamentally flawed, since the ultimate issue for determination was whether such polarization results in electoral defeats.[129] Since the court found electoral success in some districts, it missed the mark in the connection between vote polarization and the ultimate conclusion it must make, a decision which is judicially reviewable. The appellant's identification of racial bloc voting and the level of black electoral success recalled the congressional debates between advocates of result tests and the disclaimer language prohibiting proportionality. It was with these points of focus that the Supreme Court discussion began.

The *Gingles* case also raised anew for the Supreme Court certain fundamental "political questions," a legal thicket in which the

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123. 590 F. Supp. at 366.
124. *Id.* at 367.
125. *Id.*
126. *Id.* at 376.
127. 1984 N.C. Sess. Laws 4, chs. 4-6 (Extra Sess. 1984).
128. Brief for Appellant at 21, Thornburg v. Gingles, 106 S. Ct. 2752 (1986).
129. Brief for United States as Amicus Curiae at 12-13, Thornburg v. Gingles, 106 S. Ct. 2752 (1986).

Court generally prefers not to enter on the grounds of judicial restraint. What is the role of the judiciary in insuring minority political rights in a democracy? What amount of representation, if any, should a minority or political group be entitled to as a matter of law or equity? How does the Court grant relief to a minority group to enable them to elect representatives of their choice without guaranteeing proportional representation? To what extent does the remedy of guaranteed numerical goals for minorities harm other political and constitutional values?

B. The Supreme Court Decision

In upholding the district court's decision, Justice Brennan authored a majority opinion which directly addressed these fundamental issues.[130] The majority judgment was concurred in by the Court's more "conservative" justices on differing grounds. In some ways, the concurring opinions were more plaintiff-oriented than the Brennan opinion.[131]

Brennan began by discussing the prima facie elements of a section 2 case.[132] In the context of a multimember election district, he opined, there are certain preconditions necessary to show a section 2 violation.[133]

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate.[134]

Finally, Brennan observed, "the usual predictability of the majority's success distinguishes structural dilution from the mere loss of an election."[135] Most of these ultimate conclusions were evidenced by statistical analysis showing racially polarized voting.[136]

After examining the general principles which precondition a

130. Thornburg v. Gingles, 106 S. Ct. 2752 (1986).
131. 106 S. Ct. at 2763.
132. *Id.* at 2766-67.
133. *Id.*
134. *Id.* (citations and footnote omitted).
135. *Id.* at 2767.
136. *Id.*

claim, Justice Brennan adopted the district court's working definition of racially polarized voting: racial polarization exists where there is a consistent relationship between the race of the voter and the way in which the voter votes, for example, where black voters and white voters vote differently.[137] If there is a difference in voting patterns, the second question becomes one of degree. In analyzing a section 2 claim to determine whether the degree or extent of the existence of racially polarized voting is legally cognizable, the opinion would first have a court examine the statistical evidence of racial voting.[138] Next, the court should determine whether, in addition to racially polarized voting, there exists other dilutive devices encumbering minority voting strength, such as "majority vote requirements, designated posts, and prohibitions against bullet voting . . . ."[139] In addition, the court should look at the percentage of minority registered voters in the district, the size of the district, and, in multimember districts, the number of available seats in the particular election and the number of candidates running for those seats.[140] Finally, evidence of vote dilution must extend over a period of more than one election.[141] The evidence, where rebutted if a minority candidate has been successful, should be evaluated to determine whether other factors could explain success, such as lack of opposition, incumbency, bullet voting patterns or other similar explanations.[142]

Justice Brennan's opinion examined the state's three objections to the district court's handling of the vote polarization issues. The first objection was that racially polarized voting should be defined as voting patterns for which the principle cause is race and which cannot be rebutted by evidence of other reasons such as party affiliation, age, religion, income, incumbency, education or campaign expenditures.[143] A multitude of factors should be examined, not just a correlation between the race of the voter and his voting habits. Justice Brennan's opinion rejected this approach because the cause of racially polarized voting patterns was not rele-

137. *Id.* at 2776.

138. *Id.* at 2769-70.

139. Single-shot voting, sometimes called "bullet" voting is a technique used in multi-candidate races where a voter possessing the ability to vote for multiple candidates limits his vote to one candidate or a "single-shot".

140. *Id.* at 2770.

141. *Id.*

142. *Id.* at 2771.

143. *Id.* at 2776.

vant in determining a section 2 claim since it was the existence of such a pattern standing alone which made an otherwise race-neutral election device discriminatory. The opinion suggested that consideration of irrelevant variables would lead to results that were "indisputably incorrect" under section 2.[144] For example, an inconsistent result was reached from an analysis that considered that poor candidates lost elections more often wealthy candidates, even though minority candidates might be more likely to be poor.[145]

Next, Justice Brennan and a plurality of the Court found that the race of the candidate was not relevant in a section 2 inquiry.[146] The issue to be determined was not whether black voters voted for or preferred black candidates, but whether black voters' choices were electable as equally as white voters' choices. It was not the success of black candidates to office which the vote polarization analysis must examine, but the success with which the minority communities' candidates were elected which should be the focus of inquiry. From this conclusion, Justice White and four other Justices demurred, stating that this issue did not have to be decided in this case[147] and they would not desire to preclude evidence altogether of the race of a candidate in making a section 2 inquiry.[148] It is this difference of opinion which was the most remarkable in the case, since Justice O'Connor and her "conservative" colleagues were sustaining a more pro-plaintiff position than was "liberal" Justice Brennan. Finally, the Court rejected the state's appeal that vote polarization be defined as continued rejection of black candi-

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144. *Id.* at 2773.

145. We can find no support in either logic or the legislative history for the anomalous conclusion to which appellants' position leads—that Congress intended, on the one hand, that proof that a minority group is predominately poor, uneducated, and unhealthy should be considered a factor tending to probe a § 2 violation; but that Congress intended, on the other hand, that proof that the same socioeconomic characteristics greatly influence black voters' choice of candidates should destroy these voters' ability to establish one of the most important elements of a vote dilution claim.

Id. at 2775.

146. *Id.*

147. *Id.* at 2784 (White, J., concurring); *id.* at 2793 (O'Connor, J., concurring). Chief Justice Burger and Justices Powell and Rehnquist joined Justice O'Connor in her concurring opinion.

148. *Id.* at 2782-83 (White, J., concurring); *id.* at 2793 (O'Connor, J., concurring).

dates by the white community.[149] The Court held that this definition of racial bloc voting would frustrate Congress' desire that the intent test be eliminated in Section 2 inquiries.[150]

Justice O'Connor raised several fundamental issues which the Court addressed in *Gingles*, and provided the counterpoint for the Brennan opinion. The first issue concerned the measure of minority voting strength. There are theoretically several measures of minority voting strength, the first of which is the strictly proportional method of taking minority voters as a percentage of the total voters in an area. The minority would then have the potential to elect that percentage of representatives from the area.[151] Many European countries adopt this system of voting for legislative seats. If North Carolina were to adopt this approach, approximately ten senate and twenty-four house seats would be minority-controlled seats. This approach however, is specifically rejected by the Voting Rights Act and prior court decisions. A second approach would be to adopt the equitable remedy of gauging minority voting strength by examining various election or redistricting plans which would enhance minority voting influence without regard to black electoral success. The court could examine the impact which such plans would have on minority influence in elections, such as at-large districts with subgeographic, predominately minority districts. Such an equitable approach might be suggested by *Wallace v. House*,[152] and seemed to be Justice O'Connor's preferred alternative. However, neither approach was adopted by a majority of the Court. Justice O'Connor termed the Brennan approach as "maximum feasible minority voting" strength[153] but in this characterization, she is in error since the maximum strength would be representation on a strictly proportional basis. In addition, both the Brennan and O'Connor opinions leave for another case the issue of reduction of minority group influence. For example, what about areas which contain a sufficient number of minority voters to constitute forty

149. *Id.* at 2777.

150. *Id.*

151. As Justice O'Connor stated: "[I]f the minority group constituted 30% of the voters in a given area, the court would regard the minority group as having the potential to elect 30% of the representatives in that area." *Id.* at 2786-87 (O'Connor, J., concurring).

152. 515 F.2d 619, 633 (5th Cir. 1975) (court noted that "for there to be substantial—and thus illegal—impairment of minority voting rights, there must be some fundamental unfairness in the electoral system").

153. *Gingles*, 106 S. Ct. at 2787 (O'Connor, J., concurring).

percent of a single-member district? If these voters are relegated to a two-member, multimember district, has not their influence been similarly reduced or diluted?

The second major question for the Court was: What is racial bloc voting, and how is it demonstrated? Here there was no significant divergence of opinion concerning what was the statistical prima facie case for racial bloc voting as defined by both the district court and the Supreme Court. There was a strong divergence of opinion, however, on what rebuttal evidence could be used to mitigate a statistical showing of racial bloc voting. All the justices agreed that statistical proof of divergent racial voting patterns can be used to show political cohesiveness and to assess prospects for electoral success.[154] However, Justice O'Connor would allow evidence of multivariant analysis or other factors to determine why bloc voting by whites has consistently defeated minority candidates; and a majority of the Court properly found that the race of a candidate may be a relevant factor in analyzing vote dilution claims.[155]

The final issue the Court resolved was: What weight is to be given to evidence of electoral success by minority candidates? It was this final issue which drew the most discussion. All members of the Court concluded that there can be no section 2 claim where members of a minority group consistently experience electoral success in numbers roughly proportional to their population.[156] However, when electoral success was less than proportional, the Court split on the type of approach. Justice Brennan's approach was to have the courts examine the success of an occasional black candidate against the other *Zimmer* factors to determine if the success could be explained on another basis.[157] Justice O'Connor's approach was to reserve consideration of this issue for another time.[158] However, her approach suggested that if a jurisdiction with a multimember district had an occasional minority-preferred candidate elected, then a court should look to see if other avenues of influence existed for the minority group other than the election process, for instance, to what extent were elected officials responsive to the needs of the minority community? If another avenue

154. *Id.* at 2792-93.
155. *Id.*
156. *Id.* at 2793-94.
157. *Id.* at 2779.
158. *Id.* at 2795.

existed, Justice O'Connor did not say what would be the impact on a section 2 claim.

Probably the most surprising aspect of the *Gingles* opinion was the Court's handling of the issue of a candidate's race. The plurality's definition of racially polarized voting did not depend on the race of a candidate to determine if polarized voting was present. However, all of the statistical evidence adduced at the district court level specifically analyzed only elections between black and white candidates as the measure of racially polarized voting. If elections between two black candidates or two white candidates are examined, given North Carolina's predominately one-party system, then the minority and majority could have been said to prefer the election of the same candidate. This finding would negate, for litigation purposes, the crucial finding of racial bloc voting. Clearly, Justice Brennan's opinion suggested an approach that makes the race of the candidate irrelevant. However, Justices O'Connor and White rejected this approach which could well emasculate section 2. This issue remains to be examined by further litigation.

VI. EFFECTS OF *GINGLES*

The *Gingles* decision will have dramatic effects on election systems in North Carolina. Presently pending in federal court in the Eastern District of North Carolina is a section 2 case challenging North Carolina's method of electing its superior court judges.[159] Currently the judges are nominated from large, multi-member districts and then elected in a state-wide election. At-large forms of local governments are facing challenges in the cities of High Point and Asheboro, and in Forsyth, Guilford, Wilson, and Onslow Counties. Under particular fire are boards of education. These only foreshadow other potential lawsuits, given the extensive use of at-large systems in North Carolina by local governments.

The change from at-large election systems to systems which have single-member districts have other subtle political effects. These political effects were correctly foreseen by Judge Phillips in the District Court decision in *Gingles*.

> In making that political judgment, Congress necessarily took into account and rejected as unfounded, or assumed as outweighed, several risks to fundamental political values that oppo-

159. Alexander v. Martin, No. 86-1048-CIV-5 (E.D.N.C. 1986)

> nents of the amendment urged in committee deliberations and floor debate. Among these were the risk that the judicial remedy might actually be at odds with the judgment of significant elements in the racial minority; the risk that creating "safe" black-majority single-member districts would perpetuate racial ghettos and racial polarization in voting behavior; the risk that reliance upon the judicial remedy would supplant the normal, more healthy processes of acquiring political power by registration, voting and coalition building; and the fundamental risk that the recognition of "group voting rights" and the imposing of [an] affirmative obligation upon government to secure those rights by race-conscious electoral mechanisms was alien to the American political tradition.[160]

North Carolina has a total racial minority population of approximately twenty-five percent. A proportional representation system would mathematically entitle a racial minority to approximately ten senators and twenty-four representatives. Since *Gingles*, the legislature has had three minority senators and thirteen minority representatives. Although much less than a proportional representative system, this modest improvement is a leap from the prior record of one senator and three representatives prior to 1980. However, an equally significant impact has occurred in the remainder of the districts where the remnants of the counties elect the majority of the legislators. The political balance of having a predominately black and Democratic portion of a constituency removed makes conservative and Republican candidates competitive in the remainder of these districts.

An examination of the elections held in the districts affected by the *Gingles* case and the section 5 challenges bear this out. In the past, a unified black community would often provide the balance of power among white candidates. Now the black community has one or two representatives assured of their support who can act as spokesmen for their interests. This was the tradeoff which Congress and the civil rights community made in the urban areas. In areas where blacks approach a majority status, the decision will insure their continued success, as well as change the complexion of the remaining districts.

Prior to 1980, Guilford County, a "covered" county under the Voting Rights Act, elected its general assembly members, school boards, city governments in Greensboro and High Point, and

160. 590 F. Supp. at 356-57.

county commissioners all at-large. Today, all of these bodies are elected by district systems which include at least one minority district. The effect of this result has had partisan considerations. In 1980, Guilford County had one white Republican state senator and two white Democratic state senators; two white Republican house members and five white Democratic house members. In 1984, it had two white Republican senators and one black Democratic senator, and five white Republican house members, one white Democratic house member and one black Democratic house member. Districting not only alters the political equation for the black community, but also for white candidates. Of particular note is the example of State Senator William Martin, who lost in a nine-member Democratic house primary in 1980, and subsequently won election in 1982 in a black majority senate district.

Given the likelihood of increased litigation in this area of the law, what defense is there to a section 2 case after the *Gingles* decision? Clearly, the best solution is a community-based political agreement. Protecting an at-large system of voting requires a willingness on the majority's part to build coalitions with minorities to elect candidates who have sufficient appeal to a majority of the members of that group. In addition, it requires that local communities and institutions be composed of representatives supported by minority groups.

VII. CONCLUSION

Gingles' primary significance in litigation will be in the findings of fact with regard to a number of the *Zimmer* factors which can now be cited as precedent in similar Voting Rights litigation. The presence of these factors, when combined with other dilutive features of North Carolina's electoral system and with racially polarized voting, will go far in establishing a violation of a section 2 claim. These factors can be determinative, given the low success of black officeholders in North Carolina. The political effects on a jurisdiction with a cognizable minority population will also be profound—as they have been, for example, in section 5 areas like Guilford County.

Left unresolved in the *Gingles* opinion were several questions which future case law will need to address. How will future courts define the standard of racial voting strength? *Gingles* dealt only with several legislative districts. What should be the standard when the state-wide system is challenged? In the district court opinion, plaintiffs were invited to attack the state's majority vote

runoff requirements as a discriminatory device enhancing vote dilution.

Second, when does a section 2 claim dilute a minority's voting strength if it does not have sufficient numbers to constitute a majority? Can an electoral device of multimember districts *reduce* the impact of a vote? Justice Brennan suggested it may. If so, how can such a case be proven?

Third, can one rebut a section 2 claim by showing that white candidates can be the choice of black electorates? Justice Brennan's plurality opinion also seems to suggest this is possible. *Gingles* decision also means increasing competitiveness in single-member district elections. It may also point to reductions in the cohesiveness in predominately black districts as competition for representation begins in these elections. Without the need to single-shot in order to elect black candidates, the reality of political competition may flourish.

Gingles is the latest in a long line of Supreme Court decisions that guarantee citizens the right to vote and to have that vote counted. *Gingles* is also the latest discussion of balancing majority rule and minority rights in our democracy. Perhaps the clearest statement of the end to be accomplished in this debate comes from John C. Calhoun, on the veto power:

> [V]est the powers of the Government in the whole—the entire people—to make it in truth and reality the Government of the people, instead of the Government of a dominant over a subject part, be it the greater or less—of the whole people—self-government; and if this should prove impossible to practice, then to make the nearest approach to it, by requiring the concurrence in the action of the government, of the greatest possible number consistent with the great ends for which Government was instituted—justice and security, within and without. But how is that to be effected? Not certainly by considering the whole community as one, and taking its sense as a whole by a single process, which, instead of giving the voice of all, can but give that of a part. There is but one way by which it can possibly be accomplished; and that is by a judicious and wise division and organization of the Government and community, with reference to its different and conflicting interests, and by taking the sense of each part separately, and the concurrence of all as the voice of the whole. Each may be imperfect of itself, but if the construction be good and all the keys skillfully touched, there will be given out in one

blended and harmonious whole, the true and perfect voice of the people.[161]

161. J. CALHOUN, BASIC DOCUMENTS 229-31 (1952).

INSERTED INTO THE RECORD BY CHAIRMAN CHABOT ON OCTOBER 26, 2005: *BEER V. UNITED STATES* (425 U.S. 130, 96 S. CT. 1357)

Briefs and Other Related Documents

Supreme Court of the United States
Peter H. BEER et al., Appellants,
v.
UNITED STATES et al.
No. 73-1869.

Argued March 26, 1975.
Reargued Nov. 12, 1975.
Decided March 30, 1976.

The City of New Orleans instituted suit under the Voting Rights Act of 1965, seeking a judgment declaring that a reapportionment of New Orleans' councilmanic districts did not have the purpose or effect of denying or abridging the right to vote on account of race or color. The United States District Court for the District of Columbia, 374 F.Supp. 363 entered a judgment of dismissal, holding that the new reapportionment plan would have the effect of abridging the voting rights of New Orleans' Negro citizens. On appeal by the city, the Supreme Court, Mr. Justice Stewart, held that the reapportionment plan was valid where it had the effect of enhancing the position of racial minorities with respect to their effective exercise of the electoral franchise.

Judgment vacated and case remanded for further proceedings.

Mr. Justice White dissented and filed opinion.

Mr. Justice Marshall dissented and filed opinion in which Mr. Justice Brennan joined.

West Headnotes

[1] **Elections** 12(1)
144k12(1) Most Cited Cases
(Formerly 144k12)
Members of minority group have no federal right to be represented in legislative bodies in proportion to their numbers in general population. Voting Rights Act of 1965, § 5 as amended 42 U.S.C.A. § 1973c.

[2] **Municipal Corporations** 80
268k80 Most Cited Cases
(Formerly 144k12)
Since Voting Rights Act of 1965 applies only to proposed changes in voting
procedures, New Orleans councilmanic plan could not be rejected under Act solely because it did not eliminate two at-large councilmanic seats that had existed since 1954. Voting Rights Act of 1965, § 5 as amended 42 U.S.C.A. § 1973c.

[3] **Elections** 12(6)
144k12(6) Most Cited Cases
(Formerly 144k12)
Legislative reapportionment that enhances position of racial minorities with respect to their effective exercise of electoral franchise cannot have effect of diluting or abridging rights to vote on account of race within meaning of Voting Rights Act of 1965; such ameliorative new legislative apportionment therefore cannot violate Act unless new apportionment itself so discriminates on basis of race or color as to violate Constitution. Voting Rights Act of 1965, § 5 as amended 42 U.S.C.A. § 1973c.

[4] **Municipal Corporations** 80
268k80 Most Cited Cases
(Formerly 144k12)
Where, under prior apportionment of councilmanic districts in New Orleans, none of five councilmanic districts had clear Negro majority of registered voters, and no Negro had been elected to New Orleans city council while such apportionment system had been in effect, while, under revised plan based on 1970 census figures, Negroes, who constituted some 35% of registered voters in city, would constitute majority of population in two of five districts and clear majority of registered voters in one such district, such revised plan was not invalid under Voting Rights Act of 1965 as having effect of denying or abridging right to vote on account of race or color. Voting Rights Act of 1965, § § 4, 5 as amended 42 U.S.C.A. § § 1973b, 1973c; U.S.C.A.Const. Amend. 14, 15.

****1358** Syllabus [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499, 505.

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***130** The 1954 New Orleans City Charter provides for a seven-member city council, with one member being elected from each of five councilmanic districts, and two being elected by the voters of the city at large. In 1961 the council, as it was required to do after each decennial census, redistricted the city based on the 1960 census so that in one councilmanic district Negroes constituted a majority of the population but only about half of the registered voters, and in the other four districts white voters outnumbered Negroes. No Negro was elected to the council from 1960 to 1970. After the 1970 census the council devised a reapportionment plan, under which there would be Negro population majorities in two councilmanic districts and a Negro voter majority in one. Section 5 of the Voting Rights Act of 1965 prohibits a State or political subdivision subject to s 4 of the Act (as New Orleans is) from enforcing a proposed change in voting procedures unless it has obtained a declaratory judgment from the District Court of the District of Columbia that such change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" or has submitted the change to the Attorney General and he has not objected to it. After the proposed plan had been objected to by the Attorney General, New Orleans sought a declaratory judgment in the District Court. That court refused to allow the plan to go into effect, holding that it would have the effect of abridging Negro voting rights, and that moreover the plan's failure to alter the city charter provision for two at-large seats in itself had such effect. Held :

1. Since s 5's language clearly provides that it applies only to proposed changes in voting procedures, and since the at-large seats existed without change since 1954, those seats were not subject to review under s 5. The District Court consequently erred in holding that the plan could be rejected under s 5 solely because it did not eliminate the two at-large seats. P. 1362- 1363.

2. A legislative reapportionment that enhances the position of racial minorities ****1359** with respect to their effective exercise of the ***131** electoral franchise cannot violate s 5 unless the new apportionment itself so discriminates racially as to violate the Constitution, plying this standard here where, in contrast to the 1961 apportionment under which none of the five councilmanic districts had a clear Negro voting majority and no Negro had been elected to the council, Negroes under the plan in question will constitute a population majority in two of the five districts and a clear voting majority in one, it is predictable that by bloc voting one and perhaps two Negroes will be elected to the council. The District Court therefore erred in concluding that the plan would have the effect of denying or abridging the right to vote on account of race or color within the meaning of s 5. Pp. 1363- 1364.

374 F.Supp. 363, vacated and remanded.

James R. Stoner, Washington, D. C., for appellants.

Lawrence G. Wallace, Washington, D. C., for appellee United States.

Stanley A. Halpin, Jr., New Orleans, La., for appellees Jackson and others.

Mr. Justice STEWART delivered the opinion of the Court.

Section 5 of the Voting Rights Act of 1965 [FN1] prohibits ***132** a State or political subdivision ****1360** subject to s 4 of the Act [FN2] from enforcing "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect ***133** to voting different from that in force or effect on November 1, 1964," unless it has obtained a declaratory judgment from the District Court for the District of Columbia that such change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" or has submitted the proposed change to the Attorney General and the Attorney General has not objected to it. The constitutionality of this procedure was upheld in South Carolina v. Katzenbach, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769, and it is now well established that s 5 is applicable when a State or political subdivision adopts a legislative reapportionment plan. Allen v. State Board of Elections, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1; Georgia v. United States, 411 U.S. 526, 93 S.Ct. 1702, 36 L.Ed.2d 472.

FN1. Section 5 provides:
"Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or

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whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided. That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court." 79 Stat. 439, as amended, 89 Stat. 402, 404, 42 U.S.C. s 1973c (1970 ed., Supp. V).

FN2. 42 U.S.C. s 1973b (1970 ed. and Supp. V). Louisiana and its political subdivisions are subject to the provisions of s 4. 30 Fed.Reg. 9897 (1965).

The city of New Orleans brought this suit under s 5 seeking a judgment declaring that a reapportionment of New Orleans' councilmanic districts did not have the purpose or effect of denying or abridging the right to vote on account of race or color. [FN3] The District Court ***134** entered a judgment of dismissal, holding that the new reapportionment plan would have the effect of abridging the voting rights of New Orleans' Negro citizens. 374 F.Supp. 363. The city appealed the judgment to this Court, claiming that the District Court used an incorrect standard in assessing the effect of the reapportionment in this s 5 suit. We noted probable jurisdiction of the appeal. 419 U.S. 822, 95 S.Ct. 37, 42 L.Ed.2d 45.

FN3. The action was actually brought on behalf of the city of New Orleans by six of the seven members of its city council. For convenience the appellants sometimes are referred to in this opinion as New Orleans or the city.
The defendants in the suit were the United States and the Attorney General of the United States. A group of Negro voters of New Orleans intervened on the side of the defendants in the District Court.

I

New Orleans is a city of almost 600,000 people. Some 55% Of that population is white and the remaining 45% Is Negro. Some 65% Of the

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registered voters are white, and the remaining 35% Are Negro. [FN4] In 1954, New Orleans adopted a mayor-council form of government. Since that time the municipal charter has provided that the city council is to consist of seven members, one to be elected from each of five councilmanic districts, and two to be elected by the voters of the city at large. The 1954 charter also requires an adjustment of the boundaries of the five single-member councilmanic districts following each decennial census to reflect population shifts among the districts.

FN4. The difference in the two figures is due in part to the fact that proportionately more whites of voting age are registered to vote than are Negroes and in part to the fact that the age structures of the white and Negro populations of New Orleans differ significantly 72.3% Of the white population is of voting age, but only 57.1% Of the Negro population is of voting age. See U. S. Civil Rights Commission, The Voting Rights Act: Ten Years After 368, 383.

***135** In 1961, the city council redistricted the city based on the 1960 census figures. That reapportionment plan established four districts that stretched from the edge of Lake Pontchartrain on the north side of the city to the Mississippi River on the city's south side. The fifth district was wedge shaped and encompassed the city's downtown area. In one of these councilmanic districts, Negroes constituted a majority of the population, but only about half of the registered voters. In the other four districts white voters clearly outnumbered Negro voters. No Negro was elected to the New Orleans City Council during the decade from 1960 to 1970.

****1361** After receipt of the 1970 census figures the city council adopted a reapportionment plan (Plan I) that continued the basic north-to-south pattern of councilmanic districts combined with a wedge-shaped, downtown district. Under Plan I Negroes constituted a majority of the population in two districts, but they did not make up a majority of registered voters in any district. The largest percentage of Negro voters in a single district under Plan I was 45.2%. When the city submitted Plan I to the Attorney General pursuant to s 5, he objected to it, stating that it appeared to "dilute black voting strength by combining a number of black voters with a larger number of white voters in each of the five districts." He also expressed the view that "the district lines (were not) drawn as they (were) because of any compelling governmental need" and that the district lines did "not reflect numeric population configurations or considerations of district compactness or regularity of shape."

Even before the Attorney General objected to Plan I, the city authorities had commenced work on a second plan Plan II. [FN5] That plan followed the general north-***136** to-south districting pattern common to the 1961 apportionment and Plan I. [FN6] It produced Negro population majorities in two districts and a Negro voter majority (52.6%) in one district. When Plan II was submitted to the Attorney General, he posed the same objections to it that he had raised to Plan I. In addition, he noted that "the predominantly black neighborhoods in the city are located generally in an east to west progression," and pointed out that the use of north-to-south districts in such a situation almost inevitably would have the effect of diluting the maximum potential impact of the Negro vote. Following the rejection by the Attorney General of Plan II, the city brought this declaratory judgment action in the United States District Court for the District of Columbia.

FN5. The decision to draft a new plan was in large part attributable to the opposition to Plan I expressed by the residents of Algiers that part of New Orleans located south of the Mississippi River. The residents of Algiers have a common interest in promoting the construction of an additional bridge across the river. They had always been represented by one councilman, and they opposed Plan I primarily because it divided Algiers among three councilmanic districts.

FN6. The opposition to Plan I in Algiers, see n. 5, Supra, was quieted in Plan II by placing all of that section of the city in one councilmanic district.

[1] The District Court concluded that Plan II would have the effect of abridging the right to vote on account of race or color. [FN7] It calculated that if Negroes could elect city councilmen in proportion to their share of the city's registered voters, they would be able to choose 2.42 of the city's seven councilmen, and, if in proportion to their share of the city's population, to choose 3.15 councilmen. [FN8] But under Plan II the District Court concluded ***137** that, since New Orleans' elections had been mark by bloc voting along racial lines, Negroes would probably be able to elect only one councilman the candidate from the one councilmanic district in which a majority of the voters were Negroes. This difference between

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mathematical potential and predicted reality was such that "the burden in **1362 the case at bar was at least to demonstrate that nothing but the redistricting proposed by Plan II was feasible." 374 F.Supp., at 393. The court concluded that "(t)he City has not made that sort of demonstration; indeed, it was conceded at trial that neither that plan nor any of its variations was the City's sole available alternative." Ibid.[FN9]

FN7. The District Court did not address the question whether Plan II was adopted with such a "purpose." See n. 1, Supra.

FN8. This Court has, of course, rejected the proposition that members of a minority group have a federal right to be represented in legislative bodies in proportion to their number in the general population. See Whitcomb v. Chavis, 403 U.S. 124, 149, 91 S.Ct. 1858, 1872, 29 L.Ed.2d 363, 379. It is worth noting, however, that had the District Court applied its mathematical calculations to the five seats that were properly subject to its scrutiny, see part II-A of text, Infra, it would have concluded on the basis of registered voter figures that Negroes in New Orleans had a theoretical potential of electing 1.7 of the five councilmen. A realistic prediction would seem to be that under the actual operation of Plan II at least one and perhaps two Negro councilmen would in fact be elected. See Infra, at 1364.

FN9. At various points in its 40-page opinion the District Court described its understanding of the statutory criteria in terms somewhat different from those quoted in the text above. Since as will hereafter appear, our understanding of the meaning of s 5 does not in any event coincide with that of the District Court, no purpose would be served by isolating and separately examining the various verbalizations of the statutory criteria contained in its opinion.

As a separate and independent ground for rejecting Plan II, the District Court held that the failure of the plan to alter the city charter provision establishing two at-large seats had the effect in itself of "abridging the right to vote . . . on account of race or color." As the court put it: "(T) he City has not supported the choice of at-large elections by any consideration which would satisfy *138 the standard of compelling governmental interest, or the need to demonstrate the improbability of its realization through the use of single-member districts. These evaluations compel the conclusion that the feature of the city's electoral scheme by which two councilmen are selected at large has the effect of impermissibly minimizing the vote of its black citizens; and the further conclusion that for this additional reason the city's redistricting plan does not pass muster." Id., at 402. (Footnotes omitted.)

The District Court therefore refused to allow Plan II to go into effect. As a result there have been no councilmanic elections in New Orleans since 1970, and the councilmen elected at that time (or their appointed successors) have remained in office ever since.

II

A

[2] The appellants urge, and the United States on reargument of this case has conceded, that the District Court was mistaken in holding that Plan II could be rejected under s 5 solely because it did not eliminate the two at-large councilmanic seats that had existed since 1954. The appellants and the United States are correct in their interpretation of the statute in this regard.

The language of s 5 clearly provides that it applies only to proposed changes in voting procedures. "(D)iscriminatory practices . . . instituted prior to November 1964 . . . are not subject to the requirement of preclearance (under s 5)." U.S. Commission on Civil Rights, The Voting Rights Act: Ten Years After, p. 347. The ordinance that adopted Plan II made no reference to the at-large councilmanic seats. Indeed, since those seats had been established in 1954 by the city charter, an ordinance could not have altered them; any change in *139 the charter would have required approval by the city's voters. The at-large seats, having existed without change since 1954, were not subject to review in this proceeding under s 5. [FN10]

FN10. In reaching this conclusion, we do not decide the question reserved in Georgia v. United States, 411 U.S. 526, 535 n. 7, 93 S.Ct. 1702, 1708, 36 L.Ed.2d 472, 481, whether a district in a proposed legislative reapportionment plan that is identical to a district in the previously existing apportionment may be subject to review under s 5. The at-large seats in the present case were not even part of the 1961 plan, let alone of Plan II.

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B

The principal argument made by the appellants in this Court is that the District Court erred in concluding that the makeup of the five geographic councilmanic districts under Plan II would have the effect of abridging voting rights on account of **1363 race or color. In evaluating this claim it is important to note at the outset that the question is not one of constitutional law, but of statutory construction. [FN11] A determination of when a legislative reapportionment has "the effect of denying or abridging the right to vote on account of race or color," must depend, therefore, upon the intent of *140 Congress in enacting the Voting Rights Act and specifically s 5.

FN11. This Court has not before dealt with the question of what criteria a legislative reapportionment plan must satisfy under s 5. Last Term in City of Richmond v. United States, 422 U.S. 358, 95 S.Ct. 2296, 45 L.Ed.2d 245, the Court had to decide under what circumstances s 5 would permit a city to annex additional territory when that annexation would have the effect of changing the city's Negro population from a majority into a minority. The Court held that the annexation should be approved under the "effect" aspect of s 5 if the system for electing councilmen would likely produce results that "fairly reflect(ed) the strength of the Negro community as it exists after the annexation." 422 U.S. at 371, 95 S.Ct. at 2301, 45 L.Ed.2d. at 256. The City of Richmond case thus decided when a change with an adverse impact on previous Negro voting power met the "effect" standard of s 5. The present case, by contrast, involves a change with no such adverse impact upon the former voting power of Negroes.

The legislative history reveals that the basic purpose of Congress in enacting the Voting Rights Act was "to rid the country of racial discrimination in voting." South Carolina v. Katzenbach, 383 U.S., at 315, 86 S.Ct., at 812. Section 5 was intended to play an important role in achieving that goal:

"Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down. That practice had been possible because each new law remained in effect until the Justice Department or private plaintiffs were able to sustain the burden of proving that the new law, too, was discriminatory. . . . Congress therefore decided, as the Supreme Court held it could, 'to shift the advantage of time and inertia from the perpetrators of the evil to its victim,' by 'freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory.' " H.R.Rep.No.94-196, pp. 57-58. (Footnotes omitted.)

See also H.R.Rep.No.439, 89th Cong., 1st Sess., 9-11, 26; S.Rep.No.162, 89th Cong., 1st Sess., pt. 3, pp. 6-9, 24; H.R.Rep.No.91-397, pp. 6-8, U.S.Code Cong. & Admin.News 1970, p. 3277; H.R.Rep.No.94-196, pp. 8-11, 57-60; S.Rep.No.94-295, pp. 18-19, U.S.Code Cong. & Admin.News 1975, p. 781; South Carolina v. Katzenbach, supra, 383 U.S., at 335, 86 S.Ct., at 822, 15 L.Ed.2d. at 790.

By prohibiting the enforcement of a voting-procedure change until it has been demonstrated to the United States Department of Justice or to a three-judge federal court that the change does not have a discriminatory effect, Congress desired to prevent States from "undo(ing) or defeat(ing) the rights recently won" by Negroes. H.R.Rep.No.91-397, p. 8, U.S.Code Cong. & Admin.News 1970, p. 3284. Section 5 was intended *141 "to insure that (the gains thus far achieved in minority political participation) shall not be destroyed through new (discriminatory) procedures and techniques." S.Rep.No.94-295, p. 19, U.S.Code Cong. & Admin.News 1975, p. 785.

When it adopted a 7-year extension of the Voting Rights Act in 1975, Congress explicitly stated that "the standard (under s 5) can only be fully satisfied by determining on the basis of the facts found by the Attorney General (or the District Court) to be true whether the ability of minority groups to participate in the political process and to elect their choices to office is Augmented, diminished, or not affected by the change affecting voting . . . ." H.R.Rep.No.**1364 94-196, p. 60 (emphasis added). [FN12] In other words the purpose of s 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.

FN12. Cf. Mr. Justice Brennan's dissenting opinion in City of Richmond v. United States, supra, at 388, 95 S.Ct., at 2317, "I take to be the fundamental objective of s 5 . . . the protection of Present levels of voting effectiveness for the black population." (Emphasis in original.)

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[3] It is thus apparent that a legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the "effect" of diluting or abridging the right to vote on account of race within the meaning of s 5. We conclude, therefore, that such an ameliorative new legislative apportionment cannot violate s 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution.

[4] The application of this standard to the facts of the present case is straightforward. Under the apportionment of 1961 none of the five councilmanic districts had a clear Negro majority of registered voters, and no Negro ***142** has been elected to the New Orleans City Council while that apportionment system has been in effect. Under Plan II, by contrast, Negroes will constitute a majority of the population in two of the five districts and a clear majority of the registered voters in one of them. Thus, there is every reason to predict, upon the District Court's hypothesis of bloc voting, that at least one and perhaps two Negroes may well be elected to the council under Plan II. [FN13] It was therefore error for the District Court to conclude that Plan II "will . . . have the effect of denying or abridging the right to vote on account of race or color" within the meaning of s 5 of the Voting Rights Act. [FN14]

FN13. The intervenors have advised us of statistics indicating that as of 1974 the percentage of Negro registered voters in the city as a whole increased to 38.2%. Assuming the accuracy of these estimates, and that the increase has been proportionate in each councilmanic district, it is quite possible that by this time not only a majority of the population but also a majority of the registered voters in two of the Plan II districts are Negroes. See Taylor v. McKeithen, 499 F.2d 893, 896 (C.A.5).

FN14. It is possible that a legislative reapportionment could be a substantial improvement over its predecessor in terms of lessening racial discrimination, and yet nonetheless continue so to discriminate on the basis of race or color as to be unconstitutional. The United States has made no claim that Plan II suffers from any such disability, nor could it rationally do so. There is no decision in this Court holding a legislative apportionment or reapportionment violative of the Fifteenth Amendment. Cf. Wright v. Rockefeller, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512. The case closest to so holding is Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110, in which the Court found that allegations of racially motivated gerrymandering of a municipality's political boundaries stated a claim under that Amendment. The many cases in this Court involving the Fourteenth Amendment's "one man, one vote" standard are not relevant here. See Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506. But in at least four cases the Court has considered claims that legislative apportionments violated the Fourteenth Amendment rights of identifiable racial or ethnic minorities. See Fortson v. Dorsey, 379 U.S. 433, 439, 85 S.Ct. 498, 501, 13 L.Ed.2d 401, 405; Burns v. Richardson, 384 U.S. 73, 86-89, 86 S.Ct. 1286, 1293-1295, 16 L.Ed.2d 376, 387-389; Whitcomb v. Chavis, 403 U.S. 124, 149, 91 S.Ct. 1858, 1872, 29 L.Ed.2d 363, 379; White v. Regester, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314. Plan II does not remotely approach a violation of the constitutional standards enunciated in those cases.

***143** Accordingly, the judgment of the District Court is vacated, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

Judgment set aside and case remanded.

Mr. Justice STEVENS took no part in the consideration or decision of this case.

****1365** Mr. Justice WHITE, dissenting.

With Mr. Justice MARSHALL, I cannot agree that s 5 of the Voting Rights Act of 1965 reaches only those changes in election procedures that are more burdensome to the complaining minority than pre-existing procedures. As I understand s 5, the validity of Any procedural change otherwise within the reach of the section must be determined under the statutory standard whether the proposed legislation has the purpose or effect of abridging or denying the right to vote based on race or color.

This statutory standard is to be applied here in light

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of the District Court's findings, which are supported by the evidence and are not now questioned by the Court. The findings were that the nominating process in New Orleans' councilmanic elections is subject to majority vote and "anti-single-shot" rules and that there is a history of bloc racial voting in New Orleans, the predictable result being that no Negro candidate will win in any district in which his race is in the minority. In my view, where these facts exist, combined with a segregated residential pattern, s 5 is not satisfied unless, to the extent practicable, the new electoral districts afford the Negro minority the opportunity to achieve legislative representation roughly proportional to the Negro population ***144** in the community. Here, with a seven-member city council, the black minority constituting approximately 45% of the population of New Orleans, would be entitled under s 5, as I construe it, to the opportunity of electing at least three city councilmen more than provided by the plan at issue here.

Bloc racial voting is an unfortunate phenomenon, but we are repeatedly faced with the findings of knowledgeable district courts that it is a fact of life. Where it exists, most often the result is that neither white nor black can be elected from a district in which his race is in the minority. As I see it, Congress has the power to minimize the effects of racial voting, particularly where it occurs in the context of other electoral rules operating to muffle the political potential of the minority. I am also satisfied that s 5 was aimed at this end, among others, and should be so construed and applied. See City of Richmond v. United States, 422 U.S. 358, 370-372, 95 S.Ct. 2296, 2303-2305, 45 L.Ed.2d 245, 255-257 (1975).

Minimizing the exclusionary effects of racial voting is possible here because whites and blacks are not scattered evenly throughout the city; to a great extent, each race is concentrated in identifiable areas of New Orleans. But like bloc voting by race, this too is a fact of life, well known to those responsible for drawing electoral district lines. These lawmakers are quite aware that the districts they create will have a white or a black majority; and with each new district comes the unavoidable choice as to the racial composition of the district. It is here that s 5 intervenes to control these choices to the extent necessary to afford the minority the opportunity of achieving fair representation in the legislative body in question.

Applying s 5 in this way would at times require the drawing of district lines based on race; but Congress has this power where deliberate discrimination at the polls ***145** and the relevant electoral laws and customs have effectively foreclosed Negroes from enjoying a modicum of fair representation in the city council or other legislative body.

Since Plan II at issue in this case falls short of satisfying s 5 and since I agree with Mr. Justice MARSHALL that the city has failed to present sufficiently substantial justifications for its proposal, I respectfully dissent and would affirm the judgment of the District Court.

Mr. Justice MARSHALL, with whom Mr. Justice BRENNAN joins, dissenting.

Over the past 10 years the Court has, again and again, read the jurisdiction of s 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 89 Stat. 402, 404, 42 U.S.C. s 1973c (1970 ed., Supp. V), expansively so ****1366** as "to give the Act the broadest possible scope" and to reach "any state enactment which altered the election law of a covered State in even a minor way." Allen v. State Board of Elections, 393 U.S. 544, 566, 567, 89 S.Ct. 817, 832, 22 L.Ed.2d 1, 17 (1969). See also Georgia v. United States, 411 U.S. 526, 93 S.Ct. 1702, 36 L.Ed.2d 472 (1973); Perkins v. Matthews, 400 U.S. 379, 91 S.Ct. 431, 27 L.Ed.2d 476 (1971); South Carolina v. Katzenbach, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966). While we have settled the contours of s 5's jurisdiction, however, we have yet to devote much attention to defining s 5's substantive force within those bounds. Thus, we are faced today for the first time with the question of s 5's substantive application to a redistricting plan. Essentially, we must answer one question: When does a redistricting plan have the effect of "abridging" the right to vote on account of race or color?

The Court never answers this question. Instead, it produces a convoluted construction of the statute that transforms the single question suggested by s 5 into three questions, and then provides precious little guidance in answering any of them.

***146** Under the Court's reading of s 5, we cannot reach the abridgment question unless we have first determined that a proposed redistricting plan would "lead to a retrogression in the position of racial minorities," Ante, at 1364, in comparison to their position under the existing plan. The Court's conclusion that s 5 demands this preliminary inquiry is simply wrong; it finds no support in the language of the statute and disserves the legislative purposes

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behind s 5.

Implicitly admitting as much, the Court adds another question, this one to be asked if the proposed plan is not "retrogressive": whether "the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution." Ante, at 1364. This addition does much in theory, at least to salvage the Court's test, since our decisions make clear that the proper test of abridgment under s 5 is essentially the constitutional inquiry.

Still, I cannot accept the Court's awkward construction. Not only is the Court's multiple-step inquiry unduly cumbersome and an unnecessary burden to place upon the Attorney General and the District Court for the District of Columbia, but the Court dilutes the meaning of unconstitutionality in this context to the point that the congressional purposes in s 5 are no longer served and the sacred guarantees of the Fourteenth and Fifteenth Amendments emerge badly battered. And in the process, the Court approves a blatantly discriminatory districting plan for the city of New Orleans. I dissent.

I

A

The Fifteenth Amendment provides:

> "The right of citizens of the United States to vote shall not be denied or abridged by the United States ***147** or by any State on account of race, color, or previous condition of servitude." U.S. Const., Amdt. 15, s 1.

Although the Amendment is self-enforcing, litigation to secure the rights it guarantees proved time consuming and ineffective, while the will of those who resisted its command was strong and unwavering. Finally Congress decided to intervene. In 1965 it enacted the Voting Rights Act, designed "to rid the country of racial discrimination in voting." South Carolina v. Katzenbach, 383 U.S., at 315, 86 S.Ct., at 812, 15 L.Ed.2d, at 779. See also Id., at 308-315, 86 S.Ct., at 808-812, 15 L.Ed.2d, at 775-779. The Act proclaims that its purpose is "to enforce the fifteenth amendment to the Constitution . . . ," 79 Stat. 437; the heart of its enforcement mechanism is s 5. In language that tracks that of the Fifteenth Amendment, s 5 declares that no State covered by the Act shall enforce any plan with respect to voting different from that in effect on November 1, 1964, unless the Attorney General or a three-judge district ****1367** Court in the District of Columbia declares that such plan

> "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color . . . ." 42 U.S.C. s 1973c (1970 ed., Supp. V). [FN1]

FN1. Section 5 actually requires that "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" different from that in effect on November 1, 1964, be approved by the Attorney General or the District Court for the District of Columbia. 42 U.S.C. s 1973c (1970 ed., Supp. V). We have held that a redistricting plan is a "standard, practice, or procedure with respect to voting" within the meaning of s 5. Georgia v. United States, 411 U.S. 526, 93 S.Ct. 1702, 36 L.Ed.2d 472 (1973).

While the substantive reach of s 5 is somewhat broader than that of the Fifteenth Amendment in at least one regard the burden of proof is shifted from discriminatee ***148** to discriminator. [FN2] s 5 is undoubtedly tied to the standards of the Constitution. [FN3] Thus, it is questionable whether the "purpose and effect" language states anything more than the constitutional standard, [FN4] and it is ***149** clear that the "denying or abridging" phrase does no more than directly adopt the language of the Fifteenth Amendment.

FN2. We upheld the validity of the shifted burden of proof in South Carolina v. Katzenbach, 383 U.S. 301, 335, 86 S.Ct. 803, 822, 15 L.Ed.2d 769, 790 (1966).

FN3. "The Act suspends new voting regulations pending scrutiny by federal authorities to determine whether their use would violate the Fifteenth Amendment." Id., at 334, 86 S.Ct., at 822, 15 L.Ed.2d, at 790.

FN4. The Court's decisions relating to the relevance of purpose-and/or-effect analysis in testing the constitutionality of legislative enactments are somewhat less than a seamless web. The possible theoretical approaches are three: (1) purpose alone is the test of unconstitutionality, and effect is irrelevant, or relevant only insofar as it sheds light on purpose; (2) effect alone is the test, and purpose is irrelevant; and (3) purpose or effect, either alone or in combination, is sufficient to show unconstitutionality. At various times in

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recent years the Court has seemed to adopt each of these approaches.

In the two Fifteenth Amendment redistricting cases, Wright v. Rockefeller, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1964), and Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960), the Court suggested that legislative purpose alone is determinative, although language in both cases may be isolated that seems to approve some inquiry into effect insofar as it elucidates purpose. See 376 U.S., at 52, 84 S.Ct., at 603, 11 L.Ed.2d, at 512; 364 U.S., at 341, 81 S.Ct., at 127, 5 L.Ed.2d, at 113. See also 376 U.S., at 73-74, 84 S.Ct., at 614-615, 11 L.Ed.2d, at 525-526 (Goldberg, J., dissenting). McGowan v. Maryland, 366 U.S. 420, 453, 81 S.Ct. 1101, 1119, 6 L.Ed.2d 393, 414 (1961), an equal protection-First Amendment case, expressly states that effect is of relevance in imputing an improper purpose, but that legislation is invalidated only for having such a purpose. And City of Richmond v. United States, 422 U.S. 358, 378-379, 95 S.Ct. 2296, at 2307-2308, 45 L.Ed.2d, 245, at 260-261 (1975), suggests that bad purpose may invalidate a law under the Fifteenth Amendment even if there is no unconstitutional effect at all.

Completely contrary to these cases are those that hold that legislative purpose is wholly irrelevant to the constitutionality of legislation indeed, that purpose may not be examined at all and that a statute may be invalidated only if it has an unconstitutional effect. Palmer v. Thompson, 403 U.S. 217, 224-225, 91 S.Ct. 1940, 1944-1945, 29 L.Ed.2d 438, 444-445 (1971), and United States v. O'Brien, 391 U.S. 367, 384-385, 88 S.Ct. 1673, 1683-1684, 20 L.Ed.2d 672, 684-685 (1968), both vigorously attack purpose analysis and assert that Gomillion was decided as it was only because the statute in question had an unlawful effect. Between these two positions are the cases that hold that either an impermissible purpose or an impermissible effect may alone be sufficient to invalidate a law. Board of Education v. Allen, 392 U.S. 236, 243, 88 S.Ct. 1923, 1926, 20 L.Ed.2d 1060, 1065 (1968); Abington School District v. Schempp, 374 U.S. 203, 222, 83 S.Ct. 1560, 1571, 10 L.Ed.2d 844, 858 (1963). While there is no need here to synthesize these three positions and the various cases, if indeed a synthesis is possible, it should be clear that the language of purpose and effect selected by Congress for use in s 5 is not necessarily an expansion of the constitutional standard. Congress did no more than adopt the third of the tests that the Court itself has juggled over the years. See generally Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205 (1970).

In justifying its convoluted construction of s 5, however, the Court never deals with the fact that, by its plain language, s 5 does ****1368** no more than adopt, or arguably expand, [FN5] the constitutional standard. Since it has never ***150** been held, or even suggested, that the constitutional standard requires an inquiry into whether a redistricting plan is "ameliorative" or "retrogressive," A fortiori there is no basis for so reading s 5. While the Court attempts to provide a basis by relying on the asserted purpose of s 5 to preserve present Negro voting strength [FN6] it is wholly unsuccessful. What superficial credibility the argument musters is achieved by ignoring not only the statutory language, but also at least three other purposes behind s 5. [FN7]

FN5. We have recognized that s 5 of the Fourteenth Amendment gives Congress the power to expand the substantive reach of that Amendment. Katzenbach v. Morgan, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966). Undoubtedly, s 2 of the Fifteenth Amendment, under which the Voting Rights Act was enacted, confers similar power upon Congress with respect to the substantive reach of the Fifteenth Amendment. Thus, to the extent, if any, that analysis for purpose or for effect is not independently required for resolution of the constitutional question, see n. 4, Supra, Congress may be said to have expanded the constitutional inquiry in s 5 of the Voting Rights Act. Insofar as redistricting legislation is concerned, however, I believe a showing of purpose or of effect is alone sufficient to demonstrate unconstitutionality, and so I believe that in this context Congress enacted no more than the constitutional standard. Evaluation of the purpose of a legislative enactment is just too ambiguous a task to be the sole tool of constitutional analysis. See Palmer v. Thompson, supra, 403 U.S., at 224-225, 91 S.Ct., at 1944-1945, 29 L.Ed.2d, at 444-445; United States

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v. O'Brien, supra, 391 U.S., at 384-385, 88 S.Ct., at 1683-1684, 20 L.Ed.2d, at 684-685. Therefore, a demonstration of effect ordinarily should suffice. If, of course, purpose may conclusively be shown, it too should be sufficient to demonstrate a statute's unconstitutionality.

FN6. While the Court does quote language that suggests some of the other purposes that I see in the statute, Ante, at 1363, when it comes to giving substantive content to s 5, the Court relies solely on the purpose suggested in the text.
It may be that this single purpose looms so large to the Court because it thinks it would be counterproductive to bar enforcement of a proposed plan, even if discriminatory, that is at all less discriminatory than the pre-existing plan, which would otherwise remain frozen in effect. While this argument has superficial appeal, it is ultimately unrealistic because it will be a rare jurisdiction that can retain its pre-existing apportionment after the rejection of a modification by the Attorney General or District Court. Jurisdictions do not undertake redistricting without reason. In this case, for instance, the New Orleans City Charter requires redistricting every 10 years. If the plan before us now were disapproved, New Orleans would have to produce a new one or amend its charter. In other cases, redistricting will have been constitutionally compelled by our one-person, one-vote decisions. Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). The virtual necessity of prompt redistricting argues strongly in favor of rejecting "ameliorative" but still discriminatory redistricting plans. The jurisdictions will eventually have to return with a nondiscriminatory plan.

FN7. Equally unsuccessful is the Court's attempt to paint the "ameliorative" changes in this case as dramatic. Negroes constitute 45% Of the population of New Orleans and 34.5% Of the city's registered voters. Under the 1961 redistricting plan currently in effect in New Orleans, that population is distributed as follows:

District	Population % Negro	Registered Voters % Negro
A	31.6	22.7
B	62.2	50.2
C	40.2	24.6
D	43.7	36.3
E	49.4	42.8

App. 621. Under Plan II, which is at issue in this lawsuit, the same population is distributed in this manner:

District	Population % Negro	Registered Voters % Negro
A	29.1	22.6
B	64.1	52.6
C	35.8	23.3
D	43.5	36.8
E	50.6	43.2

App. 624.
Thus the positive change that convinces the Court that no inquiry into possible "abridgment" is necessary is the change from a majority of

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registered voters in District B of 50.2% (which the Court fails to mention) to what the Court calls a "clear" majority (although the Court has no idea what percentage of registered Negro voters actually vote) in that district of 52.6%. The Court also emphasizes that now Negroes constitute a majority of the population in two districts, whereas under the existing plan they are a majority in only one district. This beneficial change is accomplished by the shift from a minority of 49.4% Of the population in District E to a majority in that district of 50.6%.

***151 **1369** Thus, the legislative history of the Voting Rights Act makes clear, and the Court assiduously ignores, that s 5 was designed to preclude new districting plans that "perpetuate discrimination," [FN8] to prevent covered jurisdictions ***152** from "circumventing the guarantees of the 15th amendment" by switching to new, and discriminatory, districting plans the moment litigants appear on the verge of having an existing one declared unconstitutional, [FN9] and promptly to end discrimination in voting by pressuring covered jurisdictions to remove all vestiges of discrimination from their enactments before submitting them for preclearance. [FN10] None of these purposes is furthered by an inquiry into whether a proposed districting plan is "ameliorative" or "retrogressive." Indeed, the statement of these purposes is alone sufficient to demonstrate the error of the Court's construction.

FN8. H. R. Rep. No. 91-397, pp. 6-7 (1969), U.S.Code Cong. & Admin. News 1970, pp. 3282-3283. See also H. R. Rep. No. 439, 89th Cong., 1st Sess., 10-11 (1965), S. Rep. No. 162, 89th Cong., 1st Sess., pt. 3, pp. 8, 12 (1965), U.S. Code Cong. & Admin. News 1965, p. 2437; South Carolina v. Katzenbach, 383 U.S., at 315-316, 325, 86 S.Ct., at 811-812, 827, 15 L.Ed.2d, at 779-780, 790.

FN9. S. Rep. No. 94-295, p. 15 (1975), U. S. Code Cong. & Admin. News 1975, p. 781. See also H. R. Rep. No. 439, Supra, at 10-11. It is for this reason that the existing plan remains "frozen" in effect while the proposed plan is submitted for approval. Thus, any constitutional litigation may proceed without interruption, unless the new plan is itself found to be nondiscriminatory and is substituted. See H. R. Rep. No. 94- 196, p. 58 (1975). Either way, the litigant obtains the relief he seeks a nondiscriminatory apportionment.

FN10. The pressure of having proposed plans judged by rigorous standards and the fear of litigation over new plans were thought to encourage covered jurisdictions to end all discrimination in voting.
"The preclearance procedure and this is critical serves psychologically to control the proliferation of discriminatory laws and practices because each change must first be federally reviewed. Thus section 5 serves to prevent discrimination before it starts." 115 Cong. Rec. 38486 (1969) (remarks of Rep. McCulloch).
See also Id., at 38517 (remarks of Rep. Anderson); U. S. Commission Civil Rights, The Voting Rights Act: Ten Years After, pp. 30-31 (1975).
The Act's limited term is proof that Congress intended to secure prompt, and not gradual, relief. Originally, the Act was intended to be in effect for only five years. While it has been twice extended, each extension was also for only a few years; five more years in 1970, and seven more years in 1975. Thus, it cannot be argued that the Act contemplated slow forward movement, which the Court's construction sanctifies, rather than a quick remedial "fix."

***153** All the purposes of the statute are met, however, by the inquiry s 5's language plainly contemplates: whether, in absolute terms, the covered jurisdiction can show that its proposed plan meets the constitutional standard. Because it is consistent with both the statutory language and the legislative purposes, this is the proper construction of the provision. Thus, it is the effect of the plan itself, rather than the effect of the change in plans, that should be at issue in a s 5 proceeding. [FN11]

FN11. While I read "abridge" in both s 5 and the Fifteenth Amendment as primarily involving an absolute assessment of dilution of Negro voting power from its potential, I do not hold that recognition of a relative change is absolutely irrelevant to this determination. For instance, it may often be useful to glean some indication of purpose from a minority's relative position under the existing and proposed plans. Moreover, there will be circumstances annexations, for example where dilution can fairly be measured only in comparison to the prior scheme. See City of Richmond v. United States, 422 U.S., at 378, 95 S.Ct., at 2307, 45 L.Ed.2d, at 260. Cf. Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960).

Ultimately, the Court admits as much by adding an inquiry into whether the proposed plan, even if

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"ameliorative," is constitutional. After this admission, I cannot understand why the Court bothers at all with its preliminary inquiry into the nature of the change of plans, since the inquiry not only adds nothing, but will, I fear, prove to **1370 be a time-consuming distraction from the important business of assessing the constitutionality of the proposed plan. [FN12] Except for this unnecessary step, however, *154 the Court's final reading of the statute, on its face, no more than duplicates my own. [FN13] Nonetheless, I still do not accept the Court's approach. After properly returning *155 the constitutional inquiry to the s 5 proceeding, the Court inexplicably tosses off the question in a footnote, and never undertakes the analysis that both our constitutional cases and our s 5 cases have demanded. [FN14] This **1371 ultimate denigration of the constitutional standard is a result far short of the promise Congress held out in *156 enacting, and re-enacting the Voting Rights Act, and it is one in which I cannot join.

FN12. Today the Court finds it simple to conclude that Plan II is "ameliorative," but it will not always be so easy to determine whether a new plan increases or decreases Negro voting power relative to the prior plan. To the contrary, I believe the Court's test will prove unduly difficult of application and excessively demanding of judicial energies.
For instance, the Court today finds that an increase in the size of the Negro majority in one district, with a concomitant increased likelihood of electing a delegate, conclusively shows that Plan II is ameliorative. Will that always be so? Is it not as common for minorities to be gerrymandered into the same district as into separate ones? Is an increase in the size of an existing majority ameliorative or retrogressive? When the size of the majority increases in one district, Negro voting strength necessarily declines elsewhere. Is that decline retrogressive? Assuming that the shift from a 50.2% To a 52.6% Majority in District B in this case is ameliorative, and is not outweighed by the simultaneous decrease in Negro voting strength in Districts A and C, when would an increase become retrogressive? As soon as the majority becomes "safe"? When the majority is achieved by dividing pre-existing concentrations of Negro voters?
Moreover, the Court implies, Ante, at 140 n. 11, by its attempt to harmonize its holding today with City of Richmond v. United States, 422 U.S. 358, 95 S.Ct. 2296, 45 L.Ed.2d 245 (1975), ante, at 1363 n. 11, that this preliminary inquiry into the nature of the change is the proper approach to all s 5 cases. The Court's test will prove even more difficult of application outside the redistricting context. Some changes just do not lend themselves to comparison in positive or negative terms; others will always seem negative or positive no matter how good or bad the result. For instance, when a city goes from an appointed town manager to an elected council form of government, can the change ever be termed retrogressive, even if the new council is elected at large and Negroes are a minority? Or where a jurisdiction in which Negroes are a substantial minority switches from at-large to ward voting, can that change ever constitute a negative change, no matter how badly the wards are gerrymandered?
I realize, of course, that determining the ultimate question of "abridgment" may involve answering questions similar to those I have posed above and that those questions will be just as difficult to answer. My point, however, is exactly that the inquiry is a difficult one, and that there is no reason substantially to compound that complexity by posing an unnecessary and equally complex preliminary inquiry.

FN13. As I understand it, the Court views the constitutional inquiry as part of the s 5 inquiry. See ante, at 1364. Thus, the burden of proof on constitutional issues, as on all s 5 issues, is on the covered jurisdiction. Although the Court's treatment of the point is ambiguous, I read its observation that "(t)he United States has made no claim" that Plan II is unconstitutional, ante, at 1364 n. 14, as indicating only that it is for the United States to raise the issue of unconstitutionality in the s 5 proceeding, and not as suggesting that, once the issue is raised, the United States must prove the claim as well. Any other reading would frustrate still another legislative purpose. The Act freezes the existing plan and places the burden of proof on the covered jurisdiction to justify the proposed plan expressly in order "to shift the advantage of time and inertia from the perpetrators of the evil to its victims." South Carolina v. Katzenbach, 383 U.S., at 328, 86 S.Ct., at 818, 15 L.Ed.2d, at 786. See also H.R.Rep.No.94-196, p. 58 (1975). I do not understand the Court, in bringing the constitutional issue in through the back door, to eliminate the primary procedural advantage to the United States of the s 5 proceeding.

FN14. The Court's treatment of the constitutional questions is all the more puzzling if it intends to

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confine its constitutional analysis to those seats brought before the District Court in the s 5 proceeding. In this case, the Court holds that it may avoid looking at the two at-large seats on the New Orleans City Council in deciding the s 5 claim, but see Infra, at 1372, and its exclusion of those seats appears to extend to its ultimate constitutional inquiry as well. Yet, it is obvious that an independent constitutional challenge to Plan II would also include a challenge to the at-large seats and that such a broadened attack would be considerably more difficult to reject than the question the Court evidently considers. The change in focus caused by an expanded challenge both accentuates the dilution of the Negro vote in New Orleans, see n. 19, infra, and necessitates recognition of the particularly dilutive effects of at-large districting schemes. See White v. Regester, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973). If the Court has ignored these factors in finding Plan II constitutional, it has engaged in no more than a time-consuming hypothetical adjudication, for its holding will surely not bar a future constitutional challenge to the entire scheme.

B

The proper test in s 5 redistricting cases is preordained by our prior cases, which are ignored today by the Court. As suggested above, we have repeatedly recognized the relevance of constitutional standards to the proper construction of s 5. Thus, we have held that in passing that provision " 'Congress intended to adopt the concept of voting articulated in Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), and protect Negroes against a dilution of their voting power.' " Perkins v. Matthews, 400 U.S., at 390, 91 S.Ct., at 438, 27 L.Ed.2d, at 486, quoting Allen v. State Board of Elections, supra, 393 U.S., at 588, 89 S.Ct., at 843, 22 L.Ed.2d, at 30 (opinion of Harlan, J.). See also Georgia v. United States, 411 U.S., at 532-533, 93 S.Ct., at 1706-1707, 36 L.Ed.2d, at 479-480; Allen v. State Board of Elections, 393 U.S., at 565-566, 569, 89 S.Ct., at 831-832, 833, 22 L.Ed.2d, at 16-17, 19. [FN15] In the Fourteenth Amendment Reynolds lines of cases, we have made clear that dilution of voting power refers to resulting voting strength that is something less ***157** than potential (*i. e.*, proportional) power, not to a reduction of existing power. *White v. Regester*, 412 U.S., 755, 765-766, 93 S.Ct. 2332, 2339-2340, 37 L.Ed.2d 314, 324-325 (1973); Whitcomb v. Chavis, 403 U.S. 124, 149, 91 S.Ct. 1858, 1872, 29 L.Ed.2d 363, 379 (1971). Nonetheless, we have also acknowledged that a showing of less than proportional representation of Negroes by Negro-elected representatives is not alone sufficient to prove unconstitutional dilution:

FN15. Because I read s 5 as incorporating the standards of the Fifteenth Amendment, see nn. 4-5, supra, I read these cases as holding, implicitly, that the Fourteenth and Fifteenth Amendments mandate the same test for assessing the validity, on racial grounds, of legislative apportionments. Since a person whose right to vote is denied or abridged on account of race is likewise denied equal protection of the laws, borrowing from the developed corpus of Fourteenth Amendment law is entirely appropriate.
Seeking another source for a s 5 test is particularly appropriate given the scarcity of Fifteenth Amendment case law. Wright v. Rockefeller, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1964), and Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960), the only relevant Fifteenth Amendment cases, predate not only the Voting Rights Act, its incorporation of the language of the Fifteenth Amendment, and our cases construing that incorporation, but also all the Fourteenth Amendment developments discussed in the text. For these reasons, and because neither case states a general test, Wright And Gomillion are of no help at all in formulating a test for s 5 cases.

"To sustain such claims (of dilution), it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." White v. Regester, supra, 412 U.S., at 765-766, 93 S.Ct., at 2339, 37 L.Ed.2d, at 324.

See also Whitcomb v. Chavis, supra, 403 U.S., at 149, 91 S.Ct., at 1872, 29 L.Ed.2d, at 379. [FN16]

FN16. The Court refers to the cited page for the proposition that members of a minority group have no federal right "to be represented in legislative bodies in proportion to their number in the general population." Ante, at 1361 n. 8. Whitcomb v. Chavis stands for no such proposition. The language the Court refers to is substantively identical to that quoted in the text and supports only the notion that there is no right to proportional representation absent evidence of denial of access to the political process.

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****1372** It is this constitutionally based concept of dilution that we have held to govern in s 5 proceedings. The concept may be readily transferred to the s 5 context simply by adjusting for the shifted burden of proof. Thus, if the proposed redistricting plan underrepresents minority group members, the burden is on the covered ***158** jurisdiction to show that "the political processes leading to nomination and election were . . . equally open to participation by the group in question." [FN17] If the jurisdiction cannot make such a showing, then the proposed plan must be rejected, unless compelling reasons for its adoption can be demonstrated. [FN18]

FN17. The cases make clear that the inquiry is not meant to be limited to the ability of the minority group to participate in the voting plan under attack, but also includes sweeping analysis of the minority group's past and present treatment by the jurisdiction before the court. White v. Regester, 412 U.S., at 766-767, 93 S.Ct., at 2339-2340, 37 L.Ed.2d, at 324-325; Whitcomb v. Chavis, 403 U.S., at 149-153, 91 S.Ct., at 1872-1874, 29 L.Ed.2d, at 379-382.

FN18. For instance, a city with a 20% Negro population and a five-member council elected in wards might be able to justify the placement of only 20% Minority population in each district, despite a history of denial of access to the political process, by showing that the minority population was perfectly distributed throughout the municipality so that the creation of a Negro-majority ward was an impossibility. On the other hand, again assuming a history of denial of access to the political process, such a plan could not survive attack if the 20% Negro population of each ward were achieved by dividing five ways a concentrated bloc of Negro voters located in the center of the city.

II

Application of these standards to the case before us is straightforward. Preliminarily, while I agree with the Court that the two at-large seats on the New Orleans City Council are not themselves before the Court for approval and cannot serve as an independent basis for the rejection of Plan II, I do not think Plan II should be assessed without regard to the seven-member council it is designed to fill. Proportional representation of Negroes among the five district seats on the council does not assure Negroes proportional representation on the entire council when, as the District Court found, the two at-large seats will be occupied by white-elected members. ***159** The Court's approach of focusing only on the five districts would allow covered municipalities to conceal discriminatory changes by making them a step at a time, and sending one two or three-district alteration after another to the Attorney General for approval. If nothing beyond the districts actually before him could be considered, discriminatory effects could be camouflaged and the prophylactic purposes of the Act readily evaded. [FN19]

FN19. This effect is clear in this case, where Negroes constitute 34.5% Of the New Orleans electorate. Out of seven seats, Negroes should reasonably expect to control at least two. In considering only five seats, the Court suggests properly, given its self-imposed limitation that Negroes should have an expectancy of only one seat. Ante, at 1361 n. 8. If only two of the five districts were before us, and assuming a 34.5% Minority share of the voting population in those districts, the Court could properly conclude that Negroes could lay claim to neither of the two seats. Thus, under the Court's approach, the smaller the number of seats that the city may present for consideration, the grosser the discrimination that may be numerically tolerated.

Thus the District Court correctly began by considering the seven-member council and a districting plan that given New Orleans' long history of racial bloc voting, [FN20] ****1373** allows Negroes the expectation of no more than one seat (14% Of the council), if that, in a city with a 34.5% Negro voting population. Manifestly, the plan serves to underrepresent the Negro voting population. The District Court then, properly, turned to consider whether Negroes are excluded from full participation in the political processes in New Orleans. The court found considerable ***160** evidence of both past and present exclusion, none of which is seriously contested here. [FN21]

FN20. The tendency to racial bloc voting in New Orleans is a finding of fact by the District Court that is not challenged here. Such voting was encouraged until 1964 by a Louisiana statute, declared unconstitutional in Anderson v. Martin, 375 U.S. 399, 84 S.Ct. 454, 11 L.Ed.2d 430 (1964), that required the race of each candidate to be printed on the ballots used in all elections within the State.

FN21. Appellants challenge the propriety of looking at this evidence in assessing the effect of Plan II, not its accuracy.

The court found that Louisiana's majority-vote requirement and "anti-single-shot" requirement operate as

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a practical matter to defeat Negroes in any district in which they do not constitute a majority, [FN22] that residual effects of Louisiana's long history of racial discrimination not only in voting, but also in public schools, public assemblies, public recreational facilities, public transportation, housing, and employment, remain; and that city officeholders have generally been unresponsive to the needs of the Negro community. The court looked to the many tactics that, until recently, had been employed with remarkable success to keep Negroes from voting in the State. See Louisiana v. United States, 380 U.S. 145, 147-150, 85 S.Ct. 817, 819-821, 13 L.Ed.2d 709, 711-713 (1965). And the court found that Negro access to the political process is even further narrowed by the fact that candidates in the all-important Democratic primary run on tickets. For a city council candidate to win nomination, which is tantamount to victory in the general election, it is critical to be placed on the ticket of the winning, always white, mayoral candidate. Negro candidates for city council, however, have never been placed on such a ticket. Indeed, no Negro has ever ***161** been elected to the city council, and the court found that on the rare occasions when a Negro has been elected to any office in the city, it has been because of the support of white candidates or of the white political organization, not because of the power of the Negro electorate. These findings plainly support the District Court's conclusion that the political processes of New Orleans are not open to Negroes on an equal basis with whites.

FN22. The majority-vote requirement is a rule that the winner of an election must have a majority of the vote. Thus, in a race involving three or more candidates, a plurality of voters cannot elect their candidate. If no candidate wins a majority, there is a run-off election.
The "anti-single-shot" rule is a requirement that in a multi-member district the voter must vote for as many candidates as there are seats to be filled. Thus, although the voter may be interested in only one of the candidates, he must vote for others as well.

Since Negroes are underrepresented by Plan II and have been denied equal access to the political processes in New Orleans, Plan II infringes upon constitutionally protected rights, and only a compelling justification can save the plan. The very nature of the Negro community in New Orleans and the manner of its distortion by Plan II immediately place the city's explanations in a suspect light. The Negro community is not dispersed, but rather is collected in a concentrated curving band that runs roughly east-west. The districts in Plan II run north-south and divide the Negro community into five parts. Counsel for intervenor Jackson vividly described the effect of this division at oral argument:

> "You can walk from Jefferson Parish throughout the city for eight or ten miles through the St. Bernard Parish line and not see a white face along that band, that black belt, that parallels the river in a curve fashion throughout the city. White people live in the very wealthy sections of town out by the lake and along St. Charles Avenue to the river. The rest is left over for blacks, and these are heavy concentrations, and that plan devised by the City Council slices up that population like so many pieces of bologna . . . ." Tr. of Oral Arg. 30.

****1374** As Jonathan A. Eckert, the council staff member primarilyresponsible ***162** for drafting Plan II, conceded in the District Court, the "inevitable result" of Plan II's north-south orientation is "to have districts in which blacks are generally in the minority, or at the most in a bare majority." 2 App. 346.

New Orleans relies on seven goals that it claims mandate a north-south scheme such as Plan II. The city's own belief in this conclusion is questionable in light of Mr. Eckert's testimony in the District Court that he and his staff had drafted at least two east-west plans that satisfied them. 1 App. 336-337. In any case, however, the asserted goals, whether taken alone or in combination, do not establish a compelling justification for the plan. One claimed purpose is to prevent dilution of the vote of minority groups. Plan II plainly does not achieve this goal. Two other asserted aims are to achieve substantial numerical equality among the five districts and to keep the resultant districts compact and contiguous. Both aims can be accomplished by any number of east-west plans as well. Three more proffered justifications are to preserve ward and precinct lines, natural boundaries, and manmade boundaries. But there are findings that ward lines cannot be observed in any case because of one-person, one-vote restrictions, and that precincts are sufficiently small that their integrity can be honored in east-west districts. This latter fact minimizes any adverse effects of violating natural and manmade boundaries, except to the extent that they divide communities of different social or economic interests. And Plan II only erratically keeps such communities intact.

It is only the seventh of the proffered goals that, if compelling, mandates a north-south scheme: keeping incumbents apart in the new districts so that they will ***163** not have to run against one another for re-election. [FN23] Four of the five district councilmen live in an east-west line along the lake in the northern part of the cy. East-west districts would place all four in the same one or two districts, 1 App. 125, 232, 235, and north-south lines are therefore necessary if these councilmen are to remain

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apart. 2 App. 344. While the desire to keep incumbents in separate districts may have merit in some contexts, it surely cannot stand alone to justify the substantial dilution of minority voting rights found here.

FN23. The city asserts that its seventh goal is to retain "historic and traditional councilmanic district boundaries" so as to "preserve continuity within the electorate." Brief for Appellants 28-29. In fact, the record is conclusive that the goal was purely to keep incumbents apart. 1 App. 206-207; 2 App. 344, 557.

Thus, the city has failed to show an acceptable justification for the racially dilutive effect of Plan II. Accordingly, the District Court correctly concluded that appellants failed to demonstrate that Plan II would not have the effect of abridging the right to vote on account of race, and correctly denied the requested declaratory judgment. [FN24]

FN24. While the Court today finds that the District Court erred in finding a discriminatory effect, it does not address the issue not reached by the District Court: whether Plan II was drafted with a discriminatory purpose. Of course, this question remains on remand. See City of Richmond v. United States, 422 U.S., at 378-379, 95 S.Ct., at 2307-2308, 45 L.Ed.2d, at 260-261.

425 U.S. 130, 96 S.Ct. 1357, 47 L.Ed.2d 629

Briefs and Other Related Documents (Back to top)

• 1975 WL 173741 (Appellate Brief) Supplemental Brief for the United States (Nov. 04, 1975)

• 1975 WL 184951 (Appellate Brief) Supplemental Brief for the United States (Nov. 04, 1975)

• 1975 WL 184950 (Appellate Brief) Supplemental Brief for Appellees Johnny Jackson, Jr., et al. (Oct. 06, 1975)

• 1975 WL 173743 (Appellate Brief) Supplemental Brief for Appellees Johnny Jackson, Jr., et al (Oct. 01, 1975)

• 1975 WL 173739 (Appellate Brief) Brief for the United States (Mar. 19, 1975)

• 1975 WL 173738 (Appellate Brief) Brief for Appellees Johnny Jackson, Jr., et al (Mar. 06, 1975)

• 1975 WL 173735 (Appellate Brief) Brief for Appellants (Jan. 22, 1975)

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