Testimony of Dr. Peyton McCrary

Before the House Judiciary Committee,
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

When the United States Supreme Court decided *Shelby County v. Holder* in 2013,[1] it effectively eliminated one of the key provisions of the Voting Rights Act. The "preclearance" requirements set forth in Section 5 of the Act applied only to certain jurisdictions – for the most part former Confederate states – which were required to obtain prior federal government approval of all voting changes before they could be enforced. The Court found, by a 5-4 vote, that the formula determining which states and counties were covered by the preclearance requirement unconstitutional.[2] In the view of the five conservative justices in the majority, the coverage formula no longer identified the parts of the country where present-day racial discrimination affecting voting are concentrated. Chief Justice John Roberts, writing for the five justices in the majority, described the coverage formula as out of date, an artifact from an earlier time. In his view much had changed in the South since the systematic racial discrimination affecting registration and voting in the years preceding adoption of the Act.[3]

The coverage formula had not changed substantially since its original enactment in 1965, when Congress based the targeted jurisdictions on data showing where literacy

[1] 57 U.S. 529 (2013).

[2] The coverage formula was found in Section 4(b) of the Act.

[3] 57 U.S. 529 (2013).

tests or other discriminatory devices were accompanied by low voter registration and turnout rates in the presidential election of 1964. The formula, by design, focused pre-clearance coverage on states in the American South, where federal courts had made numerous findings of official racial discrimination affecting registration and voting – that is, *vote denial*. Congress extended the pre-clearance provisions in 1970, 1975, 1982, 1992 and finally, for an additional 25 years, in 2006. In 1975 the concept of "tests or devices" was expanded to include jurisdictions that had supplied English-only election information but had significant numbers of non-English speaking voters.[4] Despite these changes, the coverage formula continued to be based on political participation rates, as did its geographic reach: it largely covered the old Confederacy.

The formula adopted in 1965 was designed to identify states and counties where racial discriminatory vote *denial* exists. Many of the Department of Justice objections to voting changes beginning in the 1970s – as well as denials of preclearance by three-judge courts in the District of Columbia – addressed problems of minority vote *dilution* instead. Because the coverage formula was not altered by using new data to identify jurisdictions where *both* vote denial or abridgement *and* vote dilution were sufficiently harmful to justify a preclearance requirement, it appears, the majority in *Shelby County* chose to ignore the extensive record of discriminatory voting changes that would have diluted minority voting strength – including intentionally discriminatory changes – enacted by states and counties but blocked by Section 5 objections. The only part of

[4] United States Commission on Civil Rights, *The Voting Rights Act: Unfulfilled Goals* (Washington, D.C., 1981), 206-44.

the record on which the majority focused was evidence that voter participation had approached parity between whites and African Americans – the evidence that demonstrated systematic vote denial of the sort that justified finding Section 5 constitutional in past Supreme Court decisions.[5]

The four dissenters had an entirely different view of the record before Congress in 2006. To the dissenters the question before the Court was, as four legal scholars put it, "whether problems with racial discrimination in voting continue to exist *within the previously covered jurisdictions*."[6] That was also the focus of the voluminous record before Congress in 2006.

The decision in *Shelby County* removed a uniquely powerful tool for combating laws that threaten "backsliding" in minority voting rights and signaled the end of an era. What is left for advocates of minority voting rights is filing lawsuits under Section 2 of the Act, which authorizes affirmative attacks on new election laws believed to have the potential of minimizing the voting strength of minority citizens or of abridging their opportunity to register and cast a ballot.[7] There is no geographic "coverage formula" for

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[5] 570 U.S. at 547-48.

[6] Samuel Issacharoff, Pamela S. Karlan, Richard H. Pildes, and Nathaniel Persily, *The Law of Democracy: Legal Structure of the Political Process* (Fifth Edition. St. Paul, MN, 2016), 762.

[7] Where minority plaintiffs are challenging the use of at-large elections or racially discriminatory redistricting plans, the case law includes many decisions favorable to their claims of minority vote dilution. The key factor in such cases has been statistical assessment of the degree to which voting patterns are polarized along racial lines. The greatest impact of Section 2 was in the 1980s in the largely Southern jurisdictions previously defined by the VRA's Section 4(b). Chandler Davidson and Bernard

Section 2; its coverage is nationwide. Its constitutionality has been upheld in numerous lower court decisions over the last three decades.[8]

I have been asked to explain how the Voting Rights Act worked from the time of its adoption in 1965 until now. Let me begin by describing the immediate circumstances in which President Lyndon B. Johnson and the Congress joined forces to enact what has been called the most significant civil rights legislation in the nation's history.[9]

In 1960 African Americans in the South were substantially disfranchised by racially discriminatory registration procedures. Fewer than one out of three blacks of voting age in the region were registered, and whites were registered at substantially

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Grofman (eds.), *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990* (Princeton, N.J., Princeton University Press, 1994). Racially-polarized voting may, moreover, sometimes be as extreme in the second decade of the 21st century as it has ever been. Stephen Ansolabehere, Nathaniel Persily and Charles Stewart, "Race, Region, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act," 123 *Harv. L. Rev.* 1385 (2013).

[8] See, e.g., *United States v. Blaine County, Montana,* 157 F. Supp. 2d 1145 (D. Mont. 2001), *aff'd* 363 F.3d 877 (9th Cir. 2004).

[9] Daniel McCool, "Meaningful Votes," in McCool (ed.), *The Most Fundamental Right: Contrasting Perspectives on the Voting Rights Act* (Bloomington, Indiana University Press, 2012), 4-5; Timothy G. O'Rourke, "The 1982 Amendments and the Voting Rights Paradox," in Bernard Grofman and Chandler Davidson (eds.), *Controversies in Minority Voting: The Voting Rights Act in Perspective* (Washington, D.C., The Brookings Institution, 1992), 85; Hugh Davis Graham, "Voting Rights and the American Regulatory State," *ibid.*, 177. Richard M. Valelly, *The Two Reconstructions: The Struggle for Black Enfranchisement* (Chicago, University of Chicago Press, 2004), 3, refers to the Act as "the turning point in the second Reconstruction." At his last press conference President Lyndon B. Johnson told reporters passage of the Voting Rights Act was his proudest accomplishment in the White House: Steven F. Lawson, *In Pursuit of Power: Southern Blacks & Electoral Politics, 1965-1982* (New York, Columbia University Press, 1985, 4.

higher rates. In Alabama, for example, only 14 percent of African American adults were registered, as compared with 64 percent of white adults.[10] Not surprisingly, state legislatures in the region were all white, although a few local governments had elected a black person to public office from time to time in the years since World War II.[11]

By 1990 this portrait of inequality had been transformed beyond recognition. Formal barriers to registration and voting no longer existed, and in some localities African American registration and turnout approached parity with whites. Black officeholding had become routine and in some jurisdictions approached proportionality, as a result of the elimination of racially discriminatory at-large election procedures.[12]

How can we account for this remarkable transformation in Southern electoral politics in a period of only 30 years? One aspect of this change is well understood: the substantial elimination of racial barriers to registration and voting, was due primarily to

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[10] David J. Garrow, *Protest at Selma: Martin Luther King, Jr., and the Voting Rights Act 0f 1965* (New Haven, Ct., Yale University Press, 1978), 11; United States Commission on Civil Rights, *Voting* (Washington, D.C., G.P.O., 1961), 252-58, 260-63, 266-69, 278-83, 302-07 (Tables 1, 2, 4, 6, 9, 13). The Commission's data for certain states are incomplete.

[11] United States Commission on Civil Rights, *Political Participation* (Washington, D.C., G.P.O., 1968), 214-21 (Appendix VI); Donald R. Matthews and James W. Prothro, *Negroes and the New Southern Politics* (New York, Harcourt, Brace, and World, 1966), 52, 176-77; Everett Carl Ladd, Jr., *Negro Political Leadership in the South* (Ithaca, N.Y., Cornell University Press, 1966), 29-30; Numan V. Bartley, *The New South, 1945-1980* (Baton Rouge, Louisiana State University Press, 1995), 175.

[12] Chandler Davidson and Bernard Grofman (eds.), *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990* (Princeton, N.J., Princeton University Press, 1994). This is not to say, however, that all jurisdictions had proportionality in representation or that all discriminatory electoral rules had been eliminated.

the adoption and implementation of the Voting Rights Act of 1965.[13] The elimination of at-large election systems and racially discriminatory districting plans, on the other hand, resulted from a more complex process in which litigation in the federal courts played a key role, along with administrative preclearance review by the Civil Rights Division of the Department of Justice.[14]

By the beginning of 1965, both President Johnson and supporters of minority voting rights in Congress had decided that litigation by itself would never provide an effective franchise in the South. Not all federal judges were willing to disturb the status quo.[15] Even those judges who sought to eliminate discriminatory barriers found that every time the courts struck down one procedure Southern local officials or state legislators devised newer, more subtle ways of minimizing black voter registration. Frustrated with the slow progress of the jurisdiction-by-jurisdiction campaign before

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[13] National policy is explained in Steven F. Lawson, *Black Ballots: Voting Rights in the South, 1944-1969* (New York, Columbia University Press, 1976), and Lawson, *In Pursuit of Power: Southern Blacks and Electoral Politics, 1965-1982* (New York, Columbia University Press, 1985). For the quantitative evidence, see James E. Alt, "The Impact of the Voting Rights Act on Black and White Voter Registration in the South," in Davidson and Grofman (eds.), *Quiet Revolution in the South*, 351-77, 452-59.

[14] In 1957 Congress adopted a Civil Rights Act that created a Civil Rights Division in the Department of Justice and gave it authority to bring constitutional challenges to racially discriminatory voting practices. Lawson, *Black Ballots*, 86-89, 93, 109-10, 115, 134-39; Warren M. Christopher, "The Constitutionality of the Voting Rights Act of 1965," 18 *Stan. L. Rev*. 3-4 (1965).

[15] See generally Charles V. Hamilton, *The Bench and the Ballot: Southern Federal Judges and Black Voters* (New York, Oxford University Press, 1973), and Donald S. Strong, *Negroes, Ballots, and Judges: National Voting Rights Legislation in the Federal Courts* (Tuscaloosa, University of Alabama Press, 1968).

often hostile Southern courts, the President asked the Civil Rights Division to draft a strong voting rights law substantially increasing the Department's enforcement powers.[16]

The key to understanding the structure of the Voting Rights Act is that the bill submitted to Congress by the administration of Lyndon B. Johnson - and ultimately enacted by Congress with only minor changes - was drafted by lawyers in the Appeals and Research Section of the Civil Rights Division. The lawyers had completed a draft bill by March 5, 1965, two days *before* state troopers assaulted civil rights marchers on the Edmund Pettus Bridge in Selma, Alabama.[17] Not surprisingly, the bill was shaped by lessons the lawyers of the Civil Rights Division learned in winning 32 voting rights cases – decided under the Fifteenth Amendment – in the federal courts of the deep

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[16] Garrow, *Protest at Selma*, 36-39, 41-42; Christopher, "The Constitutionality of the Voting Rights Act," 5-9; Derfner, "Racial Discrimination and the Right to Vote," 546-50.

[17] I base this assessment on two careful and detailed reconstructions of the drafting process, David J. Garrow, *Protest at Selma: Martin Luther King, Jr., and the Voting Rights Act of 1965* (New Haven, Ct., Yale University Press, 1978), and Brian J. Landsberg, *Free At Last to Vote: Alabama Origins of the Voting Rights Act* (Lawrence, University Press of Kansas, 2007), as well as my own examination of drafts and memoranda from persons involved in the drafting process in the Harold Greene Papers in the Library of Congress. Working under the direction of Harold Greene, chief of the Appeals and Research Section of the Civil Rights Division, with significant input from the office of Solicitor General Archibald Cox and the Office of Legal Counsel, Landsberg, a lawyer with the Department for more than two decades and now a law professor, had access to documents unavailable to Garrow: the records of litigation that influenced decisions about what was needed in the Act, now in the National Archives, and the materials in the Harold Greene Papers while the collection was still in private hands.

South between 1957 and 1965.[18] As one law review article put it at the time, the Voting Rights Act "codifies the lessons of eight years of litigation."[19]

The Voting Rights Act departed from precedent by providing for direct federal action to enable African Americans in the South to register and vote. Section 4 of the Act suspended, initially for only five years, the use of literacy tests in six states and 40 counties in a seventh, North Carolina. To counter the broad discretion previously exercised by local registrars and poll officials, other provisions of the Act authorized the use of federal examiners to register persons in counties where few blacks were registered; federal observers were also sent to monitor the conduct of elections where trouble was expected. On the other hand, the Act also contemplated continued resort to the federal courts, instructing the Department of Justice to file lawsuits challenging poll tax requirements in states where they appeared to be used as a deterrent to minority voting.[20]

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[18] The 32 findings of unconstitutional racial discrimination are listed in Brief for the Defendants, *South Carolina v. Katzenbach* (Jan. 5, 1966), 44-45 n.33. The Department had filed 71 cases, but many were still pending at the time the bill's drafting began: H.R. Rep. No. 439, 89th Cong., 1st Sess., 9 (1965).

[19] Barry E. Hawk and John J. Kirby, Jr., Note "Federal Protection of Negro Voting Rights," 51*Va, L.Rev.* 1051, 1196 (1965). Landsberg, *Free At Last*, 152, observes that "the earlier voting rights litigation provided the factual basis for the need for stronger legislation and also established the legal theories that shaped the contents of the legislation."

[20] Pub. L. 89-110, 79 Stat. 437 [42 U.S.C. 1971, 1973]. Chandler Davidson, "The Voting Rights Act: A Brief History," in Bernard Grofman and Chandler Davidson (eds.), *Controversies in Minority Voting: The Voting Rights Act in Perspective* (Washington, D.C., The Brookings Institution, 1992), 17-21.

The most novel feature of the Act was the "preclearance" requirement set forth in Section 5. Here, too, the statute blended judicial enforcement with administrative implementation. Under its terms *all* changes in voting practices in states covered by the Act's special provisions had to be approved by either a three-judge panel in the federal courts of the District of Columbia or the Department of Justice before they can be legally enforced.[21] Administrative preclearance proved to be far speedier and less costly than judicial preclearance, and was almost always preferred by covered jurisdictions.[22]

In 1966 the Supreme Court ruled that the preclearance requirement, like other challenged provisions of the Act, was constitutional.[23] In the past, whenever the Justice Department had obtained favorable decisions striking down particular tests, Southern

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[21] Justice Department attorneys drafted the preclearance provision as a way of institutionalizing the "freezing principle" recently adopted by the federal courts as a way of coping with the constantly changing discriminatory devices used by Southern registrars and election officials. See also Strong, *Negroes, Ballots, and Judges*, 44, 49-52, 93; L. Thorne McCarty and Russell B. Stevenson, "The Voting Rights Act of 1965: An Evaluation," 3 *Harv. C.R.-C.L. L. Rev*. 361-62, Note 18 (1968). Applications of the freezing principle began with *United States v. Alabama*, 192 F. Supp. 677 (M.D. Ala. 1961), *aff'd*, 304 F.2d 583 (5th Cir. 1961), *aff'd*, 371 U.S. 37 (1962), and *United States v. Penton*, 212 F. Supp. 193 (M.D. Ala. 1962), and *United States v. Duke*, 332 F.2d 759 (5th Cir. 1964), and was adopted by the Supreme Court in *Louisiana v. United States*, 380 U.S. 145 (1965).

[22] *South Carolina v. Katzenbach*, 383 U.S. 301, 315-18, 334-35 (1966); *Allen v. State Board of Elections*, 393 U.S. 544, 549 (1969); *Morris v. Gressette*, 432 U.S. 491, 503 (1977). See generally Days and Guinier, "Enforcement of Section 5 of the Voting Rights Act," 167-80.

[23] "Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures," wrote Chief Justice Earl Warren. *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).

states simply enacted new discriminatory devices, said the Court, and "Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself."[24]

In the first three years, implementation of the Act by the Department of Justice, and by the federal courts, focused on removal of barriers to registration and voting. The Attorney General dispatched federal examiners to register blacks and federal observers to monitor elections in counties designated because of their record of obstruction and discrimination. As a result, most blacks were able to register and vote.[25] The federal courts also struck down the poll tax in four states that still used it as a prerequisite to voting in state elections.[26] The Justice Department also objected to various changes in

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[24] *South Carolina v. Katzenbach*, 383 U.S. 301, 314, 335 (1966).

[25] Initially, however, the Department of Justice had to go to court to prevent state court judges from blocking the work of federal examiners and private voter registration activists. U.S. Commission on Civil Rights, *The Voting Rights Act . . . The First Months* (Washington, D.C., 1965), App. E, 74-78; *idem*., *Political Participation*, 162-65; Peyton McCrary, Jerome Gray, Edward Still, and Huey Perry, “Alabama,” in Davidson and Grofman (eds.), *Quiet Revolution in the South*, 38-39, 398, citing *Reynolds v. Katzenbach*, 248 F. Supp. 593 (S.D. Ala. 1965), and *U.S. v. Bruce*, 353 F.2d 474 (5th Cir. 1965). Although examiners were used in only 60 counties, the threat that they might be dispatched, coupled with the fact that other provisions of the act provided criminal penalties for officials who interfered with voters' efforts to cast their ballots, brought substantial compliance throughout the region. U.S. Commission on Civil Rights, *Political Participation*, 153-62; Lawson, *Black Ballots*, 329-35; Garrow, *Protest at Selma*, 179-86, 190, 202-03, 300; Richard Scher and James Button, "The Voting Rights Act: Implementation and Impact," in Charles S. Bullock III and Charles M. Lamb (eds.), *Implementation of Civil Rights Policy* (Monterey, Calif., Brooks/Cole, 1984), 20-54.

[26] U.S. Commission on Civil Rights, *Political Participation*, 166-67; *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966). Payment of the poll tax as a prerequisite for voting in federal elections had previously been struck down by the 24th Amendment.

state law or local practices that had the potential for restricting access to the ballot. The combination of administrative and judicial implementation brought a dramatic increase in voter registration among both black and white Southerners.[27]

Shortly after passage of the Act, the lower courts began to address the problem of minority vote dilution. The first instance in which the use of multi-member districts was found to be unconstitutional, as it happens, was in *Reynolds v. Sims*,[28] now on remand as *Sims v. Baggett*.[29] The court found that the legislature had combined counties in multi-member house districts so as to minimize the percentage of blacks in any one district "for the sole purpose of preventing the election of a Negro House member."[30]

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[27] Harold W. Stanley, *Voter Mobilization and the Politics of Race: The South and Universal Suffrage, 1952-1984* (New York, Praeger, 1987), 27, 94-9, 101-02.

[28] 377 U.S. 533 (1964).

[29] 247 F. Supp. 96 (M.D. Ala. 1965). The court found the state house redistricting plan unconstitutional in part because the deviation from population equality was higher than acceptable under the one person, one vote principle, and there was no rational basis for the deviation.

[30] 247 F. Supp. 96, 107-109 (M.D. Ala. 1965). One of the three judges who decided *Sims* was Frank M. Johnson, the chief district judge in the Middle District of Alabama, who played a role in most of the important civil rights decisions in the state for a quarter century. He also decided the first lawsuit filed to challenge local at-large elections as discriminatory vote dilution, *Smith v. Paris*. In this case the African American plaintiffs attacked the adoption of at-large elections for the Democratic executive committee of Barbour County, Alabama (George Wallace's home county). The party committee's defense was that they shifted to at-large elections because their old districts violated the one person, one vote principle. Dismissing this claim as "nothing more than a sham." Judge Johnson pointed out that the committee could simply have reapportioned its districts. 257 F. Supp. 901, 905 (M.D. Ala. 1966). The "clear effect" of the change, as

Where African Americans did manage to register and vote in significant numbers, moreover, Southern legislatures often adopted new electoral procedures designed to dilute minority voting strength. Use of at-large elections -requiring candidates to run city-wide or county-wide rather than from smaller districts or wards - was the cornerstone of the vote dilution structure, along with the use of multi-member legislative districts.[31] Because racial minorities tend to be residentially segregated, they often represent a majority of the prospective voters in one or two election districts or wards and thus have the potential for electing one or two candidates of their choice. Where elections are conducted at large, however, where whites are a majority of the electorate, and where whites vote as a bloc against candidates preferred by minority voters, the

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demonstrated in the 1966 elections, was that, because black voters comprised a majority of those registered in some districts but not countywide, minority voting strength would be diluted by the bloc votes of the white majority. The court also relied on the long history of racial discrimination in Barbour County and the fact that the change followed the rapid enfranchisement of the county's African American citizens by the Voting Rights Act. In light of this factual pattern, Judge Johnson ruled that the change was motivated by an unconstitutional racial purpose. 257 F. Supp. 901. 904.

[31] This was a frequent ploy even before the adoption of the Voting Rights Act. See Matthews and Prothro, *Negroes and the New Southern Politics*, 4-5, 143-44, 208, 220-21; Ladd, *Negro Political Leadership in the South*, 29-30, 102-03, 307; Garrow, *Protest at Selma*, 179-236, 298-328; Derfner, "Racial Discrimination and the Right to Vote," 553-55, 572-74; McCrary and Lawson, "Race and Reapportionment, 1962," 302-04, 315-18; Peyton McCrary, "The Dynamics of Minority Vote Dilution: The Case of Augusta, Georgia, 1945-1986," *25 Journal of Urban History* 199 (1999); and J. Morgan Kousser, *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction* (Chapel Hill, University of North Carolina Press, 1999), 139, 163-171-80, 184-93, 224-26.

candidate preferences of the minority community are submerged in the larger pool of white voters.[32]

Even when voting patterns are racially polarized, in a *simple* at-large system a cohesive minority group can use *single-shot voting* to elect one representative if several offices are to be filled.[33] By requiring all voters to cast ballots for a full slate of offices to be filled, single-shot voting becomes impossible. The same result occurs if each candidate is required to qualify for a separate *place* or *post* (i.e., Place No. 1, Place No. 2, etc.). Both anti-single shot procedures and numbered-place requirements enhance the discriminatory potential of at-large elections.[34]

The widespread use of laws requiring *runoff* elections where no candidate receives a majority of votes cast can also have a discriminatory effect in an at-large

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[32] Chandler Davidson, "Minority Vote Dilution: An Overview," in Davidson (ed.), *Minority Vote Dilution* (Washington, D.C. Howard University Press, 1984), 4-5; Peyton McCrary, "Racially Polarized Voting in the South: Quantitative Evidence from the Courtroom," *14 Social Science History* 507 (1990); Edward C. Banfield and James Q. Wilson, *City Politics* (Cambridge, Mass., Harvard University Press, 1963), 87-96, 307-09.

[33] The U.S. Commission on Civil Rights, *The Voting Rights Act: Ten Years After* (Washington, D.C., G.P.O., 1975), 207, explains it succinctly: "Consider a town of 600 whites and 400 blacks with an at-large election to choose four council members. Each voter is able to cast four votes. Suppose there are eight white candidates, with the votes of the whites split among them approximately equally, and one black candidate, with all the blacks voting for him and no one else. The result is that each white candidate receives about 300 votes and the black candidate receives 400 votes."

[34] Katherine I. Butler, "Constitutional and Statutory Challenges to Election Structures: Dilution and the Value of the Right to Vote," *42 La. L. Rev*. 863-67 (1982). Roy E. Young, *The Place System in Texas Elections* (Austin, Institute of Public Affairs, University of Texas, 1965), is a pioneering study.

system where voting is racially polarized. If the candidate receiving a plurality of the votes wins, one minority candidate can defeat several white candidates wherever white voters split their ballots sufficiently. Requiring a runoff in the event that no candidate receives a majority of the votes cast, however, eliminates that possibility by setting up a head-to-head contest between the top two choices, so that white voters can rally behind the white candidate as a bloc.[35] Advocates of white supremacy were like the proverbial lawyer who wears both suspenders and a belt: these dilutive devices served as layers of insurance for the status quo, to be called into play wherever black political participation rose to a level that threatened white monopoly of electoral office.

African American plaintiffs in Mississippi sought to persuade the courts that the preclearance requirements set forth in Section 5 of the Voting Rights Act, not just the Reconstruction amendments, covered changes with the potential of diluting minority voting strength. The focus of this effort was legislation authorizing a shift from single-member districts to at-large elections for county boards of supervisors and boards of education because, as one state senator put it, "countywide balloting will safeguard 'a white board' [of supervisors] and preserve our way of doing business."[36] The African

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[35] Butler, "Constitutional and Statutory Challenges," 865-67; Chandler Davidson, *Biracial Politics*: *Conflict and Coalition in the Metropolitan South* (Baton Rouge, Louisiana State University Press, 1972), 63-67.

[36] *Jackson Clarion-Ledger*, May 18, 1966, pp. 1, 16.

American plaintiffs contended that under the Voting Rights Act such voting changes were not legally enforceable without federal preclearance.[37]

In 1969 the Supreme Court agreed, ruling in *Allen v. State Board of Elections* that this Mississippi law, like all other voting changes in covered jurisdictions were subject to preclearance under Section 5.[38] A change from district to at-large voting for county supervisors could have a discriminatory impact, noted the Court: "voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole." Under those circumstances at-large elections could, if voting patterns followed racial lines, "nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting."[39] The decision in *Allen* fundamentally altered enforcement of the Voting Rights Act.

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[37] Plaintiffs' legal strategy is discussed in Denison Ray to Frank R. Parker, Oct. 22, 1967, cited in U.S. Commission on Civil Rights, *Political Participation*, 23. Ray was chief counsel for the Lawyers' Committee for Civil Rights Under Law (representing some of the plaintiffs). Parker was the staff counsel for the Civil Rights Commission who wrote much of *Political Participation*. For a full discussion of the efforts of the 1966 Mississippi legislature to minimize the effects of the Act, see Parker, *Black Votes Count: Political Empowerment in Mississippi after 1965* (Chapel Hill, University of North Carolina Press, 1990), 34-66, 214-17.

[38] *Allen v. State Board of Elections*, 393 U.S. 544 (1969). Four cases were consolidated in *Allen, three from Mississippi*. The case involving at-large elections was styled *Fairley v. Patterson*; *Bunton v. Patterson* dealt with a change from elected to appointed county school superintendents in certain counties; *Whitley v. Williams* concerned restrictions on independent candidates. *Allen* involved a restrictions on providing assistance to illiterate voters.

[39] 393 U.S. 544, 569 (1969).

The effects of *Allen* were profound. In Mississippi, for example, the Department of Justice refused to preclear the 1966 change to at-large elections.[40] Fourteen Mississippi counties nevertheless tried to switch to at-large supervisor elections, and another 17 counties to at-large school board elections, but the Department and, in some cases the federal courts, blocked all of these efforts.[41] The task of winning constitutional challenges on a case-by-case basis would have been formidable, and Mississippi was just one of the covered states.

Administrative reorganization in 1969 by the administration of President Richard Nixon produced a separate section within the Civil Rights Division specializing in voting rights. Prodded by liberal critics in Congress, the new Voting Section developed detailed guidelines for enforcing Section 5 that were, in turn, endorsed by the Supreme

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[40] Mississippi chose to seek pre-clearance from the Attorney General, rather than from a three-judge panel in the District of Columbia. See Lawson, *In Pursuit of Power*, 162. Two years later the state attempted to re-enact the authorization for county-wide supervisor elections struck down in *Allen*, and the Attorney General again objected. Frank R. Parker, "County Redistricting in Mississippi: Case Studies in Racial Gerrymandering," 44 *Miss. L.J*. 391 n. 32 (1973).

[41] Testimony of Frank R. Parker, *Extension of the Voting Rights Act: Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate*, 94th Cong., 1st Sess. (1975), Ex. 3, p. 149; U.S. Commission on Civil Rights, *The Voting Rights Act: Ten Years After*, 271-72. See also David H. Hunter, *The Shameful Blight: The Survival of Racial Discrimination in Voting in the South* (Washington, D.C., The Washington Research Project, 1972), 149-50, 209; Note, "Mississippi and the Voting Rights Act: 1965-1982," *52 Miss. L.J*. 803, 835-37 (1982).

Court.[42] The Department's procedures for enforcing Section 5 were also the subject of numerous unsuccessful court challenges during the 1970s.[43]

In 1971 the Supreme Court ruled that municipal annexations were among the voting changes covered by the Act.[44] The Court subsequently decided that municipalities facing objections to annexations which had the discriminatory effect of reducing the black or Hispanic percentage within the city could overcome that objection by adopting an election plan that fairly reflected minority voting strength for the enlarged city, normally a single member district system. Otherwise such cities would likely be condemned to declining tax revenues, as well-off whites moved to nearby suburbs to

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[42] The guidelines are found at 28 C.F.R. Sec. 51. Lawson, *In Pursuit of Power*, 162-78; Drew Days and Lani Guinier, "Enforcement of Section 5 of the Voting Rights Act," in Davidson (ed.), *Minority Vote Dilution*, 167-80.

[43] See two articles by former Voting Section attorneys, John J. Roman, "Section 5 of the Voting Rights Act: The Formation of an Extraordinary Federal Remedy," *22 Am. U. L. Rev*. 111 (1972), and John P. MacCoon, "The Enforcement of the Preclearance Requirement of Section 5 of the Voting Rights Act of 1965," *29 Cath. U. L. Rev*. 107 (1979).

[44] *Perkins v. Matthews*, 400 U.S. 379 (1971). opinions. Hiroshi Motomura, "Preclearance Under Section Five of the Voting Rights Act," *61 N. C. L. Rev.* 221 *(*1983*)*, reviews the case law regarding preclearance review of annexations and consolidations, as well as the effort of the Department to act as a surrogate for the D.C. court.

escape racial integration.[45] As a result, departmental objections to annexations played a significant role in persuading Southern municipalities to give up at-large elections.[46]

The Court's first major restriction on the scope of the Act was announced in its 1976 decision, *Beer v. United States*,[47] in which the city of New Orleans sought a declaratory judgement preclearing its redistricting plan. The three-judge trial court refused, on the grounds that under current Supreme Court doctrine the plan diluted minority voting strength.[48] The majority in *Beer* reversed the trial court, however, ruling

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[45] *City of Petersburg v. U.S.*, 354 F. Supp. 1021, 1023-24 (D.D.C. 1972), *aff'd* 410 U.S. 962 (1973); *City of Richmond v. U.S.*, 422 U.S. 358 (1975). Dissenting justices Brennan, Marshall, and Douglas would not have precleared the Richmond annexation because "the record is replete with statements by Richmond officials that prove beyond question that the predominant (if not the sole) motive and desire of the negotiators of the 1969 settlement was to acquire 44,000 additional white citizens for Richmond, in order to avert a transfer of political control to what was fast becoming a black population majority." 422 U.S. 358, 382 (1975). For ample evidence of this racial purpose, see John V. Moeser and Rutledge M. Dennis, *The Politics of Annexation: Oligarchic Power in a Southern City* (Cambridge, Mass., Schenkman, 1982), 88-93, 98-102, 107-09. Peyton McCrary, "The Interaction of Policy and Law: How the Courts Came to Treat Annexations under the Voting Rights Act," *Journal of Policy History*, 26 (No. 4, 2014), 429-58. Newly appointed Justice Lewis F. Powell, Jr., abstained because he had earlier sought to persuade the Attorney General to preclear the annexation. Powell to John N. Mitchell, August 9, 1971 (public file, Voting Section, Civil Rights Division, Department of Justice).

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

[47] 425 U.S. 130 (1976).

[48] The trial court relied throughout its opinion on *White v. Regester,* 412 U.S. 755 (1973), and other vote dilution cases decided on constitutional grounds: 374 F. Supp. 363, 384, 387-90, 393-99, 401-02 (1974).

that the term "effect" has a different meaning under Section 5 than under the Constitution. The Court determined that, in the context of a preclearance review, "effect" is to be defined as "retrogression," a newly minted term to describe changes that place minority voters in a *worse* position than under the status quo. Ameliorative changes that do not make matters worse for minority voters are, under *Beer*, not discriminatory in effect.[49]

On the other hand, *Beer* did not affect the purpose prong of Section 5.[50] As the *Beer* majority put it in a key passage:

> We conclude, therefore, that such an ameliorative new legislative apportionment cannot violate Sec. 5 *unless* the new apportionment itself so discriminates on the basis of race or color *as to violate the Constitution*.[51]

This wording appears understandable only as a reference to the purpose test in Fourteenth or Fifteenth Amendment cases. The reference to a constitutional violation could not refer to a dilutive effects test because, in endorsing the retrogression concept the *Beer* majority had rejected a dilutive effects test as inapplicable in the Section 5

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[49] 425 U.S. 130, 142 (1976).

[50] Because the trial court decided the case on the grounds that the redistricting plan had a dilutive effect, it did not reach the issue of whether the change had a discriminatory intent. 374 F. Supp. 363, 387 (D.D.C. 1974). Thus, the only issue before the Supreme Court was whether the lower court's ruling under the Section 5 effect standard was correct. "Even without retrogression, a covered jurisdiction will violate Section 5 if an impermissible racial purpose is behind an electoral change," explains conservative legal scholar James F. Blumstein "Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act," 69 *Va. L. Rev.*, 633, 685 (1983).

[51] 425 U.S. 130, 141 (1976), emphasis added.

context. As a result, federal courts interpreted this wording in *Beer* as referring to a constitutional "purpose" test for the next quarter century.[52]

The Department's implementation of Section 5 evolved in direct response to federal court orders and statutory requirements. In deciding whether to preclear or object to voting changes, the Department acted as a surrogate for three-judge district courts in the District of Columbia, to which the Voting Rights Act also assigns preclearance responsibility.[53] Both public officials and minority citizens have an opportunity to present comments regarding voting changes, but the decision-making is designed to follow the dictates of current Section 5 case law. Thus the Department's administrative review under Section 5 can properly be characterized as a quasi-judicial process of implementation.

In the 1970s vote-dilution lawsuits were decided under a constitutional standard set forth by a unanimous Supreme Court in a legislative redistricting case from Texas, *White v. Regester*.[54] The decision struck down the use of multi-member districts to elect members of the state house of representatives in Dallas and Bexar counties.[55]

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[52] See for example *City of Port Arthur, Texas, v. United States*, 459 U.S. 159, 168 (1982); *City of Pleasant Grove v. United States*, 479 U.S. 462, 471-72 (1987).

[53] The responsibility to act as a surrogate for the D.C. court is set forth in the Department's Section 5 guidelines at 28 C.F.R. 51.39.

[54] 412 U.S. 755 (1973).

[55] The case involved both malapportionment and racial vote dilution. The trial court had ruled that the redistricting plan, with a total deviation of 9.9 percent, violated the one person, one vote standard. *Graves v. Barnes*, 343 F. Supp. 704, 713, 717 (W.D. Texas, 1972). The Supreme Court reversed on the grounds that, except for congressional

The Court's opinion relied on evidence of a history of official discrimination against blacks in Dallas and Hispanics in Bexar, cultural and language barriers in Bexar and a discriminatory slating group in Dallas, a lack of responsiveness by elected officials to the needs of the minority community, and the use of numbered place and runoff requirements which enhance the discriminatory potential of at-large elections. Based on what it called "the totality of the circumstances," the Court found that minority voters in these two counties had "less opportunity than did other residents . . . to participate in the electoral processes and to elect candidates of their choice."[56]

Although in later decisions the Supreme Court interpreted *White* as incorporating an intent requirement, the majority opinion in the case did not state explicitly that proof of discriminatory intent was required under the totality of circumstances test.[57] The Fifth Circuit Court of Appeals, which handled by far the largest number of vote-dilution cases

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districts, where different constitutional provisions were at stake, deviations of less than 10 percent were acceptable, a ruling from which three liberal justices dissented. 412 U.S. 755, 763-64, 772-82 (1973).

[56] 412 U.S. 755, 766, 769 (1973). Previously African American plaintiffs had lost a challenge to the use of at-large elections for the Indiana legislature because that state lacked the history of racial discrimination or discriminatory slating present in Texas, leading the Court to conclude that, unlike in Texas, minority candidates lost because they ran as Democrats and not because they were black. In addition, the plaintiffs conceded there was no evidence of racially discriminatory intent. *Whitcomb v. Chavis*, 403 U.S. 124 (1971).

[57] In *City of Mobile v. Bolden*, 446 U.S. 55 (1980), and *Rogers v. Lodge*, 458 U.S. 613 (1982), the Supreme Court subsequently found that *White* required proof of discriminatory intent. Blumstein, "Proving Race Discrimination," 669-70, observes that the wording in *White* supports *both* the view that proof of discriminatory intent is necessary *and* that it is not.

in the 1970s, initially treated the test as requiring proof of *either* purpose *or* effect, but not both, in deciding a Louisiana challenge to at-large elections, *Zimmer v. McKeithen*.[58]

Under this approach, plaintiffs in vote dilution cases were often able to win by documenting a history of racial segregation and discrimination in the jurisdiction and by showing that, due to racially polarized voting, the election system operated in such a way that minority voters did not have a reasonable opportunity to elect representatives of their choice.[59] The lower courts understood how to apply the standard.[60] Veteran Fifth Circuit Judge Irving Goldberg later characterized the standard as "a jurisprudence

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[58] *Zimmer v. McKeithen*, 485 F.2d 1297, 1304 (5th Cir. 1973)(*en banc*), *aff'd sub nom. East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636 (1976). As the majority opinion put it, plaintiffs must maintain the burden of showing that a plan was either "a racially motivated gerrymander" or that it "would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." Because plaintiffs here showed the second, it was not necessary for the court to rule on the initial purpose prong of the test.

[59] *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973)(*en banc*), *aff'd sub nom. East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636 (1976). Blacksher and Menefee, "From *Reynolds v. Sims* to *City of Mobile v. Bolden*," 18-26; Bickerstaff, "Reapportionment by the State Legislatures," 646-49; Butler, "Constitutional and Statutory Challenges," 883-90; Timothy G. O'Rourke, "Constitutional and Statutory Challenges to Local At-Large Elections." *University of Richmond Law Review* 17 (Fall 1982), 51-57, 78-81. McCrary, "Racially Polarized Voting in the South," 510-14, explains the statistical procedures used in these cases to measure the degree of racial bloc voting.

[60] As one voting rights lawyer working in Mississipp in the 1970s put it, it was, the Zimmer standard was "flexible, fact-specific, precise, and workable." Frank R. Parker, "The 'Results' Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard," 69 *Va. L. Rev*. 725 (1983).

produced by ten years of struggle and compromise between judges of varying political and jurisprudential backgrounds."[61]

In 1980, the Supreme Court ruled in *City of Mobile v. Bolden*, a challenge to that city's use of at-large elections, that plaintiffs must prove not only that the at-large system has a discriminatory effect due to racially polarized voting but also that it was adopted or maintained for the purpose of diluting minority voting strength.[62] The Court remanded the case, and a companion suit challenging at-large school board elections in Mobile County, for a new trial on the intent question. The plaintiffs ultimately prevailed under the intent standard, after demonstrating that a racial purpose lay behind shifts to at-large elections in 1876 and 1911. The case was in litigation for almost a decade, however, and required a large expenditure of time and money.[63]

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

[62] *City of Mobile v. Bolden*, 446 U.S. 55 (1980). Although supported by only a plurality, Justice Potter Stewart's opinion was the prevailing view on the Court. Not only did the opinion require proof of intent but it appeared to require a more difficult standard for inferring racial purpose through circumstantial evidence. The Fifth Circuit Court of Appeals had anticipated the intent requirement in *Nevett v. Sides*, 571 F.2d 209 (5th Cir. 1978), *Bolden v. City of Mobile*, 571 F.2d 238 (5th Cir. 1978), *Blacks United for Lasting Leadership v. City of Shreveport*, 571 F.2d 248 (5th Cir. 1978), and *Thomasville Branch of NAACP v. Thomas County*, 571 F.2d 257 (5th Cir. 1978). See O'Rourke, "Constitutional and Statutory Challenges," 56-57.

[63] *Bolden v. City of Mobile*, 542 F. Supp. 1050 (S.D. Ala. 1982); *Brown v. Board of School Commissioners of Mobile County*, 542 F. Supp. 1078 (S.D. Ala. 1982). Peyton McCrary, "History in the Courts: The Significance of *City of Mobile v. Bolden*," in Davidson (ed.), *Minority Vote Dilution*, 47-63, summarizes the testimony in both cases.

In the view of many observers, the Supreme Court's decision in *City of Mobile* was inconsistent with the intent of Congress when it adopted and expanded the Voting Rights Act in 1965, 1970, and 1975. A substantial majority in both houses revised Section 2 of the Voting Rights Act in 1982 to outlaw election methods that result in diluting minority voting strength, without requiring proof of discriminatory intent.[64] In creating a new statutory means of attacking minority vote dilution, Congress cited the "totality of circumstances" test of *White* and *Zimmer* as the evidentiary standard to be used in applying the Section 2 results test. Vote-dilution cases previously decided under the Fourteenth Amendment would henceforth be tried under the new statutory standard of amended Section 2.[65]

Even so, in a few complex lawsuits in the 1980s evidence of discriminatory intent proved critical to the court's decision, most dramatically in one Alabama case, *Dillard v. Crenshaw County*, which led to the elimination of at-large elections in more than 180

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[64] Frank R. Parker, "The 'Results' Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard," 69 *Va. L. Rev*. 715 (1983); Thomas M. Boyd and Stephen J. Markman, "The 1982 Amendments to the Voting Rights Act: A Legislative History," *40 Wash. & Lee L. Rev*. 1347 (1983); and Armand Derfner, "Vote Dilution and the Voting Rights Act Amendments of 1982," in Davidson (ed.), *Minority Vote Dilution*, 145-63. Thernstrom, who favors an intent standard, argues that Congress was misguided in adopting a results test. Thernstrom, *Whose Votes Count*, 79-136.

[65] McDonald, "The Quiet Revolution in Minority Voting Rights," 1265; Blacksher and Menefee, "From *Reynolds v. Sims* to *City of Mobile v. Bolden,"* 31-32.

counties, municipalities, and school boards.[66] The plaintiffs presented historical evidence showing that whenever black voting strength was substantial state and local officials had a policy of using at-large rather than district elections, and that in the 1950s and 1960s the state, motivated explicitly by the goal of preventing the election of blacks to office, adopted laws requiring the use of an anti-single shot device called a "numbered place" requirement in all jurisdictions to enhance the dilutive power of at-large elections.[67]

In the decade following the revision of Section 2, voting rights lawyers successfully brought numerous successful lawsuits under the new results standard. The Supreme Court made clear in a 1986 decision, *Thornburg v. Gingles*, that minority plaintiffs could prevail without proving discriminatory intent. Plaintiffs first had to meet a three-pronged threshold test, by proving that: 1) the minority group is sufficiently

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[66] *Dillard v. Crenshaw County*, 640 F. Supp. 1347 (M.D. Ala. 1986). For the effects of the court's decision, see McCrary, et.al., "Alabama," 54-64. [Add citation to the Dillard article in the Hackney festschrift]

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

numerous and geographically concentrated so that a majority-minority district can be drawn; 2) minority citizens vote cohesively; and 3) that the racial majority votes as a bloc to the degree that minority candidates usually lose.[68] Once these preconditions were satisfied, plaintiffs had to provide evidence of the "totality of circumstances" factors Congress had delineated in amended Section 2. Under this new standard many defendants settled before trial and agreed to adopt single-member districts.[69]

Scholarly research on the impact of the Voting Rights Act in the South demonstrates that the substantial increases in minority representation since 1970 are due primarily to the elimination of at-large elections and other devices that can dilute minority voting strength.[70] Fairly drawn single-member district plans have provided an

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[68] *Thornburg v. Gingles*, 478 U.S. 30 (1986), *aff'g in part rev'g in part Gingles v. Edmisten*, 590 F. Supp. 345 (E.D.N.C. 1984). The "totality of the circumstances" test of amended Section 2 was lifted from the decision in *White v. Regester*. Only rarely have plaintiffs lost after proving the three *Gingles* prongs.

[69] See the various essays in Davidson and Grofman (eds.), *Quiet Revolution in the South*, 35-36, 84, 120-21, 143, 171-73, 210-12, 247, 256, 284-87.

[70] Davidson and Grofman (eds.), *Quiet Revolution in the South*, *passim*. Pildes, "The Politics of Race," 1362-76, summarizes the findings of this collaborative study and relates them to voting rights case law as of the mid-1990s. As Pildes observes, these findings provide more definitive proof of the conventional view among political scientists that at-large elections serve as a significant barrier to minority representation." See for example Clinton B. Jones, "The Impact of Local Election Systems on Black Political Participation," *11 Urban Affairs Quarterly* 345 (1976); Albert K. Karnig, "Black Representation on City Councils," *id*., 12 (Dec. 1976), 223-42; Margaret B. Latimer, "Black Political Representation in Southern Cities: Election Systems and Other Causal Variables," *id*., 15 (Sept. 1979), 65-86; Albert K. Karnig and Susan Welch, *Black Representation and Urban Policy* (Chicago, University of Chicago Press, 1980); Richard L. Engstrom and Michael D. McDonald, "The Election of Blacks to City Councils: Clarifying the Impact of Electoral Arrangements on the Seats/Population Relationship,"

opportunity for African American or Hispanic voters to elect candidates of their choice – despite high levels of racially polarized voting – in districts where they constitute a majority of the voting population. In some localities the level of black representation by 1990 approached the black percentage of the population in the jurisdiction.[71] Very few African Americans were elected to council seats from white-majority districts. On the other hand, virtually all black-majority districts elected black council members.[72]

Nor are these results surprising to those familiar with the evidence of racial polarization produced in the hundreds of vote-dilution lawsuits tried or settled in the last quarter century. No court has ever found a violation in a voting rights case absent proof, typically presented through expert statistical analysis, that white or Anglo voters

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75 American Political Science Review 344 (1981); and Chandler Davidson and George Korbel, "At-large Elections and Minority Group Representation: A Re-Examination of Historical and Contemporary Evidence," *43 Journal of Politics* 982 (1981).

[71] Peggy Heilig and Robert J. Mundt, *Your Voice at City Hall: The Politics, Procedures, and Policies of District Representation* (Albany, State University of New York Press, 1984); Theodore S. Arrington and Thomas G. Watts, "The Election of Blacks to School Boards in North Carolina," *Western Political Quarterly*, 44 (Dec. 1991), 1099-1105, and Charles S. Bullock, "Section 2 of the Voting Rights Act, Districting Formats, and the Election of African Americans," *Journal of Politics*, 56 (Nov. 1994), 1098-1105, which deals with Georgia county commissions. Two recent longitudinal studies by economists using advanced regression models confirm a continuing, though diminished, discriminatory effect to the use of at-large elections. T.R. Sass and S.L. Mehay, "The Voting Rights Act, District Elections, and the Success of Black Candidates in Municipal Elections," *38 J.L. & Econ.* 367 (1995); Tim R. Sass and Bobby J. Pittman, Jr., "The Changing Impact of Electoral Structure on Black Representation in the South, 1970-1996," *104 Public Choice* 369 (2000).

[72] See the following tables in Davidson and Grofman (eds.), *Quiet Revolution in the South*: Tables 2.3, 2.7, 3.3, 3.7, 4.3, 4.3A, 4.7A, 5.3, 5.7, 6.3, 6.3A, 6.7, 6.7A, 7.3, 7.3A, 8.3, 8.7, 9.3, 9.7, 10.4, 10.5.

routinely defeat the candidates of choice of minority voters.[73] As a result, the only way to provide minority voters with a fair opportunity to elect their preferred representatives was to order a change to district elections or some alternative remedy. By 1990 the few at-large systems left in the South were primarily located in jurisdictions where white cross-over voting had resulted in a pattern of significant minority representation, thus making litigation unnecessary.[74] Increasingly, therefore, the focus of voting rights activists would be on the degree to which districting plans adopted earlier fairly reflected minority voting strength.

Before 1990 only a handful of vote dilution challenges were filed against single-member district plans.[75] The use of minority vote dilution in redistricting was most often

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[73] Abigail M. Thernstrom, *Whose Votes Count: Affirmative Action and Minority Voting Rights* (Cambridge, MA, Harvard University Press, 1987), 243, ignores this fundamental fact, claiming incorrectly that "the majority-white county, city, or district in which whites vote as a solid bloc against any minority candidate is now unusual." She also believes (p. 23) that blacks should in many cases be willing to settle for the fact that they "become a powerful swing vote when white candidates begin to compete." When Thernstrom discusses specific evidence of racially polarized voting presented in vote-dilution lawsuits (as in her discussion of the findings in *Thornburg*, pp. 207-08, 216), she often gets the facts wrong. See Karlan and McCrary,"Without Fear and Without Research," 759, n. 53. Pildes, "The Politics of Race," 1365-67, contends that, because of Thernstrom's indifference to the empirical evidence of racially polarized voting, judges and justices who rely on her for evidence on this subject are misguided.

[74] See Davidson and Grofman, "The Effect of Municipal Election Structure on Black Representation in Eight Southern States," in Davidson and Grofman (eds.), *Quiet Revolution in the South*, 320-21.

[75] See, however, *Kirksey v. Board of Supervisors of Hinds County*, 402 F. Supp. 658 (S.D. Miss. 1975), *aff'd*, 528 F.2d 536 (5th Cir. 1976), *rev'd,* 554 F.2d 139 (5th Cir. 1977)(en banc); *Rybicki v. State Board of Elections*, 574 F. Supp. 1082 (N.D. Ill. 1982);

attacked in the context of preclearance reviews under Section 5. In evaluating a redistricting plan under Section 5, there are two distinct quantitative issues. First, do the districts identified by the submitting authority as majority-minority districts afford minority voters a reasonable or fair opportunity to elect candidates of their choice, based on empirical analysis (that is, are they electorally viable)? Second, does the plan minimize the number of effective majority-minority districts? A redistricting plan may minimize the number of majority-minority districts either by "packing" an unnecessarily high percentage of minority citizens (say 80 or 90 percent) into a single district or by fragmenting minority population concentrations so that the group's members are dispersed among several majority-white districts.[76]

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

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Major v. Treen, 574 F. Supp. 325 (E.D. La. 1983); *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984).

[76] Frank R. Parker, "Racial Gerrymandering and Legislative Reapportionment," in Davidson (ed.), *Minority Vote Dilution*, 85-117; Motomura, "Preclearance Under Section Five," 233-36.

out at a lower rate than in the majority community, they often make up a smaller percentage of the turnout than of the registered voters.[77]

Recognizing those facts, the federal courts in the 1970s came up with a rule of thumb often dubbed "the 65 percent rule."[78] As minority registration and turnout rates have increased, however – by the twenty-first century often to a point approaching parity with whites – experts often recommend districts with a smaller percentage of minority population. And where a substantial percentage of white voters have demonstrated a regular tendency to support minority candidates, the minority threshold can be lowered accordingly.[79] For these reasons the Department of Justice and the courts assess district composition on a case-by-case basis.[80]

Both before and after the *Beer* decision, discriminatory purpose as defined in constitutional cases played a significant role in the Department's review of redistricting plans. In assessing the issue of racial purpose, a major issue is whether authorities have rejected alternative districting plans that would provide minority voters a better

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[77] Grofman, Handley, and Niemi, *Minority Representation*, 116-21.

[78] *Kirksey v. Board of Supervisors of Hinds County, Miss*., 554 F.2d 139 (5th Cir. 1977)(en banc), *cert. denied*, 434 U.S. 968 (1977); *Moore v. Leflore County Bd. Of Election Commissioners*, 502 F.2d 621 (5th Cir. 1974); *Mississippi v. U.S.*, 490 F. Supp. 569 (D.D.C. 1979), *aff'd*, 444 U.S. 1050 (1980).

[79] Allan J. Lichtman and J. Gerald Hebert, "A Theory of Vote Dilution," *6 La Raza L.J*. 10-19 (1993); Bernard Grofman, Lisa Handley, and David Lublin, "Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence," 79 *N.C.L. Rev. 1383 (2001)*.

[80] Grofman, Handley, and Niemi, *Minority Representation*, 120.

opportunity to elect candidates of their choice. The courts and the Justice Department also focus on whether minority citizens were excluded from the redistricting process, or their requests for alternative plans rejected without substantial justification, and whether there is a departure from usual redistricting practices or criteria.[81]

In 2000 the Supreme Court reinterpreted the purpose prong of Section 5, defining it for the first time in a quarter century as restricted entirely to what the majority opinion by Justice Antonin Scalia termed "retrogressive intent"[82] Three years later the Court reinterpreted the retrogressive effect standard to be applied under Section 2.[83] When reauthorizing Section 5 in 2006, Congress rejected both reinterpretations by the Court as contrary to the intent of the statute, restoring the interpretation of retrogression in the dilution context to reducing the ability of minority voters to elect candidates of their

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[81] Days and Guinier, "Enforcement of Section Five," 170-71; Motomura, "Preclearance Under Section Five," 238-39, 241; Grofman, "Criteria for Districting," 95.

[82] *Bossier Parish School Board v. Reno*, 528 U.S. 320 (2000). See "The End of Preclearance as We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act," co-authored with Christopher Seaman and Richard Valelly, *Michigan Journal of Race & Law*, 11 (Spring 2006), 275-323. [An unpublished version was printed in *Voting Rights Act: Section 5 Preclearance and Standards: Hearings Before the Subcomm. On the Constitution, H. Comm. On the Judiciary, 109th Cong., 96-181 (2005) (Serial No. 109-69).]*

[83] *Georgia v. Ashcroft*. 539 U.S. 461 (2003). See PamelaS. Karlan, "*Georgia v. Ashcroft* and the Retrogression of Retrogression," *Election Law Journal*, 3 (2004), 21-36.

choice and the interpretation of the purpose prong of Section 5 as "any discriminatory purpose.[84]

In the aftermath of *Shelby* County, battles over race in redistricting have been less common recently than controversies over election laws that appear to place barriers in the path of in-person voting – such practices as requiring voters to present photo identification at the polls or eliminating half of the period when early in-person voting is offered. Plaintiffs have offered proof that such barriers have a racially disparate impact. Because few Section 2 cases in the past have dealt with comparable issues, however, courts lack a body of relevant precedents to guide them. In many of these cases, moreover, experts must use, among other things, complex database matching methodology applied to very large data sets, such as statewide voter registration lists and state and federal ID databases.[85]

The results of these studies have been consistent with the theory that since black and Hispanic voters remain more likely to live in poverty and have lower educational attainment than white voters, they are more likely to lack required photo identification. Similarly, in many jurisdictions, minority voters use early voting at higher rates than whites. Geographic analysis of the difficulties faced by persons without access to

[84] Pub. L. No. 109-246 § 5, 120 Stat. 580-81 (2006).

[85] See, e.g., Declaration of Charles Stewart," April 11, 2014, in *United States v. North Carolina*, No. 1:13-CV-861 (M.D.N.C.)

vehicles when trying to acquire the photo identification they do not possess has also played a role in these cases.[86]

Advocates of minority voting rights have also begun exploring the use of a neglected provision of the Act – Section 3(c) – often called the "pocket trigger" or "bail-in" provision. When federal courts find liability in a Section 2 case, Section 3(c) provides judges the authority to require future voting changes by that jurisdiction to be "precleared," either by the court itself or by the Department of Justice. This could provide a small measure of the protections lost as a result of *Shelby*, but based on evidence of current racial discrimination in voting in the jurisdiction. Such a 3(c) remedy, however, can only be adopted where the court has determined that the election practice at issue in the case was adopted or maintained with a racially discriminatory purpose.[87] It remains to be seen whether courts will be willing to impose 3(c) remedies, and if they are, whether these remedies survive the appeals process.

Convincing a court that the defendants acted with a discriminatory intent has always been a major challenge for minority plaintiffs, or for the Department of Justice seeking to enforce Section 2 on behalf of minority voters. Judges are usually reluctant to make an intent finding, in part because the public typically sees such a ruling as paramount to calling public officials racists. Federal district court judges, after all, live

[86] Declaration of Dr. Gerald R. Webster, August 15, 2014, *Veasey v. Perry*, C.A. No. 2:13-CV-193 (S.D. Tex.)

[87] Travis Crum, "Note: The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance," 119 *Yale L.J.* 1992 (2010)

and work with those same public officials. The difficulty of winning under an intent standard was in fact a major impetus for the congressional decision to amend Section 2 in 1982 so that courts could strike down election practices that have a discriminatory result without the need to prove intent. Another difficulty arises from what is undoubtedly a salutary change in the political climate. Over the years as minority citizens have come to register and vote in greater numbers, public officials have generally become more guarded in their speech than when the Voting Rights Act was adopted in 1965. Courts must typically rely on circumstantial evidence in determining the purpose of an election law.[88]. That is by no means impossible, as the Fourth Circuit Court of Appeals demonstrated in ruling that North Carolina's omnibus election law – introducing a highly

[88] *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 265-66 (1977). Intent claims have sometimes been successful, however. The case in which the Supreme Court ruled that the Fourteenth Amendment requires proof that an election practice was adopted or maintained with a racially discriminatory purpose was *City of Mobile v. Bolden,* 446 U.S. 55 (1980). The Court remanded the case, and a companion suit challenging at-large school board elections in Mobile County, for a new trial on the intent question. The plaintiffs prevailed under the intent standard - at great cost - after demonstrating that a racial purpose lay behind shifts to at-large elections in 1876 and 1911. (Peyton McCrary, "History in the Courts: The Significance of *City of Mobile v. Bolden*," in Davidson (ed.), *Minority Vote Dilution* (Washington, D.C., 1984), 47-63.) The most far-reaching example is another Alabama case, *Dillard v. Crenshaw County*, which led to the elimination of at-large elections in 176 counties, municipalities, and school boards. (Peyton McCrary, et.al., "Alabama," in Davidson and Grofman (eds.), *Quiet Revolution in the South*, 54-64.) The plaintiffs presented historical evidence showing that wherever black voting strength was substantial state and local officials had a policy of using at-large rather than district elections, and that in the 1950s and 1960s the state, motivated explicitly by the goal of preventing the election of blacks to office, adopted laws designed to enhance the dilutive power of at-large elections. (Peyton McCrary, "Minority Representation in Alabama: The Pivotal Case of *Dillard v. Crenshaw County*," in Raymond Arsenault and Orville Vernon Burton (eds.), *Dixie Redux: Essays in Honor of Sheldon Hackney* (Montgomery, Al., New South Books, 2013), 403-22

restrictive photo identification requirement for in-person voting, decreasing the availability of early voting opportunities, and eliminating other provisions that had facilitated African American parity with white voter turnout in recent elections – as intentionally discriminatory. Even so, the court did not impose a "bail-in" remedy under Section 3 of the Voting Rights Act [89]

There is much for the Congress to do if it is to restore the level of protection for minority voting rights that prevailed before 2013.

[89] *North Carolina State Conference NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016).*