

**How Judicial Action Has Shaped the Record of Discrimination in
Voting Rights**

Report of

J. Morgan Kousser

Professor of History and Social Science, Emeritus

California Institute of Technology

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I. Overview: Legal Cases Make Racial Discrimination Visible

Racial discrimination in southern elections from the late nineteenth century until the passage of the Civil Rights Act in 1957 was largely invisible. People knew that it existed, but apart from a few white primary cases and sporadic instances of terrible violence, the specifics of electoral discrimination – the variations across space and time, the exact techniques used to enforce inequality, the efficacy of tools to combat it – could not be precisely delineated. It was only when the 1957 Act allowed the Department of Justice to begin investigations and bring legal actions that the extent and nature of racial discrimination could begin to be brought into view. When Congress added more power to the Justice Department in the 1960 Civil Rights Act and especially the 1965 Voting Rights Act (VRA), and when private parties and organizations became able to sue under federal law, and not just under the constitution, the picture came into much sharper focus. Only laws and favorable judicial decisions made it possible to see racial discrimination in the electoral system in detail. Without those laws, or with adverse judicial decisions, racial discrimination would have continued to exist – it just would have been much more difficult to see, to document, and to analyze.

This paper considers the implications of that simple idea for evaluating the modern record of racial discrimination in electoral laws and practices, using the most extensive database of voting rights actions in America ever collected -- all VRA Section 5 objections and “more information requests” that resulted in changes or withdrawals of submissions, all decided Section 2 cases and settlements,¹ all cases brought under the language and other provisions of the VRA, and all 14th and 15th amendment cases and settlements from 1957, when the first federal voting rights act since 1871 passed, and 2020. I have included cases drawn from every other list that I could find, many of which were prepared for the effort to renew Section 5 in 2006. The current number of

¹ Opponents of the restoration of Section 5 often criticize the inclusion of settlements in assessments of the incidence of voting rights violations. For instance, in their dissenting views to H.R. 4 in the 116th Congress, Congressmen Collins and Johnson asserted, without providing any examples, that “The way the process oftentimes works in practice is that the Department of Justice uses its vast resources to effectively coerce localities into settling voting rights violation claims, or abandoning their defenses of their voting rules prior to exhausting their appeals.” H. Rept. 116-317 (2019), at 104, <https://www.govinfo.gov/content/pkg/CRPT-116hrpt317/pdf/CRPT-116hrpt317.pdf>. But this view caricatures the often lengthy and detailed process, in which considerable information is gathered and presented to the relevant governmental jurisdiction and frequently, to courts. To take examples from the states of each of these Members of Congress, see *Cross v. Baxter*, 604 F.2d 875 (11th Cir. 1979), rev'd 639 F.2d 1383 (11th Cir. 1981), vacated and remanded 460 U.S. 1065 (1983), finally settled after four years, and the discussion in Laughlin McDonald and Daniel Levitas, *The Case For Extending And Amending The Voting Rights Act* (Atlanta, Ga.: ACLU, 2006), 269-70; *Guillory v. Avoyelles Parish Sch. Bd.*, 2006 U.S. Dist. LEXIS 98316 (W.D. La., 2006), another case that took four years to settle. More important, the U.S. government was a party in only 118 of the 1043 cases that I have located that resulted, at least eventually, in a settlement or consent judgment. It was not the U.S. government with “vast resources,” but private lawyers or civil rights organizations that received the vast majority of settlements. Not to include settlements in such a dataset would be to disregard substantial and important evidence of the extent of racial discrimination in elections.

voting rights victories by minority groups in the database is 4176, though the database is continuously revised and expanded.²

It is important not only to document that record, but to explore and understand it in depth, because the Supreme Court in *Shelby County v. Holder* ruled the coverage scheme of Section 4 of the VRA unconstitutional and challenged Congress to come up with a new coverage scheme, a challenge that this Congress has taken up. The deeper the understanding of the basis of past coverage schemes and of the course of voting rights cases over time and across jurisdictions, the more likely that any new scheme will actually prevent discrimination in the present and future, and the stronger the justification for any particular coverage formula, a justification needed to satisfy the Supreme Court.

This paper begins by tracing the origins of the “preclearance” mechanism of Section 5 of the VRA to the “freezing principle” adopted in litigation arising from the Civil Rights Acts of 1957 and 1960. It shows that from the beginning of voting rights law, it was largely the courts that defined what discrimination could be uncovered and how it could be combatted.

In 1965, Congress adopted a coverage scheme in Section 4 of the VRA that separated the 21 states that still had literacy tests for voting into two groups -- a southern group that continued to maintain many openly racially discriminatory laws, and another group that had repealed all or nearly all of those laws. It required preclearance of only the first group, the one whose discriminatory laws and practices raised the most suspicion. But covered states and localities were slow to submit changes in their election laws for preclearance, and it was only decisive action by the courts, particularly the U.S. Supreme Court in the 1969 case of *Allen v. Board of Elections*, that made possible the revelation of the scope and degree of racial discrimination in elections. *Allen* ruled that Section 5 applied to laws that “diluted” minority votes – affected the way votes were aggregated to elect officials -- and not just to laws that flatly denied individual citizens the right to vote. In renewing Section 5 for another five years in 1970, Congress agreed that *Allen* accurately expressed congressional intent. But it was the Supreme Court that had first clarified that intent.

In 1975, Congress expanded Section 4 coverage to “language minorities,” drawing on decisions in lower federal courts both for evidence of discrimination and for the definition of the areas that would be additionally covered. In 1982 and 2006, Congress justified its extensions of Section 5 largely by citing legal decisions under Section 2 of the VRA and Section 5 objections that proved the continuing existence of racial discrimination in election laws and processes. In both years, Congress reacted to decisions of the Supreme Court that made it more difficult to reveal discrimination – *City of Mobile v. Bolden* and *Reno v. Bossier Parrish II* – by passing amendments that were intended to reaffirm the original congressional intent of Sections 2 and 5.

This barebones sketch of an argument that will be documented in much more detail below is meant to drive home the point that the record of voting rights cases and other legal actions does not afford a complete and transparent picture of the nature, incidence, and extent of racial

² I have compiled separate databases on cases brought under the National Voting Registration Act and the California Voting Rights Act, which are not included in the totals here.

discrimination in voting. Instead, the Supreme Court’s decisions govern how much of the racial discrimination that actually exists can be observed, as if a stage manager were opening or closing a curtain, allowing the audience at various times to see all, some, or none of the action on stage. Less metaphorically, if the Supreme Court, by rendering decisions that make it more difficult to prove discrimination, has reduced the number of cases that minorities have brought and the number that they have won, then the record of decided cases will understate the extent and possibly distort the geographical and temporal incidence of racial discrimination. Congress should bear this point in mind in constructing a coverage scheme. In particular, the striking decline since the beginning of the 21st century in the number of VRA cases that minorities have won should not be read as reflecting an equally striking decline in the amount of discrimination that occurred. A coverage scheme based on only the most recent cases would underestimate the extent of discrimination even during that period, because the Court’s decisions themselves have diminished our ability to determine the degree and shape of discrimination.

An analysis of the record of over 4000 voting rights actions will also facilitate the correct framing of any new coverage scheme by answering a series of other questions, such as: How good a prediction was the pre-*Shelby* formula? What caused cases to ebb and flow over time? What practices produced the most successful challenges and how narrow should the list of suspect practices be? What patterns of demographic conditions correlated most highly with the incidence of voting rights violations? At what level, state or local, did most violations occur? What were the time trends in “vote dilution” and “vote denial” cases? And how concentrated were cases across states, and within states, across counties?

Although this analysis could lead to explicit evaluations of proposed coverage formulas and proposals for new ones, I will not include evaluations or proposals at this time.

II. The Challenge of *Shelby County*

In *Shelby County v. Holder* in 2013, a majority of the U.S. Supreme Court declared that the coverage scheme in Section 4 of the Voting Rights Act was no longer justified.³ With this ruling, the Court effectively suspended Section 5 of the Act, which had required “covered jurisdictions,” predominantly in the Deep South, to obtain “preclearance” from the Department of Justice or the District Court of the District of Columbia before putting any new election laws or procedures into effect. Reaffirming the holding in *South Carolina v. Katzenbach* that the coverage formula was “rational in both practice and theory”⁴ when first adopted, Chief Justice Roberts announced that “Nearly 50 years later, things have change dramatically” and that “Coverage today is based on decades-old data and eradicated practices.”⁵ Preclearance constituted a “burden” – a word the Chief Justice repeated six times -- on covered jurisdictions, a burden whose unequal incidence across states and local jurisdictions needed more justification.

³ *Shelby County v. Holder*, 570 U.S. 529 (2013).

⁴ *South Carolina v. Katzenbach*, 383 U.S. 301, at 308 (1966), quoted in *Shelby County*, at 546.

⁵ *Shelby County*, at 547, 551.

Any correlation between the coverage formula and the current pattern of discrimination, he asserted, was “fortuitous.”⁶

In its brief in *Shelby County*, the Government argued that the 1965 coverage formula and its 1975 expansion to include protection of “language minorities” were “reverse engineered” to cover the areas that Congress knew had discriminated against minorities in the past and that Congress therefore believed were most likely to be the principal areas of discrimination in the future. It added that for the 2006 renewal of Section 4, Congress had compiled a large amount of evidence documenting continuing voting discrimination in the covered states and counties. To this argument, the Chief Justice replied that the Government had failed to demonstrate “how that discrimination [in the covered states] compares to discrimination in States unburdened by coverage.”⁷ In the *Northwest Austin* case in 2009, the Court had warned that “a statute’s disparate geographic coverage [must be] sufficiently related to the problem that it targets.”⁸ In *Shelby County*, the Chief Justice castigated Congress for not responding in the four years after his *Northwest Austin* warning by reshaping the coverage formula to ground it in “current conditions.”⁹ “If Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula,” he contended. “It would have been irrational for Congress to distinguish between States in such a fundamental way based on 40-year-old data,” he went on, “when today’s statistics tell an entirely different story.”¹⁰

However, the Chief Justice offered no evidence for his assertion that the formula had ceased to fit spatial patterns of voting discrimination, and he made no effort to delineate the course of discrimination over time or to explain that course. Although he left Section 5 itself untouched and invited Congress to “draft another formula based on current conditions,” he did not suggest any formula or provide any criteria by which to judge the adequacy of such a formula.

III. The Development of the Pre-*Shelby* Coverage Schemes

A. The Freezing Principle

Congress did not invent preclearance; it borrowed the idea from the courts. When the 1960 Civil Rights Act gave federal courts the ability to appoint federal referees to determine whether in any particular area there was a “pattern or practice” of discrimination against minorities attempting to register to vote, it created a dilemma. If local voting registrars had previously applied lenient standards to white applicants for registration, should federal registrars apply to Black applicants the much stricter standards that state laws, on their face, required? If they did so, then the white disparity in registration would be “frozen” into place. Even worse, what if a state replaced a law that a court might or actually did declare unconstitutional or

⁶ *Shelby County*, at 556.

⁷ *Shelby County*, at 552.

⁸ *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193, at 203 (2009)

⁹ *Shelby County*, at 554.

¹⁰ *Shelby County*, at 556.

contradictory to the 1957 or 1960 federal Civil Rights Acts with a new law that accomplished the same discriminatory purpose? Did the litigation against the new law have to start from the beginning again? Did the new law have to be declared unconstitutional or contrary to federal law before any Blacks could be registered? If not, under what law would they be registered?

The remedy that Federal District Judge Frank M. Johnson, Jr. of Alabama first applied to litigation brought by the Department of Justice and which was later extended and clarified by judges on the then-Fifth Circuit Court of Appeals, was to “freeze” the situation before the new laws or practices were allowed to go into effect.¹¹ Under this principle, Blacks would be subject to the same standards of registration as whites had previously had to meet. Any change in state laws, such as the substitution of a “citizenship test” for a discriminatory “understanding test,” or the addition of a “good moral character” requirement, would be suspended, at least for a period of time.

In 1965, the Department of Justice essentially wrote into its draft of Section 5 the relief that it and the federal courts in the Deep South had developed in the course of eight years of often frustrating litigation aimed at dismantling the legacy of racial discrimination in voting.¹² As a law review article stated at the time, Section 5 “represents the statutory adoption of the ‘freezing doctrine.’”¹³ While the law was being drafted, and only a day after “Bloody Sunday” in Selma outraged the nation and spurred Congress into rapid action, the U.S. Supreme Court approvingly reviewed several of the lower court “freezing principle” opinions in the major case of *Louisiana v. U.S.* The 1965 House and Senate reports cited the Louisiana case prominently, noting that “the Court suspended the operation of a literacy test (enacted during pendency of the litigation) without evidence that that particular test had been abused, on the basis of evidence that previous tests had been used to discriminate. Essentially, that is what Congress will be doing in the present bill, on the basis of overwhelming evidence that, where discrimination in voting has occurred, literacy tests have been an effective instrument of such discrimination.”¹⁴

The 1965 Senate report on the Voting Rights Act justified preclearance as a remedy with extensive discussion of the voting rights cases filed by the Department of Justice since 1957, especially 12 in Alabama, 22 in Mississippi, and 14 in Louisiana. “The barring of one contrivance [of disfranchisement of Blacks] has too often caused no change in result, only in methods,” the report announced. The corresponding House report made the same point in almost the same language: “Indeed, even after apparent defeat resisters seek new ways and means of discriminating. Barring one contrivance too often has caused no change in result, only in

¹¹ Attorneys for the Department of Justice had suggested what became the freezing principle to Judge Johnson. John Doar, “The Work of the Civil Rights Division in Enforcing Voting Rights Under the Civil rights Acts of 1957 and 1960,” 25 Fla. St. U.L.R. 1, 3 (1997).

¹² “The Federal Voting Referee Plan and the Alteration of State Voting Standards,” 72 *Yale L.J.* 770 (1963); B.E.H. and J.J.K., Jr., “Federal Protection of Negro Voting Rights,” 51 *Virginia L.R.* 1051, at 1137-48 (1965); Michael Dowling, “Freezing Concept and Voter Qualifications,” 16 *Hastings L.J.* 440 (1965); “Voting Rights Act of 1965,” 1966 *Duke L.J.* 463 (1966); Brian K. Landsberg, *Free at Last to Vote: The Alabama Origins of the 1965 Voting Rights Act* (Lawrence, Kansas: University Press of Kansas, 2007), 104-07, 167-72.

¹³ “Voting Rights Act of 1965,” 1966 *Duke L.J.* 463 (1966), at 470, n. 32.

¹⁴ *Louisiana v. U.S.*, 380 U.S. 145 (March 8, 1965); S. Rept. 89-162, Part 3, 12; H. Rept. 89-439, 15.

methods.”¹⁵ Court orders had been evaded or disregarded, the Senate report pointed out, in Forrest and Tallahatchie Counties in Mississippi, Bullock, Dallas, Macon, Montgomery, and Perry Counties in Alabama, and in Plaquemines Parish in Louisiana. The only solution was “freezing relief . . . and, in recent cases, the [Fifth Circuit] court of appeals has applied the ‘freezing principle.’”¹⁶ Following the path pioneered by the courts, Section 5 was “intended, by providing for judicial scrutiny of new or changed voting requirements, to insure against the erection of new discriminatory voting barriers by States or political subdivisions which have already been found to have discriminated.”¹⁷

Preclearance was in its origins and, as we shall see, in its operation, a conversation between the courts, the executive branch, and Congress, not a unilateral imposition by Congress. Any revision of Section 5 should build on that observation.

B. The First Coverage Scheme

How did Congress determine the “States or political subdivisions which have already been found to have discriminated”? Between the 1894 repeal of most of the provisions of the Federal Enforcement Acts of 1870 and 1871 and the passage of the Civil Rights Act of 1957, the Department of Justice had very limited authority to instigate voting rights suits.¹⁸ After 1957, the Civil Rights Division’s resources were sufficiently meager that it was forced to concentrate on the worst offenders in Alabama, Louisiana, and Mississippi.¹⁹ During the 1950s and early 60s, civil rights organizations had their hands too full with school desegregation litigation and defending the activists of the Civil Rights Movement to file many voting lawsuits. So in 1965, the geographic scope of litigation that proved racial discrimination in voting was necessarily limited, providing an insufficient record of voting rights cases on which to base a national coverage standard. What could be substituted for a comprehensive, nationwide record of litigation?

In an attempt to distinguish the states whose past discriminatory behavior was sufficiently egregious that they could be expected to discriminate in the future, the Senate catalogued the laws and constitutional provisions of the 21 states which imposed literacy tests for voting on a variety of topics: details about the literacy tests in each state; laws mandating segregation in travel, recreation, schools, and hospitals; and state antidiscrimination laws. It also compared statistics for the 21 states on voter turnout, population, voting age population, nonwhite

¹⁵ S. Rept. 89-162, Part III, at 8; H. Rept. 89-439, at 10.

¹⁶ S. Rept. 89-162, part III, at 8-12.

¹⁷ S. Rept. 89-162, part III, at 20.

¹⁸ U.S. Commission on Civil Rights, *Voting* (Washington, D.C.: Government Printing Office, 1961), 73-75.

¹⁹ *Hearings Before the Committee on the Judiciary, United States Senate, 8th Cong., 1 Sess. On S. 1564* (Washington, D.C.: U.S. Government Printing Office, 1965), at 1450; S. Rept. 89-162, at 13; John Doar, “The Work of the Civil Rights Division in Enforcing Voting Rights Under the Civil Rights Acts of 1957 and 1960,” 25 Fla. St. U.L.R. 1, 3-5 (1997).

population, and voting registration.²⁰ These indices divided the states neatly into two groups on the basis of the degree of past legal discrimination, and those groupings closely matched the formula for covered states of the original bill: the presence of a literacy test and overall voting participation or registration in the November 1964 election of less than 50%. States with less than majority registration or turnout had segregation laws, lacked antidiscrimination laws, and had vague, complicated literacy and other tests that lent themselves to administrative discrimination. States with higher voter participation had repealed earlier segregation laws and adopted antidiscrimination laws, and their literacy tests were generally simpler and more objective.

This extensive comparison of other characteristics of 21 states which all had literacy tests shows that Congress recognized from the beginning that the intent and effects behind formally similar laws might differ. Only an intensive consideration of the facts related to the adoption and workings of laws could distinguish those with discriminatory purposes and/or impacts from non-discriminatory laws. Thus, the very act of establishing a coverage scheme that separated out states that were very likely to discriminate in the future from those that were not so likely established a practical, fact-intensive mode of inquiry for Section 5. That a new election law was similar to one in another state or local jurisdiction neither excused nor automatically condemned it. Whether it would pass muster depended on the particular circumstances in each jurisdiction at each time.

Noticing that Alaska and certain counties in non-covered states would be covered under the literacy test and low political participation formula, the Senate added a 20% non-white criterion in order to exclude those areas. To ensure that states could not escape coverage by registering enough additional whites to bring total registration to over 50%, and to capture counties in states without literacy tests, but which statistics on registration and turnout suggested might be discriminating, some members of the Senate Judiciary Committee added coverage for any county in which Black voting turnout was lower than 25%.²¹ The final bill dropped the Black voting turnout criterion because of the unavailability of data on turnout by race, and it eliminated the necessity of the 20% nonwhite threshold by making it easy for a county or state with no discriminatory history to “bail out” of coverage.²²

²⁰ S. Rept. 89-162, part III, at Appendixes B, C, J, K, and L. H. Rept. 439, at 14, summarized the same data as an explanation of why the coverage scheme was chosen. That this comparison was understood to be important was reaffirmed during the 1969 House hearings on extending Section 5. Rep. Peter Rodino, later chair of the Judiciary Committee, recalling the 1965 hearings, noted that those hearings produced “considerable statistics and other data to support a record of actual substantial racial discrimination in this area [the covered jurisdictions], and . . . no comparable evidence in other areas . . .” Voting Rights Act Extension, Hearings before Subcommittee No. 5 of the House Judiciary Committee on H.R. 4249, 5538, and Similar Proposals, 91st Congress, May 14, 15; June 19, 26; July 1, 1969, at 237.

²¹ S. Rept. 89-162, part III, at 37-38.

²² B.E.H. and J.J.K., Jr., “Federal Protection of Negro Voting Rights,” 51 *Virginia L.R.* 1051, at 1198, n. 12. Alaska and certain counties in other states were allowed to bail out of coverage in 1966 by the District Court of the District of Columbia. H. Rept. 94-196, at 5, n. 4. Some election districts in Alaska were recovered from 1970 until 1972. *Id.*, at 6, n. 5. When coverage was extended to “language minorities” in 1975, the whole state of Alaska was once again covered. *Id.*, at 16, 24.

In sum, the process of devising the first coverage scheme is best described as choosing an index that tracked extensive evidence of current discriminatory patterns, not as reverse engineering from a predetermined set of states.

C. Supreme Court Approval of Section 5

When South Carolina challenged the Voting Rights Act, concentrating on preclearance and the coverage scheme, eight members of the Supreme Court flatly rejected the challenge, and the Court unanimously upheld the coverage scheme.²³ Under then-existing Supreme Court precedent, the principle of equality of the states “applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared,” Chief Justice Warren concluded for himself and seven colleagues.²⁴ Reviewing evidence from the House and Senate hearings and reports that connected literacy tests and low turnout with voting discrimination in specific legal cases, especially in Alabama, Louisiana, and Mississippi, the Chief Justice declared the coverage formula “rational in both practice and theory” – in theory, because of the logical connection of discrimination with low voting turnout, and in practice, because of the proven empirical connection of literacy tests with discrimination.²⁵ Although the evidence from other legal cases and from studies by the U.S. Commission on Civil Rights was “more fragmentary,” Congress was, the Court observed, “entitled to infer a significant danger of the evil [of voting discrimination] in the few remaining States and political subdivisions covered by Section 4 (b) of the Act.”²⁶ Exclusions from the formula confirmed its rationality. “There are no States or political subdivisions exempted from coverage under Section 4 (b) in which the record reveals recent racial discrimination involving tests and devices.”²⁷

As for preclearance, the Chief Justice cited sections of the House and Senate reports that catalogued federal cases in which courts, including the Supreme Court itself, had employed the freezing principle to counteract what he termed some states’ “extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees.”²⁸ The evidence from legal cases, the Court ruled, gave Congress a firm basis for concluding “that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself.”²⁹

²³ *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). While Justice Black dissented on preclearance, echoing the outmoded “conquered province” view of the First Reconstruction that had been prevalent in Alabama in his youth (*id.*, at 360), he upheld the coverage scheme as an exercise of Congress’s “hitherto unquestioned and undisputed power to decide when, where, and upon what conditions its laws shall go into effect.” (*id.*, at 356).

²⁴ *Id.*, at 328-29.

²⁵ *Id.*, at 330.

²⁶ *Id.*, at 329.

²⁷ *Id.*, at 331.

²⁸ *Id.*, at 335, citing H. Rept. 89-439, at 10-11, and S. Rept. 89-162, part III, at 8, 12.

²⁹ *Id.*, at 335.

Thus, the record drawn from legal cases concerning racial discrimination in voting that inspired Congress's framing of the coverage scheme and the remedial provisions of Section 5 also provided the evidence on which the Supreme Court declared the provision constitutional. This observation suggests that inquiring into the record of legal cases might provide the basis for current revisions of the Act.

D. "Vote Dilution" and "Vote Denial" in Tuskegee

The Supreme Court opinion in *Allen v. Board of Elections* ruled that not only "vote denial" laws, but also "vote dilution" laws had to be precleared under Section 5.³⁰ This central decision in the development of Section 5 represented not a new departure in the protection of voting rights, but a return to the recent roots of that protection, for vote denial and vote dilution were intertwined from the beginning.³¹

Macon County, Alabama had the highest percentage of Blacks in its population of any county in the country in 1960.³² Because it was the site of the famous Black institution of higher education, Tuskegee Institute, it also had a highly educated Black population, available for political leadership if any appreciable number of the 83% of the county's population which was Black managed to overcome obstacles to voter registration.³³ It was not surprising, then, that Macon County's white political establishment pioneered techniques of racial discrimination or that Blacks and the U.S. government fought back with lawsuits. Two ingenious techniques – drawing the most famous gerrymander since the 1812 original, and having the voting registrars simply resign without replacement, so that no additional Blacks could be registered -- produced temporally and substantively overlapping legal actions in the courts of the Middle District of Alabama and the U.S. Supreme Court from 1958 through 1961.³⁴

³⁰ 393 U.S. 544 (1969). Legal scholars conventionally term laws or practices that hamper people from voting "vote denial," and anything that disadvantages minorities in transforming their votes into power within the political system as "vote dilution." Daniel P. Tokaji, "The New Vote Denial: Where Election Reform Meets the Voting Rights Act," 57 *South Carolina LR* 689, 691 (2006).

³¹ That this was true during the nineteenth century, as well, is shown in *my Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction* (Chapel Hill, N.C.: Univ. of North Carolina Press, 1999), 25-38, in a passage that began as testimony before a House Judiciary Subcommittee considering revisions of the Voting Rights Act in 1981.

³² U.S. Census, Negro Population, By County: 1960 and 1950, Table 2. – "Total and Nonwhite Population, 1960, and Negro Population, 1960 and 1950, For Counties, By State," available at <https://babel.hathitrust.org/cgi/pt?id=mdp.39015071205598&view=1up&seq=3>.

³³ Gabriel J. Chin and Lori Wagner, Eds., *U.S. Commission on Civil Rights: Reports on Voting* (1959 report), (Buffalo, N.Y.: William S. Hein & Co., Inc.), 69-70, 75.

³⁴ The resignation of the members of the Board of Registrars to avoid registering Blacks was actually an old tactic in Macon County, having apparently begun in 1946, after the white primary was declared unconstitutional, and having been used sporadically from 1946 through 1961. Appointees after the first decision in *U.S. v. Alabama* refused to serve because of what a United Press International article termed "the pressure for Negro registration." Gabriel J. Chin and Lori Wagner, Eds., *U.S. Commission on Civil Rights: Reports on Voting* (1959 report), (Buffalo, N.Y.: William S. Hein & Co., Inc.), 75-76, 140.

Judge Frank Johnson decided the dilution case, *Gomillion v. Lightfoot*, more than five months before he decided the denial case, *U.S. v. Alabama*.³⁵ In between the two decisions, the U.S. Commission on Civil Rights held a fractious, highly publicized hearing in Montgomery, Alabama that focused on Macon County.³⁶ Not only did the commissioners hear from numerous Black witnesses who had been denied the right to register to vote, but they also received evidence that the Tuskegee gerrymander was only another disfranchising device, including the same map of the gerrymander that would become famous in the U.S. Supreme Court's opinion in *Gomillion*.³⁷ Notice of the gerrymander law and the even more radical state constitutional amendment, which passed both houses of the Alabama legislature in 1957, to abolish Macon County and divide its population among neighboring counties, was also presented to a U.S. Senate committee during 1959 hearings concerning an amended Civil Rights Act.³⁸

In his opinion in *Gomillion*, Judge Johnson painstakingly detailed the racially discriminatory nature of the gerrymander, ending his description with an explicit connection between dilution and disfranchisement: "Plaintiffs state that said Act [the Alabama legislature's local redistricting law for Tuskegee] is but another device in a continuing attempt to disenfranchise Negro citizens not only of their right to vote in municipal elections and participate in municipal affairs, but also of their right of free speech and press, on account of their race and color."³⁹ He refrained from overturning the law, however, citing distant precedents that barred courts from regulating municipal charters and a more recent one that prohibited courts from inquiring into legislative motives.⁴⁰

The Court of Appeals affirmed Johnson's opinion over a lengthy dissent by Judge John Brown, who rejected the municipal precedents as too old and more recent cases about reapportionment, the poll tax, and the Georgia county unit system because racial concerns were not explicitly raised in them. Brown thought the Tuskegee redistricting "discriminatory in purpose and effect" and cited decisions which held that "sophisticated as well as simple-minded modes of discrimination" could be barred.⁴¹ Judge John Minor Wisdom concurred "specially," his opinion raising the problem that would later be addressed by the freezing principle and Section 5: "The best that this Court could do for the plaintiffs would be to declare Act 140 of 1957 invalid. There is nothing to prevent the legislature of Alabama from adopting a new law redefining Tuskegee town limits, perhaps with small changes, or perhaps a series of laws . . ."⁴²

³⁵ *Gomillion v. Lightfoot*, 167 F. Supp. 405 (M.D. Ala. Oct. 29, 1958); *U.S. v. Alabama*, 171 F. Supp. 720 (M.D. Ala. March 6, 1959).

³⁶ Gabriel J. Chin and Lori Wagner, Eds., *U.S. Commission on Civil Rights: Reports on Voting* (1959 report), (Buffalo, N.Y.: William S. Hein & Co., Inc.), 75-

³⁷ Compare Gabriel J. Chin and Lori Wagner, Eds., *U.S. Commission on Civil Rights: Reports on Voting* (1959 report), (Buffalo, N.Y.: William S. Hein & Co., Inc.), 77 with *Gomillion v. Lightfoot*, 364 U.S. 339, 348 (1960).

³⁸ Senate Hearings, at 90-91.

³⁹ 167 F. Supp. 405, 407.

⁴⁰ *Id.*, 408-10.

⁴¹ 270 F.2d 594, 607-08 (5th Cir. 1959). In his opinion in *Gomillion*, Brown tied the discrimination in that case explicitly with the discrimination that Judge Johnson had found in *U.S. v. Alabama*. 270 F.2d 594, 611 (5th Cir. 1959).

⁴² 270 F.2d 594, 615-16.

The Supreme Court unanimously reversed the lower courts on the questions of whether, in a case involving racial discrimination, courts were powerless to inquire into motives and to order changes in municipal law, and it remanded the case to Judge Johnson to decide whether the Alabama legislature had acted in a discriminatory manner in this instance. Although Justice Felix Frankfurter had ruled congressional reapportionment non-justiciable in *Colegrove v. Green*,⁴³ he here made an exception for racial discrimination, equating this instance of vote dilution to vote denial: “While in form this is merely an act redefining metes and bounds, if the allegations are established, the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights.”⁴⁴ Thus, to his later regret, Justice Frankfurter had opened the door to the reapportionment and other vote dilution cases – *Baker v. Carr*,⁴⁵ *Reynolds v. Sims*,⁴⁶ and all of their progeny – because he recognized that a dilutive device which “singles out a readily isolated segment of a racial minority for special discriminatory treatment, . . . violates the Fifteenth Amendment.”⁴⁷

The Macon County registration case, *U.S. v. Alabama*, was the second test case that the government brought anywhere in the nation under the 1957 Civil Rights Act.⁴⁸ Judge Johnson at first dismissed it on the grounds that Alabama law did not allow suing voting registrars as officeholders, but only as individuals, so that when they resigned, the U.S. was left with no one to sue who had the power to register voters. But the case serves as another illustration of the interweaving of the courts and Congress, for both the Justice Department’s complaint and Johnson’s initial opinion were reprinted in the 1959 Senate Hearings on civil rights, and the case served as one of the inspirations for the 1960 Civil Rights Act.⁴⁹ As Sen. John Carroll, a supporter of the 1960 law, remarked during a hearing on the bill, “if there are defects, in the right to vote legislation [a reference to the 1957 Civil Rights law], such as have been revealed by the Federal court in the Macon County decision, if we could strengthen that statute, it would render an appeal moot.”⁵⁰

Although the 5th Circuit affirmed Johnson’s cautious decision, the U.S. Supreme Court, as if following the prepared colloquy between Senators Carroll and Joseph Clark,⁵¹ vacated and remanded it to Johnson’s court, pointing to the just-passed 1960 Civil Rights Act as authorizing

⁴³ 328 U.S. 549 (1946).

⁴⁴ 364 U.S. 339, 357 (1960).

⁴⁵ 369 U.S. 186 (1962). *Gomillion* was central to Justice Brennan’s argument for the justiciability of reapportionment in *Baker*. See *id.*, at 229-31.

⁴⁶ 377 U.S. 533 (1964).

⁴⁷ 364 U.S. 339, 346.

⁴⁸ 171 F. Supp. 720 (M.D. Ala. March 6, 1959); C.W.H. III, “Federal Legislation to Safeguard Voting Rights: The Civil Rights Act of 1960,” 46 *VA. L. R.* 945, 961 (1960).

⁴⁹ “Legislative History of the Civil Rights Act of 1960: P.L. 86-449: 74 Stat. 86: May 6, 1960” (1960), hereinafter referred to as “Senate Hearings,” pt. 1, at 36, 161-65, 174-80. The 1960 Act allowed the Attorney General to sue a state specifically to remedy the problem documented in *U.S. v. Alabama*. C.W.H. III, “Federal Legislation to Safeguard Voting Rights: The Civil Rights Act of 1960,” 46 *VA. L. R.* 945, 965, n. 120, 973 (1960).

⁵⁰ Senate Hearings, pt. 1, at 183. Sen. Carroll had a similar colloquy about the case with Attorney General William P. Rogers. *Id.*, at 220-21. There was a similar statement by Sen. Clifford Case, *id.*, at 496.

⁵¹ Senate Hearings, at 183-84.

him to appoint federal referees to register voters in Macon County.⁵² On remand, Judge Johnson froze the loose standards that had been used previously to register whites and ordered 64 Blacks registered. Both the 5th Circuit and the U.S. Supreme Court affirmed.⁵³ Johnson’s opinion is seen as the origin of the freezing principle, even though its more explicit enunciation would wait for 18 months until another Johnson opinion in *U.S. v. Penton*.⁵⁴

E. Defining a “Standard, Practice, or Procedure with Respect to Voting”⁵⁵ Broadly Enough to Overcome Disfranchisers’ “Ingenuity”⁵⁶

Allen v. Board of Elections decided two questions. First, it allowed private citizens and groups to bring suits to compel refractory jurisdictions to comply with the law. Second, by interpreting the language of Section 5 to include not only simple restrictions on registration and casting a ballot, but any discriminatory devices, it enabled the provision to impede the almost infinite range of elusive tactics of voting discrimination. Contrary decisions on either question would have severely hamstrung Section 5, assuming no successful effort in Congress to overturn them. Were these decisions outside the original intent of Congress, and were they departures from lower court decisions interpreting the Voting Rights Act and the constitution?

After the Supreme Court extended its fifteenth amendment ruling in *Gomillion* that racial gerrymandering was justiciable to a fourteenth amendment ruling in *Baker v. Carr* that reapportionment in general was justiciable, and then to the one-person, one vote decision in *Reynolds v. Sims*, Alabama and other states were forced to redistrict their legislatures.⁵⁷ In *Reynolds v. Sims*, Chief Justice Warren essentially equated vote denial with vote dilution, characterizing racial gerrymandering in *Gomillion* and white primaries in *Smith v. Allwright*⁵⁸ as resulting in “denying to some citizens their right to vote . . . [A]ny restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”⁵⁹

With that guidance from the Supreme Court, it was not surprising that the same three-judge court that had ruled the Alabama legislature unconstitutionally malapportioned in the lower court phase of *Reynolds v. Sims* found that the legislature had intentionally racially

⁵² *U.S. v. Alabama*, 267 F.2d 808 (5th Cir. 1960), vacated and remanded 362 U.S. 602 (1960).

⁵³ *U.S. v. Alabama*, 188 F. Supp. 759 (M.D. Ala. 1961), consolidated with 192 F. Supp. 677 (M.D. Ala. 1961), aff’d 304 F.2d 583 (5th Cir. 1962), aff’d 371 U.S. 37 (U.S. 1962).

⁵⁴ Michael Dowling, “Freezing Concept and Voter Qualifications,” 16 *Hastings L.J.* 440, 441-42 (1965); B.E.H. and J.J.K., Jr., “Federal Protection of Negro Voting Rights,” 51 *Virginia L.R.* 1051, 1052-53 (1965); *U.S. v. Penton*, 212 F. Supp. 193 (M.D. Ala. 1962).

⁵⁵ Section 5 of the Voting Rights Act, quoted in *Allen v. State Bd. of Elections*, 393 U.S. 544, 548 (1969).

⁵⁶ *Allen v. State Bd. of Elections*, 393 U.S. 544, 548 (1969).

⁵⁷ *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964). *Reynolds* had been appealed from a *per curiam* decision by three-judge court in the Middle District of Alabama, which included Frank Johnson, holding the unequally apportioned Alabama legislature unconstitutional.

⁵⁸ 321 U.S. 649 (1944).

⁵⁹ *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

gerrymandered several legislative seats in its post-*Reynolds* redistricting.⁶⁰ In particular, it ruled that Black votes had been diluted by combining 83% Black Macon County with two overwhelmingly white counties, Elmore and Tallapoosa, to create a 41% Black state House district, and by combining four counties into a three-member multimember House district to prevent Blacks from electing anyone from 72% Black Bullock County. “Systematic and intentional dilution of Negro voting power by racial gerrymandering is just as discriminatory as complete disfranchisement or total segregation. . . . We, therefore, hold that the Legislature intentionally aggregated predominantly Negro counties with predominantly white counties for the sole purpose of preventing the election of Negroes to House membership.” Citing *Gomillion*, the panel ruled the legislature’s scheme violative of both the fourteenth and fifteenth amendments.⁶¹ Although the case was filed before the passage of the Voting Rights Act and was not formally decided under that statute, it provides another powerful illustration of the connection between racial and non-racial vote dilution cases and of both with the concept of vote denial. As the court put it, “Any limitation of the persons for whom votes may be cast is logically a restriction on the right to vote.”⁶²

When Black candidates tried to run for the state legislative seats in Bullock, Barbour, and Macon Counties that had been redrawn after *Sims v. Baggett*, as well as for county offices in those counties, the county Boards of Registrars and other election officials allegedly failed to purge the rolls of whites who were no longer eligible to vote, counted votes illegally cast by whites, harassed poll watchers for Black candidates, and refused to assist illiterate Black voters. In response, Black candidates sued under the Voting Rights Act, but the election officials challenged their right to bring suit under the Act, contending that only the U.S. Government had the power to sue. Judge Johnson ruled that even though certain provisions of the Act did authorize the United States to sue, nothing in the Act precluded private lawsuits or diminished the power of individuals to sue under Section 1983, the remaining provision of the Enforcement Act of 1871. Bolstered by an *amicus curiae* brief by the Department of Justice, Judge Johnson denied the defendants’ motions and allowed the private lawsuit to go forward.⁶³

Six months after *Sims v. Baggett*, a slightly different panel of judges in the Middle District of Alabama issued a decision squarely based upon Section 5 that explicitly interpreted the scope of actions covered by it as being very broad. In June, 1965, with the Voting Rights Act having already passed the Senate and pending in the House, an Alabama state legislator introduced a bill extending the terms of local officials in Bullock County, which would have insured a continuation of white control in the face of Black enfranchisement.⁶⁴ As in *Gomillion*, this law was challenged not by the federal government, but by the Black Montgomery lawyer

⁶⁰ The three judges were Circuit Court Judge Richard Rives and District Court Judges Daniel H. Thomas and Frank Johnson. The earlier case was *Sims v. Frink*, 208 F. Supp. 431 (M.D. Ala., July 21, 1962), and the post-*Reynolds* case was *Sims v. Baggett*, 247 F. Supp. 96 (M.D. Ala. Oct. 2, 1965).

⁶¹ *Sims v. Baggett*, 247 F. Supp. 96, 109-10 (M.D. Ala. Oct. 2, 1965).

⁶² *Sims v. Baggett*, 247 F. Supp. 96, 105 (M.D. Ala. Oct. 2, 1965).

⁶³ *Gray v. Main*, 291 F. Supp. 998 (M.D. Ala. Sept. 7, 1966).

⁶⁴ Steven F. Lawson, *Black Ballots: Voting Rights in the South, 1944-1969* (New York: Columbia Univ. Press, 1976), 318-19; *Sellers v. Trussell*, 253 F. Supp. 915, 917 (M.D. Ala., April 15, 1966).

Fred Gray (the first named plaintiff in *Gray v. Main*) and the NAACP-LDF. The opinion in the case by Circuit Judge Richard Rives gave Section 5 a close reading:

As originally introduced, Section 5 mentioned only "qualifications" and "procedures." The legislative history shows that the present language was meant to broaden the section and to make it all-inclusive of any kind of practice. Senate Hearings 191, 192, House Hearings 192, 89th Cong., 1st sess. Postponing an election by extending the terms of office of elected officials is within the phrase "any voting qualifications or prerequisite to voting, or standard, practice, or procedure with respect to voting," as used in Section 5 and, hence, the change embodied in Act No. 536 is covered.⁶⁵

Because neither Bullock County nor the State of Alabama had submitted Act No. 536 for preclearance, the court ruled that it could not go into effect.

Spotlighting another dilutive reaction to the upsurge in Black registration under the Voting Rights Act, Judge Johnson declared unconstitutional a shift from district to at-large elections for members of the Barbour County Democratic Executive Committee, a shift undertaken after six Black candidates had qualified to run for the Committee. The "clear effect" of the change, which ended thirty years of district elections in the first election in which substantial numbers of Blacks were registered to vote in the county, "is to turn Negro majorities into minorities in certain political areas, thus, as a practical matter, eliminating the possibility of a Negro candidate winning a place on the Executive Committee."⁶⁶ This was another private party case brought by Fred Gray and the NAACP-LDF. Even though the case had not been brought under the Voting Rights Act, the issues were similar, particularly the attempt to employ a change in the electoral structure to overcome an upsurge in registered Black voters and a consequent threat from Black candidates.

Although these Alabama cases show that Section 5 and the 15th amendment were interpreted in the 1960s to include dilutionary devices, none of the Alabama cases was appealed to the U.S. Supreme Court. A case from Virginia and three test cases from Mississippi were. Because the Voting Rights Act suspended literacy tests, Virginia for the first time required election officials to assist illiterates who wished to cast write-in votes. But when functionally illiterate Black voters sought to cast write-ins in 1966 by sticking labels with a candidate's name on their ballots, they were prohibited from doing so. A three-judge Virginia court rejected an NAACP-LDF challenge on the basis of the fourteenth amendment and the Voting Rights Act on the ground that "The requirement that a write-in candidate's name be inserted in the voter's

⁶⁵ *Sellers v. Trussell*, 253 F.Supp. 915, 918 (M.D. Ala., April 15, 1966). The Senate Hearing reference is to a colloquy between Sen. Hiram Fong and Attorney General Nicholas Katzenbach, in which Sen. Fong suggested that the word "procedure" in the draft of the law be expanded to "standards, practices, or procedures." The Attorney General agreed that the longer phrase might be "broader than simply the word 'procedure,'" but said that even the single word was "intended to be all-inclusive of any kind of practice." The longer phrase was inserted into the final draft of the law.

⁶⁶ *Smith v. Paris*, 257 F. Supp. 901, 904 (M.D. Ala. Aug. 22, 1966), aff'd 386 F.2d 979 (5th Cir. 1967).

handwriting is not a test or device defined in 42 U.S.C. Section 1973b(c). The requirement did not preclude the plaintiffs from registering or from voting.”⁶⁷

If the Virginia case describes what many scholars would now call vote denial, the Mississippi cases were clearly examples of vote dilution. In response to a nearly tenfold increase in Black voting registration in Mississippi as a result of the passage of the Voting Rights Act,⁶⁸ the 1966 Mississippi legislature passed a series of bills that have been described by the same phrase used to name southern governments’ response to *Brown v. Board of Education*: “massive resistance.”⁶⁹ Besides racially gerrymandering the state legislature and congressional delegations, the legislature shifted some boards of supervisors, which had since 1869 been elected by districts, to at-large elections; eliminated elections for county school superintendents in 11 counties, making them instead appointed positions; and radically changed the procedures for qualifying independent candidates for office, a measure designed to inhibit campaigns by the Mississippi Freedom Democratic Party, a Black civil rights group organized during the 1964 “Freedom Summer.” The MFDP filed suit against the redistricting separately in what became a 14-year litigation that took nine trips to the Supreme Court.⁷⁰

The Lawyers’ Committee for Civil Rights filed six cases challenging the at-large, appointment, and candidate-qualifying statutes, which were all decided during October, 1967, one each by Judges W. Harold Cox and Dan M. Russell, Jr., and one by a three-judge court composed of Cox, Russell, and Robert A. Ainsworth. In all three cases, the Lawyers’ Committee dropped all constitutional issues, and both the plaintiffs and the State stipulated to facts and submitted briefs on the sole question of whether the laws were subject to preclearance. In identically worded three-paragraph opinions, Judges Cox and Russell decided for the State and passed the issue on to the Supreme Court.⁷¹ Although the candidate-qualifying case was a bit more complicated, the *per curiam* opinion had the same formulaic quality and concluded that “The Act does not deal with voting but deals with elections, and more particularly the candidates; therefore, it does not impinge upon Section 5 of the Voting Rights Act of 1965.”⁷²

Before discussing the Supreme Court’s opinion in *Allen*, it is worth considering how surprising it would have been if that Court had not decided the way it did. First, we have already seen the intimate connections between dilution and denial in the litigation from the late 1950s on in Alabama. Second, virtually every state and local government in the country had had to reapportion several years before the regular decadal redistricting because of court decisions whose fount was a racial gerrymandering case, *Gomillion*, that equated vote dilution with vote denial. Third, Mississippi, notorious in the nation for voting discrimination because of the

⁶⁷ *Allen v. State Bd. of Elections*, 268 F.Supp. 218, 221-22 (1967).

⁶⁸ H. Rept. 91-397, at 4 gives the registration gain.

⁶⁹ The best treatment of the Mississippi legislation and subsequent litigation is Frank R. Parker, *Black Votes Count: Political Empowerment in Mississippi After 1965* (Chapel Hill, North Carolina: Univ. of North Carolina Press, 1990), chapters 2-4.

⁷⁰ *Id.*, at 85-91.

⁷¹ *Bunton v. Patterson*, 281 F.Supp. 918 (S.D. Miss., Oct. 9, 1967); *Fairley v. Patterson*, 282 F. Supp. 164 (S.D. Miss., Oct. 4, 1967).

⁷² *Whitley v. Johnson*, 296 F.Supp. 754, 756 (S.D. Miss., Oct. 27, 1967).

Freedom Summer of 1964, passed radical laws in its first legislative session after the passage of the Voting Rights Act that had the transparent purpose of rendering the Blacks' newly regained right to vote illusory. If it was that easy to circumvent the Act with mechanisms – at-large elections, appointment, and restrictions on candidacies – that had been used to hamper the First Reconstruction,⁷³ then the broad purpose of the Voting Rights Act, finally to fulfill the promise of the First Reconstruction, would be severely undermined. Fourth, the “standard, practice, or procedure with respect to voting” language was broad and had been extended by amendment from the bare word “procedure,” even though Attorney General Katzenbach had stated that the word “procedure” in the initial bill “was intended to be all-inclusive of any kind of practice.”⁷⁴ Fifth, in his initial introduction of the Voting Rights Act in the House, Katzenbach rested his argument for its constitutionality under the fifteenth amendment on the Supreme Court’s opinion in *Gomillion*, and later in his testimony, he rejected an attempt to constrain the types of procedures that could be challenged under Section 5, stating that “there are an awful lot of things that could be started for purposes of evading the 15th amendment if there is the desire to do so.”⁷⁵ And sixth, in its attack on Section 5 in 1969, the Nixon Administration, elected on a “southern strategy” platform of slowing, if not reversing the progress of civil rights, did not challenge the application of Section 5 to vote dilution, which could have been accomplished by a simple amendment to the statute.⁷⁶

In his opinion for a 7-2 majority, Chief Justice Warren ruled that the Act’s “laudable goal could be severely hampered” if private parties could not sue to require jurisdictions to submit changes in their election laws for preclearance. The Department of Justice, he pointed out, had limited staff, and there were many areas to supervise. Moreover, the Department’s brief had urged the Court to allow private lawsuits, and the Court had previously granted the right of the affected public to sue under the Securities Exchange Act of 1934, even though that law, like the Voting Rights Act, did not explicitly allow for private enforcement.⁷⁷

In considering whether Congress meant Section 5 to cover dilution, Chief Justice Warren repeated the two statements of Attorney General Katzenbach quoted above. He discounted a statement of Asst. Attorney General Burke Marshall that “The problem that the bill was aimed at was the problem of registration” not only because it seemed inconsistent with the Katzenbach statements, but more important, that it was inconsistent with the broad purposes of the Act, its definition of the right to vote as including “all action necessary to make a vote effective,” and with the Court’s own recent decisions, in particular, with *Reynolds v. Sims*. It was *Sims* that the Chief Justice paraphrased in his summary of *Allen*’s holding. Congress, the Chief Justice said, intended “that all changes, no matter how small, be subjected to Section 5 scrutiny. . . . The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on

⁷³ See Kousser, *Colorblind Injustice*, 25-38.

⁷⁴ Hearings Before the Committee on the Judiciary, United States Senate, 89th Cong., 1 Sess. on S. 1564 (Washington, D.C.: Government Printing Office, 1965), at 191-92.

⁷⁵ Hearings Before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, 89th Cong., 1 Sess. on H.R. 6400 (Washington, D.C.: Government Printing Office, 1965), at 15, 95.

⁷⁶ Kousser, “The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965-2007,” 86 *Tex. L.R.* 667, 687-88 (2008).

⁷⁷ *Allen v. Board of Elections*, 393 U.S.566 at 556-57 (1969).

casting a ballot.”⁷⁸ Even as harsh a critic of Section 5 as Abigail Thernstrom termed the decision in *Allen* as “both correct and inevitable.”⁷⁹

In May, 1968, the U.S. Commission on Civil Rights had delivered to Congress a report entitled *Political Participation: A study of the participation by Negroes in the electoral and political processes in 10 Southern States since passage of the Voting Rights Act of 1965*,⁸⁰ which devoted three detailed chapters to documenting obstacles to Blacks remaining after they managed to register and to vote in general elections and even Democratic primaries in the South. The title of the first chapter in this section of the report was “Diluting the Negro Vote,” and it began with a discussion of shifts from district to at-large elections in Mississippi that, the next year, led to the Supreme Court’s decision in *Allen*.

The House Judiciary Committee, in its 1969 report on the extension of the Voting Rights Act, drew heavily on the Civil Rights Commission’s study and cases before and after *Allen* that had ruled laws that diluted Black votes illegal to support its enthusiastic endorsement of the *Allen* decision.⁸¹ *Allen*, in the Committee’s words, “discussed the history of the enforcement of section 5 and clarified its scope. . . . Federal review of voting law changes insures that, with discrimination in registration and at the voting booth blocked, the affected States and counties cannot, by employing changes in legislation undo or defeat the rights recently won by nonwhite voters.”⁸² The bipartisan committee report did not treat *Allen* as a departure from or expansion of the original purpose of Section 5. On the contrary, during the hearings on the bill, the ranking Republican member of the relevant subcommittee, Rep. William McCulloch of Ohio, remarked that “the operation of this legislation is not new or novel . . . that authority was there, not only under this legislation, but under the basic theory of the Supreme Court” in *Gomillion*.⁸³

Rep. McCulloch’s comment came in a colloquy with the Attorney General of Mississippi, A.F. Summer, about a case from Summer’s hometown that had been decided on July 17, 1969 by a three-judge federal court in Mississippi. Canton, Mississippi had annexed disproportionately white areas before the elections of 1966 and 1968, relocated polling places within the city, and proposed to shift from district to at-large elections. It had not submitted any of these post-1965 changes for preclearance because, according to Summer, “Nobody ever dreamed you would have to submit an enlargement of the city limits.”⁸⁴ For the majority, Judge James P. Coleman, a

⁷⁸ *Id.*, at 564-69.

⁷⁹ *Whose Votes Count? Affirmative Action and Minority Voting Rights* (Cambridge, Mass.: Harvard Univ. Press, 1987), 30. Justice Thomas’s assertions in *Holder v. Hall*, 512 U.S. 874, at 891-94 (1994) that the Voting Rights Act “was originally perceived as a remedial provision directed specifically at eradicating discriminatory practices that restricted blacks’ ability to register and vote in the segregated South” distorted the historical record of the background and early operation of the Act, as his gloss on “standard, practice or procedure” distorted the intent of those who drafted the text, as statements by Attorney General Katzenbach during the Senate hearings on the bill demonstrate.

⁸⁰ Washington, D.C.: United States Commission on Civil Rights.

⁸¹ H. Rept. 91-397, at 7.

⁸² *Id.*, at 8.

⁸³ Voting Rights Act Extension, Hearings before Subcommittee No. 5 of the House Judiciary Committee on H.R. 4249, 5538, and Similar Proposals, 91st Cong., May 14, 15; June 19, 26; July 1, 1969, at 132.

⁸⁴ *Id.*, at 132.

former governor of Mississippi, failed to distinguish or even cite the March 3, 1969 *Allen* opinion by the Supreme Court, which had been issued four and a half months before Coleman's decision. And he did not stop at deciding whether Section 5 covered the changes in election practices, but went on to rule that the changes were not discriminatory in intent or effect, questions reserved by the Voting Rights Act for the Department of Justice or the District Court of the District of Columbia.⁸⁵ Coleman's decision reaffirmed the wisdom of Congress in resting jurisdiction of substantive Section 5 lawsuits (although not those concerned with whether a practice was covered) in the District Court of the District of Columbia.

Even though by the time that the Supreme Court made its decision on appeal, Chief Justice Warren and Justice Abe Fortas had been replaced by Justices Warren Burger and Harry Blackmun, Justice Brennan announced the reversal of Judge Coleman's decision for the same 7-2 majority as in *Allen*, proving that *Allen* was not just an activist expansion of Section 5 by the Warren Court. Brennan was evidently unhappy with Judge Coleman's opinion, noting that the case had been filed in the Mississippi court two months after *Allen* had been decided by the Supreme Court.⁸⁶ Citing *Gomillion* and a summary of the Civil Rights Commission's *Political Participation* study in testimony before the House Judiciary Committee, Justice Brennan concluded that annexation and a shift from district to at-large elections were as clearly meant by Congress to be covered practices as changing the locations of polling places was.⁸⁷ As Rep. McCulloch had rested his view of the scope of Section 5 and the fifteenth amendment on decisions of the Supreme Court, Justice Brennan quoted McCulloch to justify the Court's view of the intent of Congress:

. . . resistance to progress has been more subtle and more effective than I thought possible. A whole arsenal of racist weapons has been perfected. Boundary lines have been gerrymandered, elections have been switched to an at-large basis, counties have been consolidated, elective offices have been abolished where blacks had a chance of winning, the appointment process has been substituted for the elective process, election officials have withheld the necessary information for voting or running for office, and both physical and economic intimidation have been employed.

Section 5 was intended to prevent the use of most of these devices.⁸⁸

Any question about the practically unlimited breadth of the practices that triggered Section 5 was answered in 1973 in *Georgia v. U.S.*⁸⁹ In redistricting its legislature in 1971, Georgia increased the number of multimember districts and extensively redrew district lines, crossing many county boundaries and bringing many counties that had previously been in single-member districts into multimember districts. Candidates in multimember districts had to run for numbered posts and receive a majority of votes. Following *Allen*, Georgia submitted its plan to the Department of Justice, but the Department denied preclearance on the double negative

⁸⁵ *Perkins v. Matthews*, 301 F. Supp. 565 (S.D. Miss. July 17, 1969).

⁸⁶ *Perkins v. Matthews*, 400 U.S. 379, 383 (1971).

⁸⁷ *Id.*, at 387-89.

⁸⁸ *Id.*, at 390, n. 8. McCulloch evidently meant to refer to intimidation as a device that Section 5 did not cover.

⁸⁹ 411 U.S. 526 (1973).

grounds that it could not conclude that the change did not have a discriminatory purpose or effect. Georgia redrew its plan with fewer multimember districts, but the Department was still unsatisfied, and when the State sought to proceed to elections with un-precleared districts, the Department obtained an injunction in a Georgia federal court. Georgia lost and appealed on grounds that redistricting was not a covered practice under Section 5; that it had not changed procedures, because it had had multimember districts, numbered posts, and a majority vote requirement before 1965, just not these particular districts; and that the Department should have to decide affirmatively that the practice did have a discriminatory purpose or effect.⁹⁰

For a five-member majority, Justice Potter Stewart first brushed aside the idea that having multimember districts before 1965 insulated differently drawn districts after 1965, saying the Court was concerned “rather with the reality of changed practices as they affect Negro voters.”⁹¹ Almost as easily, he declared that the question of whether Section 5 applied to redistricting was “all by conclusively established” by *Allen*, which he said “implicitly recognized the applicability of Section 5 to similar but more sweeping election law changes arising from the reapportionment of state legislatures.”⁹² In another demonstration of the intertwining of congressional and judicial actions, Justice Stewart additionally justified his conclusion by noting that Congress had repeatedly discussed and approved of the *Allen* decision in its extension of Section 4 in 1969-70, that Georgia had explicitly recognized that *Allen* required it to submit its redistricting plans when it transmitted them – twice – to the Department, and that 381 reapportionment plans had been submitted for preclearance since *Allen*.⁹³ Although dissenters disagreed with Justice Stewart’s approval of the Department’s rules on its burden of proof, they did not explicitly question the application of Section 5 to redistricting.⁹⁴ The broad interpretation of the covered practices was now firmly established by three Supreme Court decisions with a variety of justices in agreement.

F. Expansion of Coverage to Places Containing “Language Minorities”

Congress made minimal changes in the coverage scheme in 1970, appending registration and turnout in the 1968 presidential election to the formula, which had the effect of adding 15 counties in Arizona, California, Idaho, and New York, 4 districts in Alaska, and several towns in Connecticut, New Hampshire, Maine, and Massachusetts to the list of jurisdictions that were

⁹⁰ *Id.*, at 528-31.

⁹¹ *Id.*, at 531.

⁹² *Id.*, at 532-33.

⁹³ *Id.*, at 533-34.

⁹⁴ *Id.*, at 541-45. The Department of Justice had not drawn up any rules for Section 5 until Sept. 10, 1971, 30 months after the *Allen* decision. H. Rept. 94-196, at 9. The reasoning behind the rule at issue in *Georgia v. U.S.* was that if jurisdictions submitted their election law changes to the District Court of the District of Columbia, they would bear the burden of convincing the court that their law did not have a discriminatory purpose or effect, so jurisdictions should have the same burden if they submitted the change to the Department. Before 1971, Attorney General Mitchell had only objected to a change if he affirmatively decided that it was discriminatory. See “Extension of the Voting Rights Act of 1965, Hearings before the Subcommittee on Constitutional rights of the Senate Judiciary Committee on S. 407, S. 903, S. 1297, S. 1409 and S. 1443, 94th Congress, April 8, 9, 10, 22, 29, 30; May 1, 1975,” (statement of Howard Glickstein), at 224. Hereinafter referred to as 1975 Senate Hearings.

required to preclear their election laws.⁹⁵ By contrast, in 1975, Congress made the only major expansion in areal coverage in the history of the Voting Rights Act – the expansion to areas in which Latino, Asian, Native American, or Alaskan Native “language minorities” constituted 5% of the citizen population, which in 1972 printed election material only in English, and where turnout in the 1972 presidential election had been less than 50%.⁹⁶ This provision paralleled the 1965 coverage provision, adding a numerical population criterion for the first time because a suspension of literacy tests in English would not cure the problem for people whose command of written English might be imperfect. Embedded in a new Title II of the law, the expansion added counties in California, Arizona, Florida, Colorado, New Mexico, Oklahoma, New York, North Carolina, South Dakota, Utah, Virginia, Hawaii, and the entire states of Alaska and Texas,⁹⁷ many of which successfully bailed out of coverage quickly.

The bills initially introduced in the House provided only for a simple extension of the sunset clause for Section 5.⁹⁸ But as in 1969, when the Civil Rights Commission’s *Political Participation* study had influenced Congress’s course in extending and amending the Voting Rights Act, a 1975 Civil Rights Commission study, *The Voting Rights Act: Ten Years After*, pointed Congress toward the language minority expansion, especially in Texas.⁹⁹ Because the Commission had not had time to complete a detailed study of discrimination against language minorities by the time Congress needed to act under the 1970 provision that had extended Section 5 for five years, Congress devoted several hearings to gathering evidence on the issue. The Department of Justice drafted a bill expanding Section 4 coverage to state and local jurisdictions with low turnout in which at least 5% of the population were “members of any minority race or color, the native language of which is other than English.”¹⁰⁰ A separate bill expanding coverage only to persons of “Spanish origin” was prepared by three members of Congress – Herman Badillo of New York, Barbara Jordan of Texas, and Edward Roybal of California, who represented districts with substantial numbers of Latinos.¹⁰¹ Its most forceful proponent, who is generally given credit for successfully pressing the expansion over the objections of nearly all other Members of Congress from Texas and despite the concerns of some Black lobbyists, was the most prominent Black Member of Congress from the South, Rep. Jordan.¹⁰²

⁹⁵ H. Rept. 94-196, at 6.

⁹⁶ H. Rept. 94-196, at 23-24. The 5% figure had been suggested as a cut-off in federal court decisions mandating bilingual materials. *Id.*, at 24, n. 35, citing *Arroyo v. Tucker*, 372 F. Supp. 764 (E.D. Pa. 1974), *Torres v. Sachs*, 381 F. Supp. 309 (S.D.N.Y. 1974) – another illustration of the interconnections between judicial and congressional decisions.

⁹⁷ H. Rept. 94-196, at 24.

⁹⁸ H. Rept. 94-196, at 4.

⁹⁹ The House Report’s first paragraph about the expansion to language minorities notes the Commission’s recommendation that language minorities be brought under the protection of preclearance. H. Rept. 94-196, at 16. S. Rept. 94-295, at 24, is identical.

¹⁰⁰ 1975 Hearings, at 711 (memo of Cynthia L. Attwood, Attorney, Appellate Section, Department of Justice, to Brian K. Landsberg, Chief, Appellate Section, April 8, 1975).

¹⁰¹ 1975 Senate Hearings, at 231.

¹⁰² Ari Berman, *Give Us the Ballot: The Modern Struggle for Voting Rights in America* (New York: Farrar, Straus and Giroux, 2015), at 110; William Broyles, “The Making of Barbara Jordan,” *Texas Monthly*, Oct., 1976,

The central focus of the proposed expansion was the state of Texas, which had not been covered by the 1965 or 1970 formulas, because even though its presidential turnout in 1964 was only 44%, it had no literacy test.¹⁰³ It did, however, have a poll tax, which was widely understood to have had a disproportionately disfranchising effect on minority groups.¹⁰⁴ In 1965, liberals on the Senate Judiciary Committee initially attempted to ban poll taxes everywhere, but in a compromise, Congress finally settled on directing the Attorney General to bring lawsuits to have them declared unconstitutional in the four states where they remained. The Texas case, styled *U.S. v. Texas*, was decided in 1966.¹⁰⁵ To replace the poll tax, the Texas legislature quickly passed and the state's voters ratified a constitutional amendment requiring annual voter registration with a four-month window for registration that closed on Jan. 31. This Texas version of Mississippi's massive resistance was overturned in a lawsuit brought by private Corpus Christi lawyers in 1971. That court concluded that the annual registration requirement disfranchised over a million Texans.¹⁰⁶

Vote dilution in Texas was also challenged, again by private parties, not the U.S. government, in the early 1970s in what became one of the most important vote dilution cases ever, *Graves v. Barnes*.¹⁰⁷ Texas state legislators from Dallas and Bexar (San Antonio) Counties were elected in multimember districts in which, a three-judge court ruled, endorsements by white slating groups effectively determined the nominees. This at-large system discriminated against Black and Mexican-American voters, and any justification for the multimember system collapsed because of the fact that voters in the other major Texas city, Houston, were allowed to elect their legislators in single-member districts. On remand from the Supreme Court, the same three-judge court heard extensive evidence and ruled seven more multimember legislative districts illegal because they discriminated against Blacks and/or Latinos.¹⁰⁸

One of the lawyers for the plaintiffs in *Graves*, George Korbel, spread much of the evidence developed for the case before the Senate when it was considering expanding Section 5 to Texas in 1975,¹⁰⁹ and he noted extensive ongoing, but not yet resolved litigation against at-

<https://www.texasmonthly.com/news-politics/the-making-of-barbara-jordan-2/>. Sen. Bayh made a veiled reference to the misgivings on the part of “long-time advocates of voting rights” in 1975 Senate Hearings, at 797. On differences between the more and less inclusive approaches, see David H. Hunter, “The 1975 Voting Rights Act and Language Minorities,” 25 *Catholic U. L. Rev.* 250 (1976), at 262, n. 61, <https://scholarship.law.edu/lawreview/vol25/iss2/4>.

¹⁰³ 1975 Senate Hearings, at 218 (statement of Howard Glickstein); Hunter, “The 1975 Voting Rights Act and Language Minorities,” at 269.

¹⁰⁴ See, e.g., (Former Texas Secretary of State) Bob Bullock to Rep. Barbara Jordan, April 18, 1975, reprinted in 1975 Senate Hearings, at 247-48.

¹⁰⁵ 252 F. Supp. 234 (W.D. Tex. 1966), aff'd 384 U.S. 155 (1966). For congressional actions and discussion, see S. Rept. 89-162, 32-35; H. Rept. 89-439, 4, 19-22; H. Rept. 89-711, 6-7.

¹⁰⁶ *Beare v. Smith*, 321 F.Supp. 1100, 1108 (S.D. Tex. 1971), aff'd aff'd sub nom. *Beare v. Briscoe*, 498 F.2d 244 (5th Cir. 1974). For discussion of these events, see 1975 Senate Hearings, at 458 (statement of George Korbel).

¹⁰⁷ 343 F.Supp. 704 (W.D. Tex. 1972) (three-judge court), partially rev'd and remanded sub nom. *White v. Register* 412 U.S. 755 (1973), 422 U.S. 935 (June 30, 1975), further proceedings sub nom. *Graves v. Barnes*, 378 F. Supp. 640 (W.D. Tex. 1974), 408 F. Supp. 1050 (W.D. Tex. 1976), 446 F. Supp. 560 (W.D. Tex. 1977).

¹⁰⁸ *Graves v. Barnes*, 378 F. Supp. 640. (W.D. Tex. 1974).

¹⁰⁹ 1975 Senate Hearings, at 452-61, 466-87.

large elections for local offices throughout Texas.¹¹⁰ Korbelt went on to catalogue a large variety of abuses in Texas elections, some of which were documented in legal cases, and some were simply widely known: racial gerrymanders, the imposition of majority vote or numbered place requirements, discriminatory annexations, last-minute changes of polling places (for instance, placing a polling place for a majority-Black precinct in a segregated white hunting club), and registration forms and ballots available only in English. Several of these laws had been adopted recently, in the face of growing political participation by Black and Mexican-American citizens.¹¹¹ The poll tax, registration, and at-large cases and the Mississippi-like imposition of new laws in apparent reaction to minority activism made it difficult to argue that Texas was different from the other states that had been covered by Section 5. As Rep. Jordan summed up recent litigation in her testimony before the Senate, “The entire history of voting legislation in Texas has been one of reluctant acquiescence to federal court orders.”¹¹²

Faced with the prospect of becoming a covered jurisdiction, Texas scrambled to change its laws, even drafting, without consulting MALDEF, what was termed the Texas Voting Rights Act, which provided for bilingual election materials. Altogether, there had been 60 bills dealing with elections submitted to the Texas legislature during the 1975 legislative session.¹¹³ One of the most active supporters of the federal Voting Rights Act, Sen. Birch Bayh, suggested that these bills, especially the Texas Voting Rights Act, represented little “more than an effort to get the [federal] Voting Rights Act derailed . . .”¹¹⁴ Texas newspaper reports echoed Bayh’s charge.¹¹⁵

Some testimony Congress heard went beyond Texas. Vilma Martinez, President and General Counsel of MALDEF, told the Senate Judiciary Committee not only about the organization’s suits against at-large elections in San Antonio, Corpus Christi, Lubbock, Waco, and Hondo, Texas, but also against at-large elections in California, Arizona, and Washington State. MALDEF attacked gerrymandering in Bexar, Kleberg, and Val Verde Counties and the city of El Paso in Texas, but also the Los Angeles City Council in California. It brought suit against English literacy tests in Arizona and Washington State and the early closing of registration in California.¹¹⁶ A memo from MALDEF detailed gaps between whites and Mexican-Americans in registration, turnout, and office-holding percentages not only in Texas, but also in California.¹¹⁷

In addition, in the early 1970s, Spanish-speaking citizens in New York, Philadelphia, and Chicago successfully challenged the lack of bilingual materials on voting, and there was a

¹¹⁰ 1975 Senate hearings, at 465.

¹¹¹ 1975 Senate Hearings, at 239 (testimony of Rep. Barbara Jordan), 285 (testimony of Texas Secretary of State Mark White), and 473-82 (testimony of Korbelt).

¹¹² 1975 Senate Hearings, at 246.

¹¹³ 1975 Senate Hearings, at 268-90 (colloquy between Texas Secretary of State Mark White and Sens. John Tunney and Birch Bayh); *id.*, 296-367 (copies of bills and legislative analysis).

¹¹⁴ 1975 Senate Hearings, at 454.

¹¹⁵ 1975 Senate Hearings, at 744 (statement of Houston City Controller Lionel Castillo).

¹¹⁶ 1975 Senate Hearings, at 758-59.

¹¹⁷ 1975 Senate Hearings, at 772-73.

successful suit on the same grounds, *New York v. U.S.*, brought by the federal government.¹¹⁸ As the Senate Report noted, judges in the Philadelphia and New York cases had ruled that election materials had to be provided in Spanish, as well as English, where Spanish-speakers constituted at least 5% of the citizens.¹¹⁹ As with the freezing principle, Congress at least in part drew its coverage standard from the courts.

In her testimony before the Senate Judiciary Committee, Rep. Jordan stated that she and her co-authors fixed on the 5% figure after trying several formulas because it “was easily discernible and you could count them because of the census figures which are already available, and which would help you to derive that percentage of the population which is Spanish speaking.” The authors were not merely attempting to correct low voter turnout, she continued, and she cited her own experience of losing elections to the Texas state legislature because during the early 1960s, such elections were conducted at-large in Houston.¹²⁰ The focus on an objective percentage test for the expanded coverage, which was also applied to a new Section 203 on bilingual election materials, constitutes a useful precedent for a potential new coverage scheme in 2021.

The original Badillo/Jordan/Roybal bill expanded Section 4 coverage only to Latinos. But even though there was little or no testimony documenting electoral discrimination against Asian-Americans or Native Americans, Congress apparently felt compelled to extend coverage to them for two reasons: First, election materials only in English constituted a literacy test for anyone, not just Latinos, who lacked fluency in English.¹²¹ Second, singling out one group for coverage under a language exception might violate the equal protection clause.¹²² In 1970, Congress had reaffirmed its commitment to the broad reading of the scope of discriminatory actions that the Supreme Court had approved in *Allen*. Similarly, in 1975, Congress shaped the expanded coverage scheme both in response to and in anticipation of judicial action. In drafting the original Voting Rights Act and extending and expanding coverage under it, Congress has always been cognizant of and deferential to past and prospective future judicial decisions.

But it must be concluded that the evidence for expanding the coverage scheme to all the states and localities which the 1975 Act mandated was somewhat weaker than the evidence had been in 1965. Between 1957 and 1965, the Department of Justice had filed numerous lawsuits in Alabama, Louisiana, and Mississippi. From 1965 to 1975, the only case that the Department of Justice filed against Texas or any local jurisdiction within the state was the 1966 poll tax case,

¹¹⁸ *Arroyo v. Tucker*, 372 F. Supp. 764 (E.D. Pa. 1974); *Torres v. Sachs*, 381 F. Supp. 309 (S.D.N.Y. 1974); *Lopez v. Dinkins*, 73 Civ. 695 (S.D.N.Y. 1973); *Coalition for Education in School District One v. Board of Elections of the City of New York*, 370 F. Supp. 42 (S.D.N.Y. 1974, aff'd 495 F.2d 1090 (2d Cir. 1974), cited in H. Rept. 94-196, 24. *Puerto Rican Organization for Political Action v. Kusper*, 490 F.2d 575 (7th Cir. 1973); *Marquez v. Falcey*, Civ. No. 1447-73 (D.N.J. 1973); *Ortiz v. New York State Board of Elections*, Civ. No. 74-455 (W.D.N.Y. 1974), cited in S.Rept. 94-295, 33. *New York v. U.S.*, Civ. No. 2419-771 (D.D.C., April 13, 1972), *declaratory judgment rescinded*, 65 F.R.D. 10 (D.D.C.), *aff'd mem.*, 419 U.S. 888 (1974).

¹¹⁹ S. Rept. 94-295, at 32, n. 31.

¹²⁰ 1975 Senate Hearings, at 234, 239.

¹²¹ 1975 Senate Hearings, at 792 (testimony of Prof. William Van Alstyne).

¹²² See memo from Cynthia L. Attwood, Attorney, Appellate Section, U.S. Department of Justice, to Brian K. Landsberg, Chief, Appellate Section, April 8, 1975, reprinted in 1975 Senate Hearings, at 709-14.

which had been explicitly ordered by the 1965 law. The Johnson Administration was more concerned with insuring fair registration practices than with pioneering new types of lawsuits, and the Nixon Administration, elected through the “Southern Strategy,” was unenthusiastic about voting rights enforcement in general.¹²³ Unlike the 1965 congressional reports, the 1975 House and Senate reports did not make comprehensive comparisons of racial discrimination in the states proposed to be covered and those excluded from coverage or even previously covered states. Although the evidence of voting discrimination against Mexican-Americans in Texas was developed in some depth, and litigation documenting discrimination in the electoral system against Puerto Ricans in the Northeast and Chicago was solid, if sparse, the evidence of discrimination against Asian-Americans and Native Americans largely concerned education and employment, not voting rights.¹²⁴

Yet the very lack of evidence of voting discrimination in legal cases and administrative actions before the expansion to Texas and other states and to other minorities besides Blacks should draw attention to what might be called the paradox of invisible discrimination: Without a law or regulation that allows discriminatory treatment to be uncovered, it may remain hidden. If regulated, however, it may suddenly be revealed. From 1965 through 1974, minorities won only 10 voting rights cases in Texas. After the expansion of the coverage scheme of Section 4 in 1975, they were successful in 115 instances from 1975 through 1979. Four of the cases in the first decade of the Voting Rights Act in Texas involved Latinos. Sixty of the Texas cases in the five years after the 1975 expansion concerned Latinos.

Section 5 immediately proved its effectiveness in Texas. Reversing its stance in considering the “Texas Voting Rights Act,” the 1975 state legislature passed S.B. 300, requiring a purge and re-registration of every voter. Alleging discrimination against Blacks and Mexican-Americans, the ACLU and MALDEF obtained a preliminary injunction against the law from a three-judge federal panel, but a final ruling in the case was rendered unnecessary when the Department of Justice issued its first Section 5 objection against a Texas state law.¹²⁵

IV: Assessing Patterns of Past Discrimination as a Guide to a New Coverage Scheme

¹²³ Steven F. Lawson, *In Pursuit of Power: Southern Blacks and Electoral Politics, 1965-1982* (New York: Columbia Univ. Press, 1985), 136-56; Kousser, “The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965-2007,” 86 *Tex. L. Rev.* 667 (2008), at 684-85; Berman, *Give Us the Ballot*, 87-92.

¹²⁴ See, e.g., H. Rept. 94-196, at 21-22 (majority), 87 (supplemental views of Messrs. McClory, Hutchinson, Wiggings, Moorhead, Ashbrook, and Hyde).

¹²⁵ No byline, “Renewal form ban is affirmed,” *Austin American-Statesman*, Nov. 15, 1975, p. 6; Jon Ford, “Judges delay voter registration mailing,” *Austin American-Statesman*, Nov. 26, 1975, p. 1; No byline, “Texas officials say vote opinion ‘unclear,’” *Austin American-Statesman*, Dec. 11, 1975, p. 1; J. Stanley Pottinger to Secretary of State Mark White, Dec. 10, 1975 (objection # X0335), <https://www.justice.gov/crt/voting-determination-letters-texas>. *Flowers v. Wiley* evinced no recorded opinion, but only a decision about attorneys’ fees, 675 F.2d 704 (5th Cir. 1982).

A. Limits on Previous Congressional Evidence-Gathering about Coverage Schemes

When Congress first passed and later renewed Section 5, its view of the pattern of past and current discrimination was necessarily fragmentary and partial. Only the passage and extensions of the Voting Rights Act allowed lawsuits and the preclearance mechanism to expose more of the facts of discrimination. Without the tools that the VRA provided – the microscopes, eyeglasses, and wide-angle lenses, as it were – neither Congress nor the public could estimate the degree and geographical patterns of discrimination with much precision.

Thus, before 1965, successful minority voting rights lawsuits had been brought almost exclusively by the Department of Justice, and the Department had concentrated almost entirely on the most obvious and egregious offenders in the three Deep South states of Alabama, Louisiana, and Mississippi. Despite the initial controversy over preclearance, Section 5 was rarely employed before the Supreme Court’s decision in *Allen v. Board of Elections*. From 1965 through June 30, 1969, there had only been 325 submissions for preclearance, 292 of which came from South Carolina.¹²⁶ From 1965 through the end of 1968, the Attorney General had objected to only 4 submissions.¹²⁷ In contrast, in 1971 alone, there were 1118 submissions and 50 objections.¹²⁸ Of the 70 legal cases that found discrimination against minorities from 1965 through 1968, 47 had been brought by the Department of Justice, and 34 of the 47, many of which had been filed before the passage of the Voting Rights Act, involved Alabama, Louisiana, and Mississippi.

Before the expansion of the coverage scheme of Section 4 to apply to language minorities in 1975, Texas, Arizona, and important counties in California, New York, and South Dakota were not subject to preclearance, and the evidence that led Congress to expand coverage drew less heavily from legal cases than from other evidence of discrimination. In 1982, the focus of Congress was not on Section 5 or the geographical scope of discrimination, but on reinvigorating Section 2 after the Supreme Court’s decision in *Mobile v. Bolden*.¹²⁹ In 2006, the mammoth amount of evidence gathered by civil rights organizations and presented not only to Congress, but to hearings of The Commission on the Voting Rights Act, was primarily aimed at documenting the “continued need” for Section 5 in the jurisdictions to which it then applied.¹³⁰

¹²⁶ Washington Research Project, *The Shameful Blight: The Survival of Racial Discrimination in Voting in the South* (Washington, D.C.: Washington Research Project, 1972), 136-39.

¹²⁷ John J. Roman, “Section 5 of the Voting Rights Act: The Formation of an Extraordinary Federal Remedy,” 22 *Am. U.L.Rev.* 111, at 126, n. 54 (1972).

¹²⁸ H. Rept. 94-196, at 9-10.

¹²⁹ 446 U.S. 55 (1980). On the 1981-82 renewal, see Kousser, “The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965-2007,” 86 *Tex.L.Rev.* 670, at 703-12.

¹³⁰ H. Rept. 109-478, at 5.

Only Prof. Ellen Katz’s intensive study of 323 published Section 2 cases sought to compare discrimination in covered and non-covered jurisdictions.¹³¹

The data that I have collected allows Congress, for the first time, to base a coverage scheme on an extensive and lengthy series of instances of proven racial discrimination in voting and to compare the degree of that discrimination, indexed by judicial decisions, Section 5 objections, and settlements of cases, in every state and county in the country over a 64-year period or any sub-period within those years.¹³² It provides a much more solid basis for distinguishing between different geographic areas and for forging a formula integrally connected with recent practices, as well as for alleviating the “burden” of preclearance on areas where discrimination has been absent or has diminished. At the same time as it makes it possible to meet the challenge that the Chief Justice laid down in *Shelby County*, the evidence in my database allows Congress to focus the resources of the federal administration and the courts on the places where discrimination continues to exist and to counter it effectively.

B. Patterns in Previous Cases

1. The Pre-Shelby Scheme Fit the Pattern of Discrimination Well

The first and most important thing to note is how good a job Congress did in 1965 and 1975 at assessing discrimination at those times and since then. Figure 1 provides a detailed view of the minority victories, by state, in what I shall call voting rights “events” or “actions” from 1957 through 2020, including not only state-level, but sub-state jurisdictions such as counties, school districts, and utility districts. It shows that 13 of the 14 states that were entirely or partially covered by Section 4 in 2013¹³³ accounted for nearly 95% of the total number of events in which minorities were successful. In fact, each of the 13 produced a larger number of events than any of the other 37 states. Of the covered states, only Alaska was the site of a small number of minority victories (10). If one excludes the non-covered jurisdictions in states that were only partially covered (California, Florida, New York, North Carolina, and South Dakota), the wholly covered states plus the covered local jurisdictions in the partially covered states accounted for 91% of the total number of minority victories over the whole period.

Figure 2 shows that this tight fit between the coverage scheme and the pattern of documented discriminatory events was not the product of a very large number of events early in the period, concentrated in a few states, and a decreasing number of events spread out into a large number of states later. In an attempt to address Chief Justice Roberts’s statement in *Shelby County* that “If Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula,” it divides the period from 1957 to 2006 into two roughly equal sub-

¹³¹ Ellen Katz, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982* (Ann Arbor, Michigan: University of Michigan Law School, 2005).

¹³² I have compiled separate databases on cases brought under the National Voting Registration Act and the California Voting Rights Act, which are not included in the totals here.

¹³³ The list of jurisdictions may be found at <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5>.

periods broken by the 1982 renewal of the Voting Rights Act. Figure 2 displays lines of different lengths for each period for each state.¹³⁴ The two obvious conclusions to be drawn from Figure 2 are that the order of the states is quite similar in both time periods and that the number of events after 1982 is much greater than the number before that date. To be precise, 78% of the events in the period from 1957 through 2005 took place after the 1982 renewal of the Voting Rights Act. When members of Congress in 2006 looked back over the period since the previous extension of Section 5, they had plenty of reason to believe that that the coverage scheme in effect properly singled out the appropriate states and sub-state jurisdictions.

¹³⁴ The order of the states is kept the same as in Figure 1 and the numbers beside each line are omitted to increase comprehensibility and readability.

Figure 1: Total Number of Discriminatory Events, 1957-2020, by State

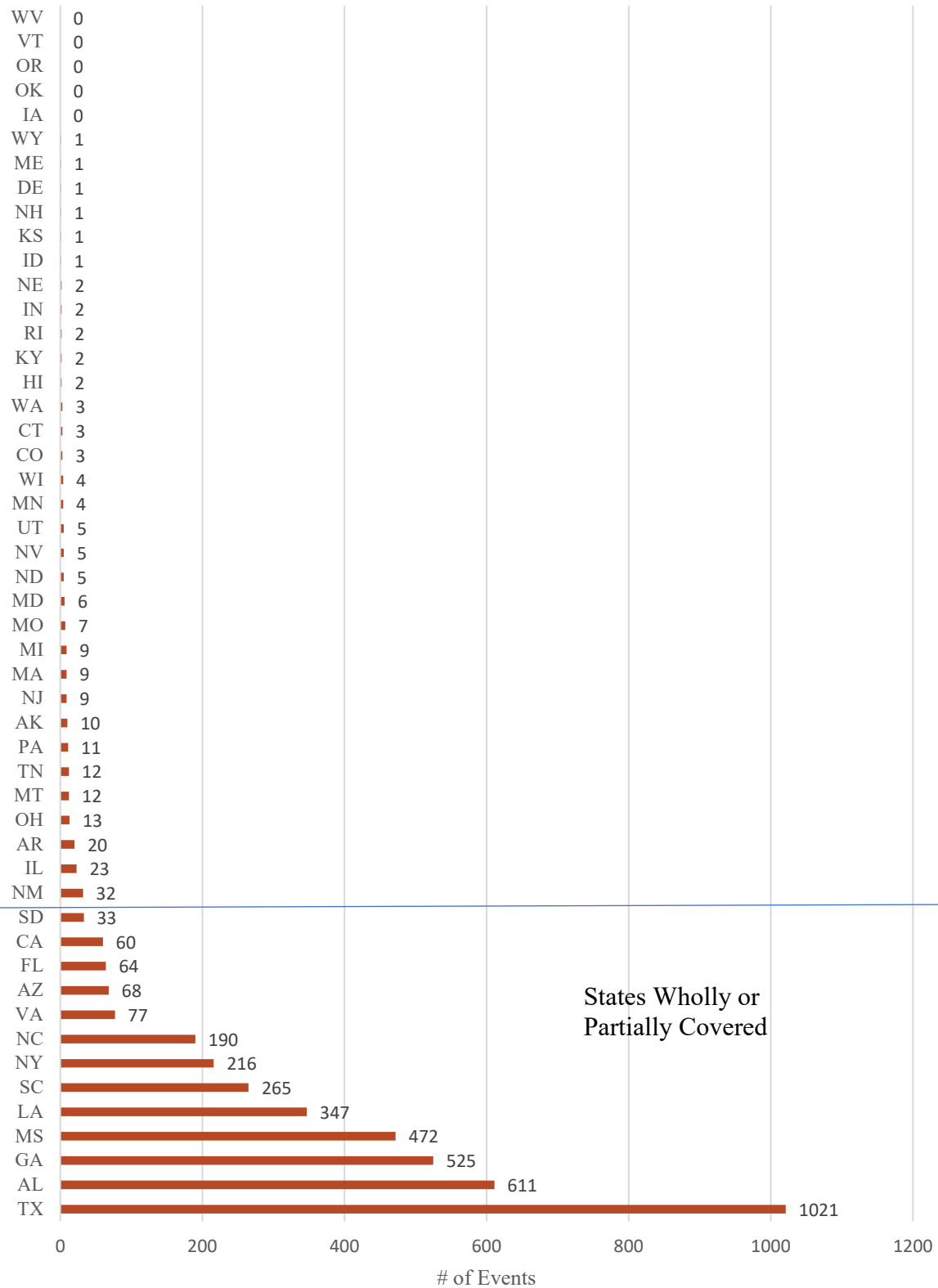
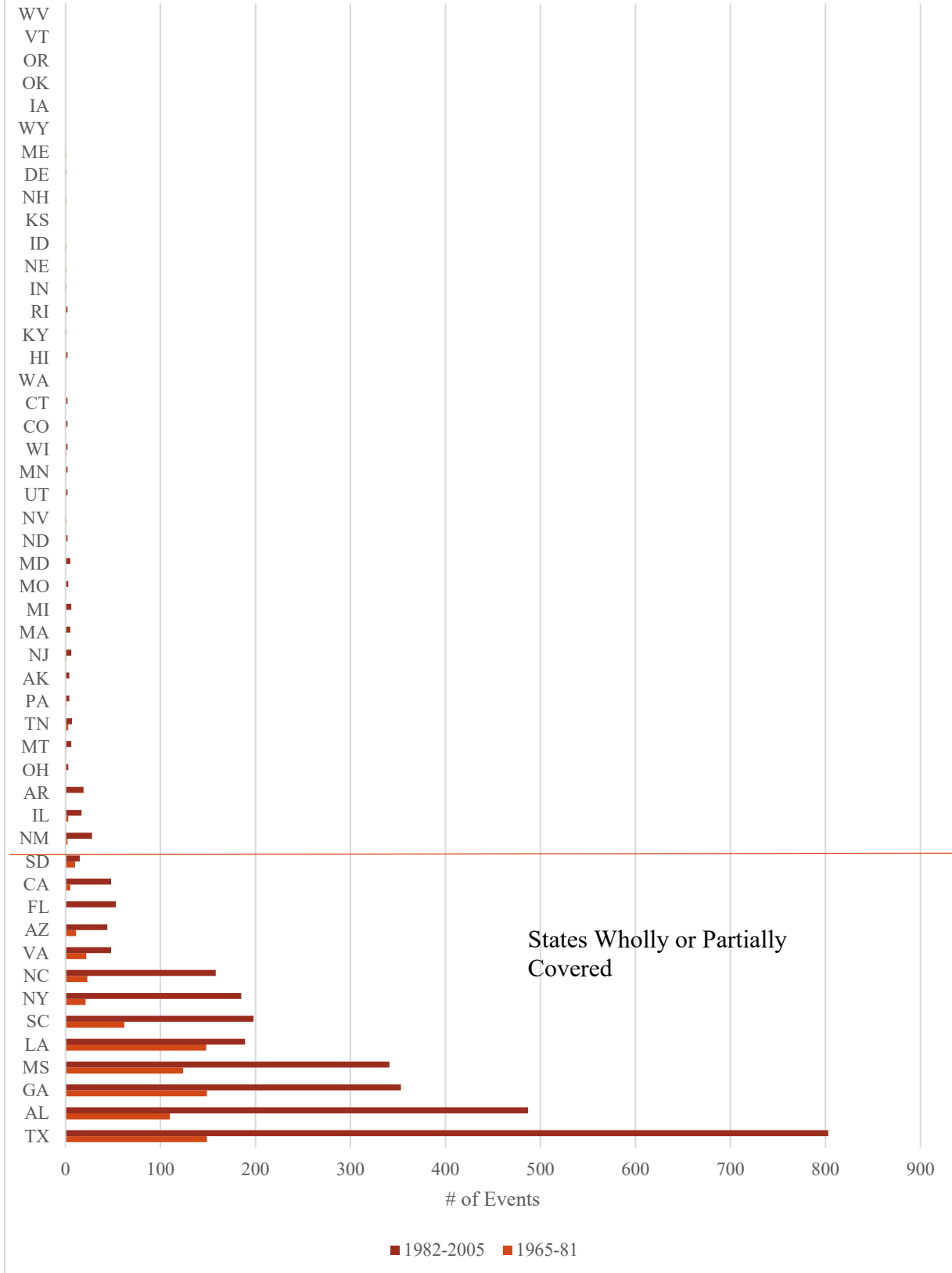


Figure 2: Discriminatory Events, by State, 1957-81 and 1982-2005



2. The Scope and Variety of Practices That Were Ruled Illegal

Figure 3 breaks down the provisions of the election laws that were challenged and includes information on minority losses in cases brought in court.¹³⁵ Many court cases and objection letters concerned multiple provisions of the same law. Because the dilution provisions were closely connected and were often challenged together in the same Section 5 submission or Section 2 lawsuit, I have counted each separately. At-large systems often had majority-vote and numbered post, staggered terms and/or residency district requirements. Separating each would multiply the categories and add to confusion, requiring different treatments of at-large elections alone, at-large elections with and without majority vote requirements, numbered post requirements alone, staggered terms with and without residency requirements, etc. Annexations and at-large elections were both contested in 15 cases, and districts and at-large provisions, in 83. Every “*Shaw*” challenge to “racial gerrymandering” involved districts. The first seven provisions, counting from the left of the graph, involved vote dilution. All the others except the last, miscellaneous one on the right side of the graph concerned the denial of the right to vote itself, not the way votes were aggregated. Because there is much less overlap among those categories, I have separated them entirely from each other.¹³⁶

The two largest categories by far are at-large elections and districting, followed by the miscellaneous category. Next come vote denial cases not involving polling place or precinct line changes, the lack of election materials in languages other than English, or voter ID or felony disfranchisement laws. Finally, there are annexations and de-annexations and language cases under Sections 4e, 203, or 208 of the Voting Rights Act. Although many people associate voting rights cases primarily with redistricting, especially at the state level, in fact, the more typical cases have involved the structure of local governments: most voting rights cases have been local. All but the *Shaw* cases involve laws that were or might have been subject to preclearance under Section 5, and some of the more recent *Shaw* contentions charging discrimination against minority voters might have had to be precleared.¹³⁷ Indeed, nearly twice as many voting rights actions from 1967 through 2020 were objections or more information requests that resulted in changes or withdrawals of submissions under Section 5 as were cases or settlements under Section 2 (2498 Section 5 and 1315 Section 2).

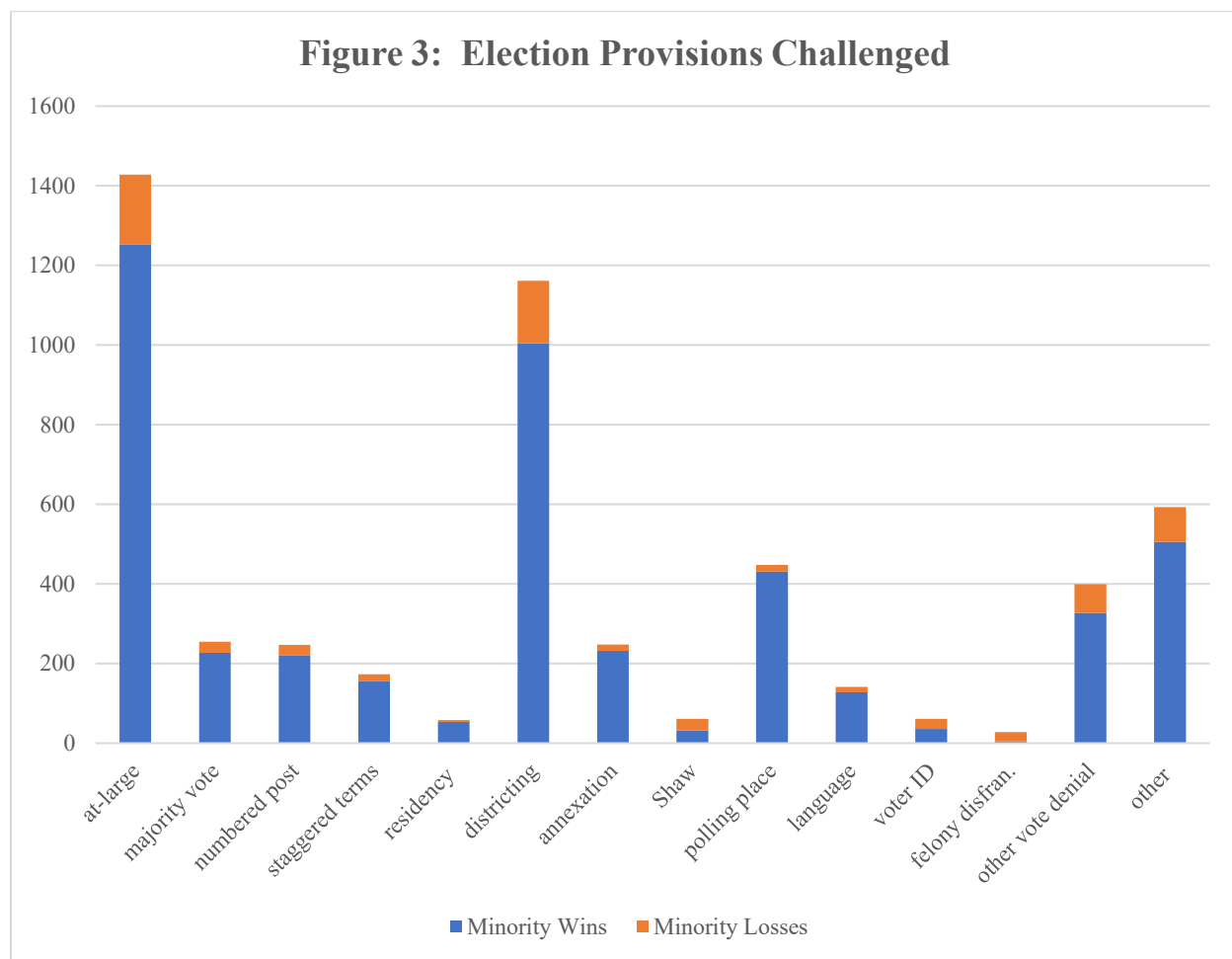
Except for *Shaw*, voter ID, and felony disfranchisement cases, minorities won the overwhelming proportion of cases in each category. There were 4176 minority victories and only 600 losses, a ratio of nearly seven to one. While the Voting Rights Act has not guaranteed minority victories, it has led to the discovery of a great deal of discrimination.

¹³⁵ Provisions that were not objected to or were not the subject of letters asking for more information are not included in the graph.

¹³⁶ Later in this paper, I will count polling place and precinct line changes and language infractions, voter ID, and felony disfranchisement cases as part of the vote denial category.

¹³⁷ For example, *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254 (2015); *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788 (2017).

But what should impress the reader more is the scope and variety of cases. When Section 5 was being framed, lawyers and civil rights leaders were aware that a variety of tactics could be used to circumvent successful attacks on discriminatory laws, and the freezing principle was a flexible response to that realization, exemplified in the *Gomillion* and *U.S. v. Alabama* cases discussed earlier. But they focused at first on registration and voting, because since the early 20th century, restricting those had been the chief means of countering minority political power. Had the Voting Rights Act been less malleable – had it been confined to preventing discrimination only in the bare rights to register and cast a ballot – then it would have been incapable of responding to the huge variety of discriminatory devices that were rediscovered or invented once literacy tests, poll taxes, and the discriminatory administration of registration had been overcome.¹³⁸



¹³⁸ Many of the tactics, especially at-large elections, annexations, polling place discrimination, and discriminatory redistricting, that were employed during the Second Reconstruction and after had been used for the same purposes during the First Reconstruction, as I showed in my testimony before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, “Extension of the Voting Rights Act,” 97 Cong., 1st Sess. (1981), 2005-28.

3. A Restrictive Definition of Practices Will Not Cover the Wide Range of Discriminatory Devices

Another way to appreciate the ability of the Voting Rights Act to counter variegated forms of discrimination is to look at a sampling of cases that were so difficult to categorize that I had to put them into the “other” group in Figure 3. Table 1 provides short summaries on 110 of the electoral devices that produced objections from the Department of Justice.¹³⁹

There are three principal conclusions to be drawn from the descriptions of objections in Table 1. First, there is the range and variety of electoral laws. No one in 1965 or 1975 or even 1982 could have enumerated all the ways in which election laws could be twisted or extended to diminish or contain minority political power. The number of devices that might be discriminatory is practically infinite – rescheduling dates for candidate qualifying or elections, setting up new governmental bodies, increasing candidate qualifications or filing fees, requiring or discouraging nomination by conventions, changing from elections to appointment, altering the powers of officials or boards, prohibiting dual officeholding, switching from partisan to nonpartisan elections or vice-versa, defunding elective bodies, failing to publicize elections, and distributing confusing or poorly translated instructions.

Second, the same election law that was benign or neutral in one context might be harshly discriminatory in another. Delaying an election before a transition from at-large to single-member district elections might keep white incumbents in office for a few more years, but rushing an election a few weeks after a redistricting that drastically redrew minority districts might make it especially difficult for minorities to organize campaigns and for voters to gain information. Both increasing and decreasing the number of members of an elected body might decrease minority political power, depending on the number of seats and the minority proportion of and geographical concentration in the voting-age population. The creation of new school boards or cities might open further opportunities for minority voters or, in other circumstances or with other plans, fence them out of power to a greater extent than the status quo.

Third, any attempt to focus the attention of the courts or administrative bodies on one or a few of the widely recognized discriminatory devices – at-large elections, as is the focus of the California and Washington State Voting Rights Acts,¹⁴⁰ or redistricting, as is often the center of discussions about the federal Voting Rights Act – merely invites those who stand to benefit from discrimination to employ or invent other devices. An inflexible or limited definition of

¹³⁹ There were 506 voting rights events that resulted in minority victories, but which did not fall neatly into any of the categories in Figure 3. Of these, 144 came from lawsuits, 158 from Section 5 objections, and the rest from more information requests. The focus of this paper on Section 5 made it seem more logical to focus on the objections, and I had much more information readily available, through the Department of Justice objection letters, than I had on more information requests.

¹⁴⁰ California Elections Code, Sections 14025-14032 https://leginfo.ca.gov/faces/codes_displayText.xhtml?lawCode=ELEC&division=14.&title=&part=&chapter=1.5.&article=; Washington State Elections Code, Chapter 29A92 RCW, < <https://app.leg.wa.gov/RCW/default.aspx?cite=29A.92>>.

discriminatory devices cedes the advantage, perhaps a fatal advantage, to crafty discriminators. Table 1 suggests the lengths to which they will go to seize it.

**Table 1: The Range of Discriminatory Provisions
Successfully Frozen or Overturned**

State	County	Year	DOJ Objection #	Practice
AL	Chambers	1989	89-1242	Creation of new school system
	Conecuh	1982	82-1336	Size of Democratic Executive Committee
	Lowndes	1978	A6405	Incorporation of Hayneville
	Marengo	1986	86-2012	Increase in number of officials reduces Black influence
	Mobile	1973	V5607	Candidate qualification procedures
	Mobile	2006	206-6792	Change in method of filling vacancies
	Perry	1981	81-1192	Replacement of paper ballots with voting machines
	Perry	1987	87-1706	Method of implementation of creation of separate school district
	(State)	1969	T6864	Preventing candidates from running as independents if they ran in party primaries hurts new Black faction
	(State)	1972	V4105	Change from elected to appointive local justices
	(State)	1972	V4074	Independent candidate signature requirements
	(State)	1976	X0521	Change of primary date makes it difficult for independent Black party to nominate by mass meeting
	(State)	1982	82-1365	Change of candidate qualifying dates makes it difficult for Black party to nominate in time
	(State)	1989	89-1469	Reduction in number of members of board reduces Black influence
	(State)	1989	89-1264	Changes in rules for electing members of State Democratic Executive Committee
	(State)	1994	89-1439	Requirement of Commission approval before local constitutional amendment may be referended
AZ	Cochise	1983	83-1403	Term limits; poor translation of ballot into Spanish
	(State)	1973	V5782	Regulations on circulating recall petitions
FL	Hillsborough	1984	84-1881	Transfer of legislative powers to body with no minority representatives
GA	Baldwin	1991	90-2210	Change from a locally elected board to a statewide board appointed by governor
	Bulloch	1981	80-1433	Increase in terms of office
	Clarke	1971	V3157	Reduction in size of elected body reduces Black influence
	Clay	1993	93-2816	Minimum education requirements for school board
	Coweta	1984	84-2106	Increase in number of districts fragments Black concentration
	Decatur	1977	X7847	Decrease in number of districts limits Black influence in city
	Decatur	1994	94-2499	Increase in number of districts limits Black influence in county

	Dougherty	1972	V3734	Moving city and county elections to one day with different polling places for each in Black area
	Dougherty	1973	V5761	Increased filing fees for candidacy
	Effingham	1992	92-1162	Elected mayor, elimination of vice-chair position which had been held by Blacks
	Jenkins	1993	93-2161	Implementation schedule for switch to districts leaves Blacks without representation for 2 years
	Lamar	1986	85-2316	Increase in number of officials; decrease in terms of office
	Laurens	1974	V6412	Postponement of election
	Pierce	1988	87-2691	Direct election of mayor
	Randolph	2005	2006-3856	Reclassification of Black member's residence to 70% white district
	Richmond	2012	2012-3262	Rescheduling Augusta elections from Nov. to July
	(State)	1968	S1445	Qualifications for registration and election officials lend themselves to discrimination
	(State)	1982	82-1835	Schedule for general elections in radically redistricted congressional districts disadvantages Black candidates
LA	Concordia	1992	92-3075	Reduction in number on board
	East Baton Rouge	1982	82-2041	Consolidation of parish and city boards, increase in size reduce Black influence in city
	Franklin	1992	90-3200	Reduction in size of board
	Morehouse	1993	91-4384	Reduction in number of constables and justices of the peace
	Ouachita	1977	83-2303	Exclusion of city residents from voting on parish school board
	Ouachita	1982	82-2137	Increase in number on school board diminishes Black influence
	Washington	1993	92-5344	Increase in number on school board diminishes Black influence
	Webster	1995	94-3165	Decrease in number on police jury diminishes Black influence
	(State)	1984	84-2758	One-time suspension of presidential preference primary
	(State)	1998	97-2264	Freezing precinct boundaries for 4 years prevents changes due to redistricting
	(State)	2009	2008-3512	Freezing precinct boundaries for 4 years prevents changes due to redistricting
MS	Bolivar	1973	V5903	Change from elective to appointive city clerk
	Clarke	1994	93-4338	Special election under old districting plan
	Grenada	1988	87-3098	Change from elective to appointive school board
	Harrison	1980	D0649	Incorporation of new city containing few Blacks
	Madison	1983	83-2481	Creation of new school district reduces Black influence
	Montgomery	2001	2001-2130	Cancellation of election when Blacks ran for the first time
	Rankin	1973	V5636	Incorporation of new city which gerrymandered Blacks out
	Washington	1973	V5570	Change from elective to appointive city clerk

	(State)	1975	V8679	Early qualifying date hurt independent candidates, who are predominantly Black
	(State)	1979 1976 1974	C2879 X7280 V6213-14	Eliminating partisan primaries disproportionately hurts Blacks
	(State)	1981	7X-0112	Prohibiting campaigning within 500 feet of polls disproportionately diminishes opportunities for Blacks
	(State)	1983	82-2250	Changing dates for qualifying candidates and holding primaries hurts independent Black candidates
	(State)	1989	87-3282	Giving suburban school districts a veto over annexation by municipal school districts will decrease opportunities for school desegregation
	(State)	1994	94-4538	Prohibiting persons holding local office from serving in legislature apparently aimed at one Black member
NY	New York	1996	96-3759	Replacement of elected with appointive board
	(State)	1994	93-0672	Expanding trial and claims court judgeships in presence of slating disadvantages minority candidates
NC	Bladen	1987	87-3340	Increase in number of seats diminishes Black influence
	Cumberland	1985	84-3052	Three-year delay in elections for new board
	Lenoir	2009	2009-0216	Switch from partisan to nonpartisan elections disadvantages minority candidates
	(State)	1981	81-2275	Constitutional amendment prohibiting splitting county boundaries for legislature forces multi-member districts, which disadvantage Blacks
SC	Aiken	1986	86-4090	Delay of shift to single-member districts
	Bamberg	1986	R1027	Too little time between calling primary election and holding it disadvantages Black candidates
	Charleston	2004	2003-2066	Switch from nonpartisan to partisan elections disadvantages minority candidates
	Chester	1979	C6023	Delay in elections
	Chester	1990	89-3374	Filing fees
	Clarendon	1973	V5682	Change from elective to appointive office
	Clarendon	1975	V9142	Change from elective to appointive office
	Dorchester	1986	86-4218	Appointment of interim school board
	Fairfield	2010	2010-0970	Increase in size of board and temporary appointment decrease Black influence
	Georgetown	1994	94-2274	Switch from partisan to nonpartisan elections disadvantages minority candidates
	Hampton	1982	82-2588	Candidate qualifying period effectively eliminates Black candidates
	Kershaw	1990	90-4108	Filling vacancy through at-large, majority-vote referendum
	Lee	1994	94-1009	Too expedited election schedule hurts Black candidates
	Marlboro	1990	90-4137	Delay in shift from at-large to single-member district elections

	Richland	1988	88-4728	Requirement to resign from county employment before running for office disadvantages Blacks
	Saluda	1972	V4588	Creation of new school district by referendum that largely excludes Blacks
	Spartanburg	1994	94-2743	Replacement of elected with appointed school board
	Spartanburg	1995	95-1979	Defunding of school board
	(state)	1984	84-3392	Election schedule too rapid in drastically redistricted Black districts
	(state)	1990	90-3896	Requiring college degree or 4 years of experience in probate judge's office to be a probate judge, instead of current no requirements, disadvantages Blacks
SD	Charles Mix	2008	2007-6012	Increase in number of members of board decreases influence of Native Americans
	Shannon and Todd	1979	X-0149	Creation of new counties without resources discriminates against Native Americans
TX	Andrews	1995	94-2271	Cumulative voting with staggered terms disadvantages Latinos
	Bailey	1993	93-0194	Reduction in number of elected constables and justices of the peace disadvantages Latinos
	Edwards Underground Water Dist.	1993	93-2267	Replacement of elected with appointive board
	Edwards Underground Water Dist.	1995	94-3902	Confusing procedures, lack of publicity for election
	Cochran	1994	94-1303	Cumulative voting with no outreach in Spanish
	Dallas	1991	89-0245	Change in the definition of terms in office affects only Black incumbents
	El Paso	1984	84-0391	Delay in implementing single-member districts
	Harris	1980	7X0019	Change in election date for school board from Nov. to Jan. of even-numbered years
	Harris	1982	82-0519	Change in election date for school board from Nov. to Jan. of odd-numbered years
	Harris, Waller	1978	A4416	Change in election date from April to August for district with large HBCU
	Harrison	1988	87-0060	Different polling places for city and school district on the same day
	Jefferson	2013	2013-0895	Backdating date for candidate qualifying eliminates Black candidates for 3 Black ability-to-elect seats
	San Patricio	1987	87-1132	Reduction in number of constable and justice of the peace districts hurts Latinos
	San Patricio	1990	89-0874	Transfer of voter registration duties from county clerk, who had cooperated with DOJ in earlier case, to county tax assessor
	Tarrant	1978	A1496-97	Delay in transitioning from at-large to single-member districts

	(state)	1976	X0612	Forcing a small party to nominate by convention, which it would have to pay for, rather than by primary, which the State would pay for, would apply only to La Raza Unida party
	(state)	1998	98-1365	Changing method of filling judicial vacancies from election to appointment disadvantages minorities
	(state)	2008	2007-5032	Candidate qualifications prevented non-landowner in a fresh water district from being supervisor disadvantages Latino candidates
VA	Fredericksburg City	1988	87-4154	Reduction of council from 10 at-large to 6 with 3 at-large hurts Blacks
	Hopewell City	1980	80-2203	Reduction of council from 7 to 5 at-large hurts Blacks

4. The Temporal Pattern of Voting Rights Violations Is a Function of Supreme Court Decisions, as well as of Discrimination

A different contrast between covered and non-covered jurisdictions than in Figures 1-3 may be employed to delineate the temporal pattern of voting rights events. Figure 4 aggregates the events depicted in Figures 1 and 2 into states and localities that were covered before *Shelby County* and those that have never been covered jurisdictions, it inserts the most significant cases and congressional acts to help explain the patterns, and it adds successful changes to at-large elections brought about because of the state-level California Voting Rights Act.¹⁴¹

There are two obvious, but important conclusions to be drawn. First, as previously noted, until 2013, the overwhelming proportion of cases and objections and settlements (92.3%) took place in covered states and counties. Discriminatory events uncovered by the Voting Rights Act continued to be nearly as centered in the covered jurisdictions in the five years before 2006 (87.6%) as they were in the five years before 1965 (95.5%).

Second, the events were not pure measures of discrimination. They also reflected changes in the legal frameworks of discrimination cases and administrative law. Before *Allen* in 1969, there had been only 4 objections under Section 5. *Allen* alerted states and localities to the necessity of preclearing changes in election laws and announced to the Department of Justice, as well as to covered jurisdictions, that election laws that diluted minority votes had to be submitted and might be objected to. Objections soared to 50 in 1971. By contrast, the Supreme Court's decision in *Beer v. U.S.* in 1976, which ruled that only changes that made minorities worse off, not all changes that had a discriminatory effect, were illegal, caused a decline in objections from 63 in 1976 to 31 in 1979.¹⁴²

Objections and especially Section 2 cases increased dramatically after the 1982 renewal of Section 5 and the amendments to Section 2 that aimed at reversing another restrictive decision of the Supreme Court in *Mobile v. Bolden*.¹⁴³ In 1981, the year before Congressional action, minorities succeeded in 49 cases or Section 5 objections; in 1984, in 199. Reversal came after 1993, when the Supreme Court in *Shaw v. Reno*¹⁴⁴ ruled against a "racial gerrymander" for the first time since *Gomillion*, despite many challenges to anti-Black gerrymanders in the

¹⁴¹ Previously published versions of this graph included the CVRA data in with the VRA data. This separates them entirely. All other information about voting rights events in this paper includes only VRA data.

¹⁴² 425 U.S. 130. That the *Beer* retrogression interpretation of a discriminatory effect under Section 5 was inconsistent with the inspiration for Section 5, the freezing principle, has rarely been noted. As pointed out above, the freezing principle was proposed by Justice Department lawyers to facilitate the registration of Black voters in counties where few or none of them had been registered. Their registration percentages could not retrogress, because they were close to zero already. And the administrative practices under which judges sought to allow Blacks to be registered retrogressed to those under whites had already been registered, instead of new literacy and other tests or much stricter applications of the earlier tests than whites had had to meet.

¹⁴³ 446 U.S. 55 (1980). *Bolden* ruled that plaintiffs in Section 2 cases had to prove that the law had been adopted (or perhaps only perpetuated) with a racially discriminatory intent. By its amendments, Congress attempted to restore the effect, but carefully limit the "effect" standard that had always been explicit in Section 2. See S. Rept. 97-417 (1982), at 2 (The amendment "restores the legal standards, based on the controlling Supreme Court precedents, which applied in voting discrimination claims prior to the litigation involved in *Mobile v. Bolden*.").

¹⁴⁴ 509 U.S. 630.

intervening 33 years. Minority successes diminished from 252 in 1992 to 107 in 1995, as voting rights lawyers and lower federal court judges apparently interpreted *Shaw* not only as a specific holding, but also as a signal that the Supreme Court was going to be less favorable to minority voting rights lawsuits in the future. Despite a temporary upswing during and after the 2001 redistrictings, the number of successful voting rights cases continued to decline, even after the 2006 renewal, and by 2013, the year of *Shelby County*, they reached the lowest level since 1967.

The contention that the number of objections or cases cannot be interpreted as a transparent index of the amount of discrimination is reinforced by comparing the lines on the right end of the graph for covered and non-covered jurisdictions with that for the California Voting Rights Act (CVRA). Passed in 2002, the CVRA had little effect until a decision of the Fifth District California Court of Appeal in 2006 ruling the CVRA constitutional, and the refusal of the California and U.S. Supreme Courts to take up the case on appeal.¹⁴⁵ Aimed solely at at-large elections in local jurisdictions, the CVRA was amended in 2016 to encourage such jurisdictions to settle cases without going to court. Although only four cases have been fully litigated (one of which is currently before the California Supreme Court), at least 453 city councils, school boards, and special districts have abandoned at-large elections as a result of the CVRA. The line in Figure 4 represents all those changes, which news stories and statements by the local governments treated as having taken place because of potential or actual threats of lawsuits.¹⁴⁶ The 453 minority victories that can be tallied up to the CVRA since 2007 may be contrasted with the corresponding total of 239 as a result of the VRA.

In her dissent in *Shelby County*, the late Justice Ruth Bader Ginsburg offered a protection metaphor for Section 5: “Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”¹⁴⁷ While the metaphor, which immediately went viral and has continued to echo ever since it was coined,¹⁴⁸ is justly celebrated, Figure 4 suggests that a

¹⁴⁵ *Sanchez v. City of Modesto*, 145 Cal. App. 4th 660 (Cal. Ct. App. 2006), *cert. denied*, 552 U.S. 974 (2007).

¹⁴⁶ There is no central resource for CVRA-induced changes. These have been gathered by searches for newspaper reports and local jurisdiction websites. Both news stories and resolutions from elected bodies highlight the connection between changes to at-large systems and the CVRA. For example, the *Los Angeles Times*, July 9, 2015, reported that “Fullerton officials have settled a lawsuit alleging that the city's at-large elections violate California's Voting Rights Act, agreeing to create a district-based system that would then need voters' approval.” <http://www.latimes.com/local/orangecounty/la-me-fullerton-voting-20150709-story.html> In a press release on April 19, 2017, the City of Indio stated that “The City has decided to transition to district-based elections for City Council in order to fulfill the intent and purposes of the California Voting Rights Act.” < <http://www.indio.org/news/displaynews.htm?NewsID=276&TargetID=48>>.

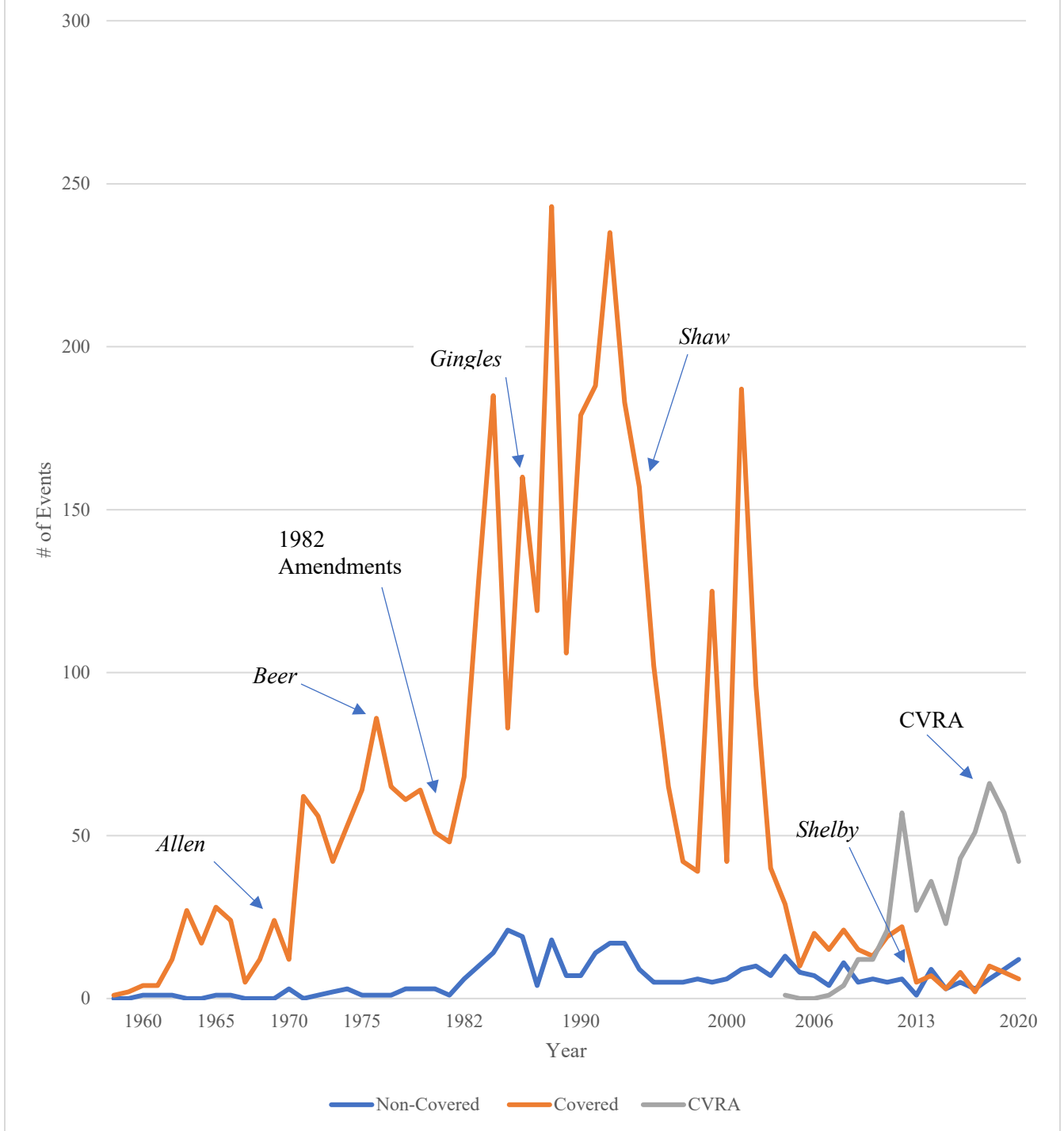
¹⁴⁷ 570 U.S. 529, at 590. The umbrella metaphor had been used in congressional testimony as early as 1969 by Howard Glickstein, then staff director of the U.S. Commission on Civil Rights. See “Extension of the Voting Rights Act of 1965, Hearings before the Subcommittee on Constitutional rights of the Senate Judiciary Committee on S. 407, S. 903, S. 1297, S. 1409 and S. 1443, 94th Congress, April 8, 9, 10, 22, 29, 30; May 1, 1975,” at 219.

¹⁴⁸ Ellen D. Katz, “Justice Ginsburg’s Umbrella,” in Katz and Samuel R. Bagenstos, eds., *A Nation of Widening Opportunities*,” available at <https://quod.lib.umich.edu/m/maize/13855464.0001.001/1:15/--nation-of-widening-opportunities?rgn=div1;view=fulltext>; Robert Barnes and Michael A. Fletcher, “Ruth Bader Ginsburg, Supreme Court justice and legal pioneer for gender equality, dies at 87,” *Washington Post*, Sept. 18, 2020,

perception metaphor may also be apposite. There was surely more discrimination in election laws before 1957 than since, and there was surely more, in total, in the other 49 states than in California after 2007, but adverse Supreme Court decisions and weak or non-existent laws obscured the legal system's view. Racial discrimination can only be legally perceived when and to the extent that the eyes of the law are open.

https://www.washingtonpost.com/local/obituaries/ruth-bader-ginsburg-dies/2020/09/18/3cedc314-fa08-11ea-a275-1a2c2d36e1f1_story.html quotes the passage.

Figure 4: Discriminatory Events in Covered and Non-Covered Jurisdictions, and California VRA, 1958-2020

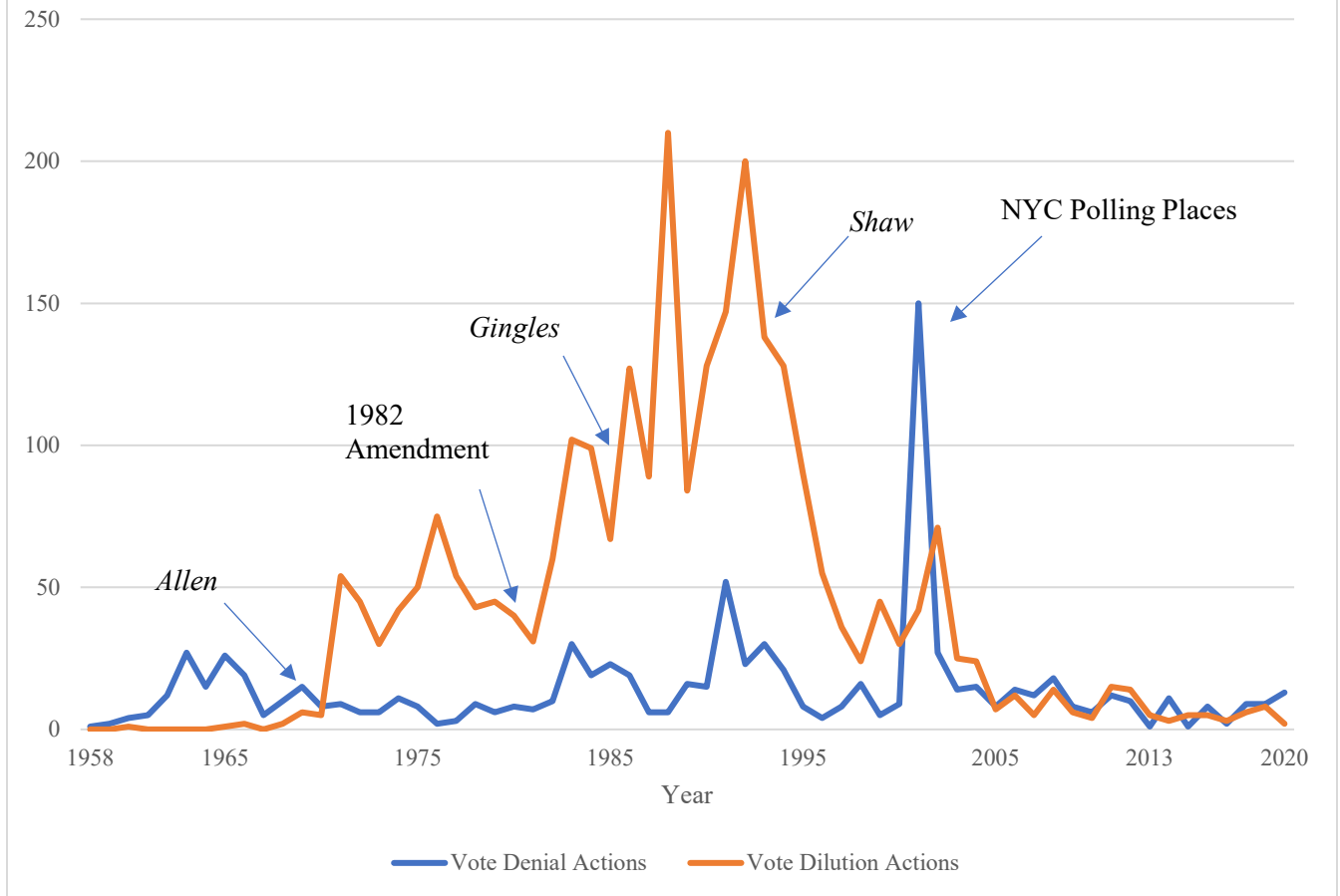


5. There Have Always Been Both Vote Denial and Vote Dilution Cases

Two other important temporal trends in voting rights legal actions that might affect the choice of coverage schemes are the balances between vote denial and vote dilution cases and between state and local sites of discrimination. Figure 5 demonstrates again the effects of Supreme Court decisions. *Allen* made dilution actions viable, the 1982 amendment to Section 2 provided a checklist for Section 2 cases, the 1986 case of *Thornburg v. Gingles*¹⁴⁹ focused attention on a subset of that checklist, and *Shaw v. Reno* discouraged districting cases and objections in particular and voting rights lawsuits in general. If one categorizes changes in polling places and precinct lines as vote denial cases, as I do here, because they make it more difficult for individuals to vote, then vote denial cases have never disappeared, and since 2005, they have sometimes exceeded vote dilution cases in number. Because of 141 Department of Justice objections to polling place changes in 2001 in three boroughs of New York City that were covered jurisdictions, there was a large, temporary spike in denial cases in that year. But the most significant conclusion to be drawn from Figure 5 is that any potential coverage scheme should apply to both vote denial and vote dilution.

¹⁴⁹ 478 U.S. 30.

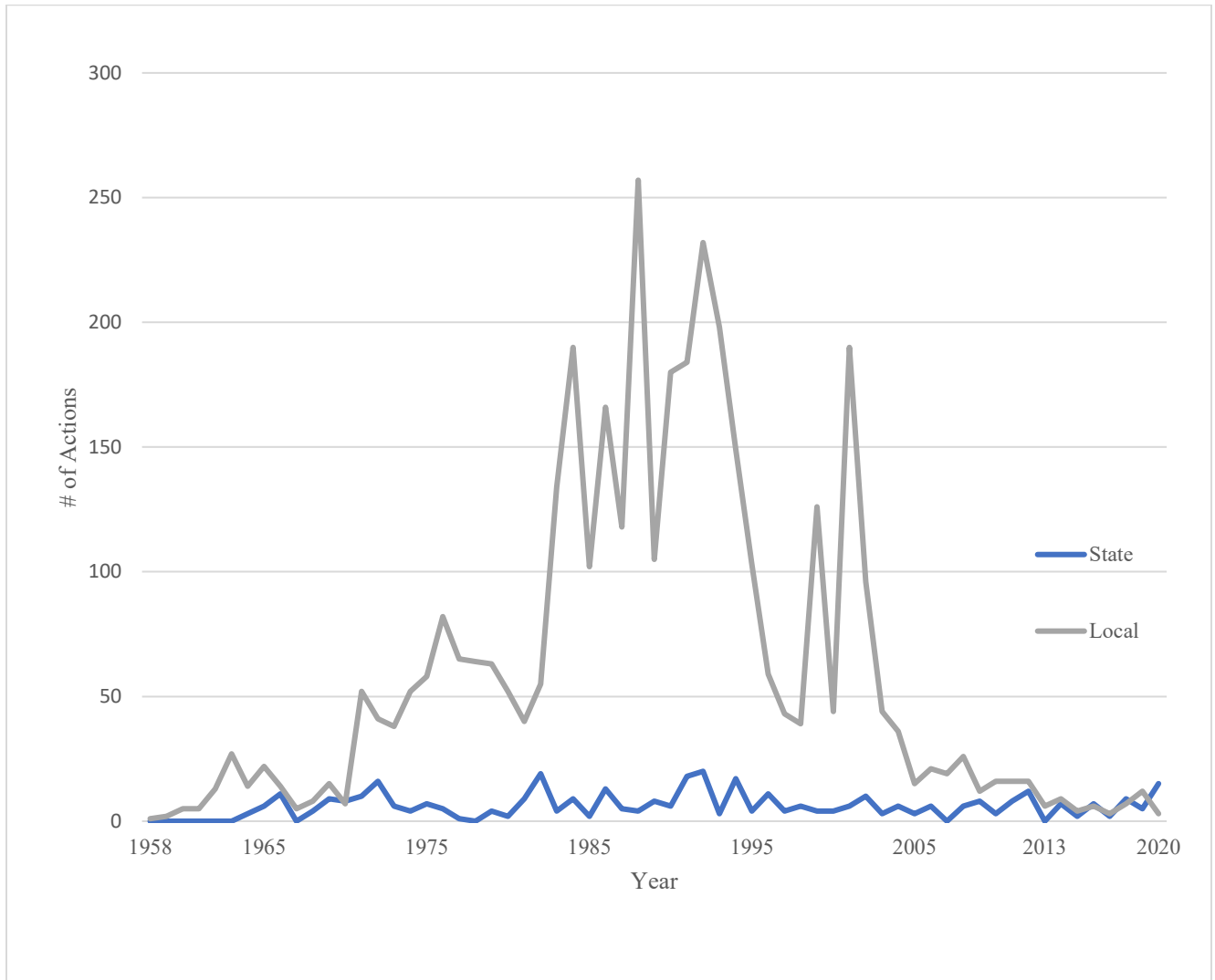
Figure 5: Vote Denial and Vote Dilution, 1958-2020



6. Voting Rights Violations Have Always Been Primarily Local

I have previously pointed out that the overwhelming majority of voting rights cases across the time period (3790 of 4176, or 90.8%) concerned local, instead of state laws or practices. Figure 6 shows the time trend. After 1965, there were always at least a few state cases. Contrary to popular perceptions, only 136 of the 386 (35.2%) successful state cases related to districting plans. After *Shaw* in 1993 and the round of cases following the 2001 redistricting cycle, the local cases and objections declined very markedly. Although the proportion of successful cases filed at the state, as opposed to the local level has risen since 2013, that is explained by the decline in the number of local cases, not the rise in the number of state cases. The conclusion to be drawn is that any new voting rights law or coverage scheme must pay attention to discrimination at both the state and local levels.

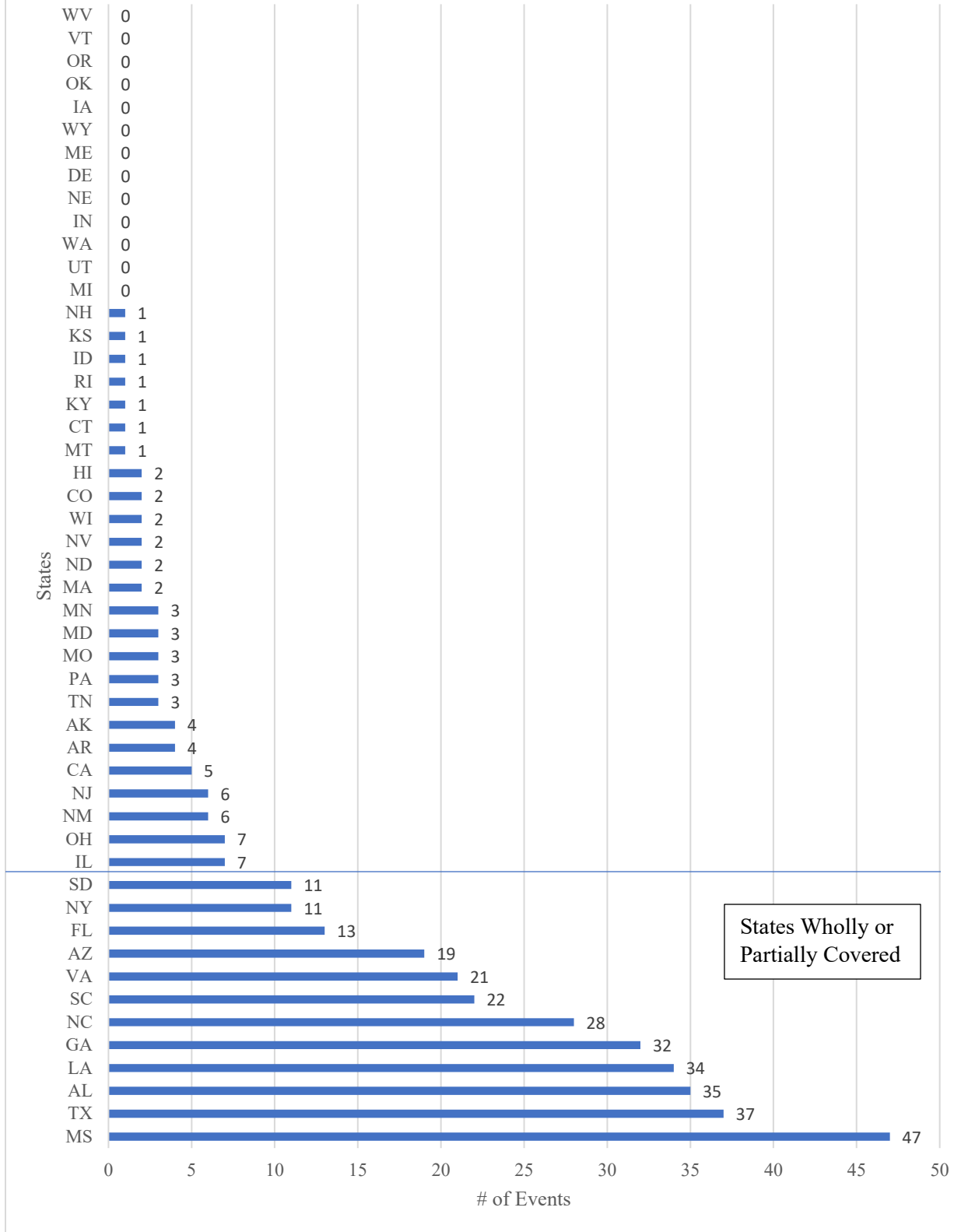
Figure 6: State vs. Local Actions Won by Minorities, 1958-2020



7. State-Level Cases Were Concentrated in a Few States

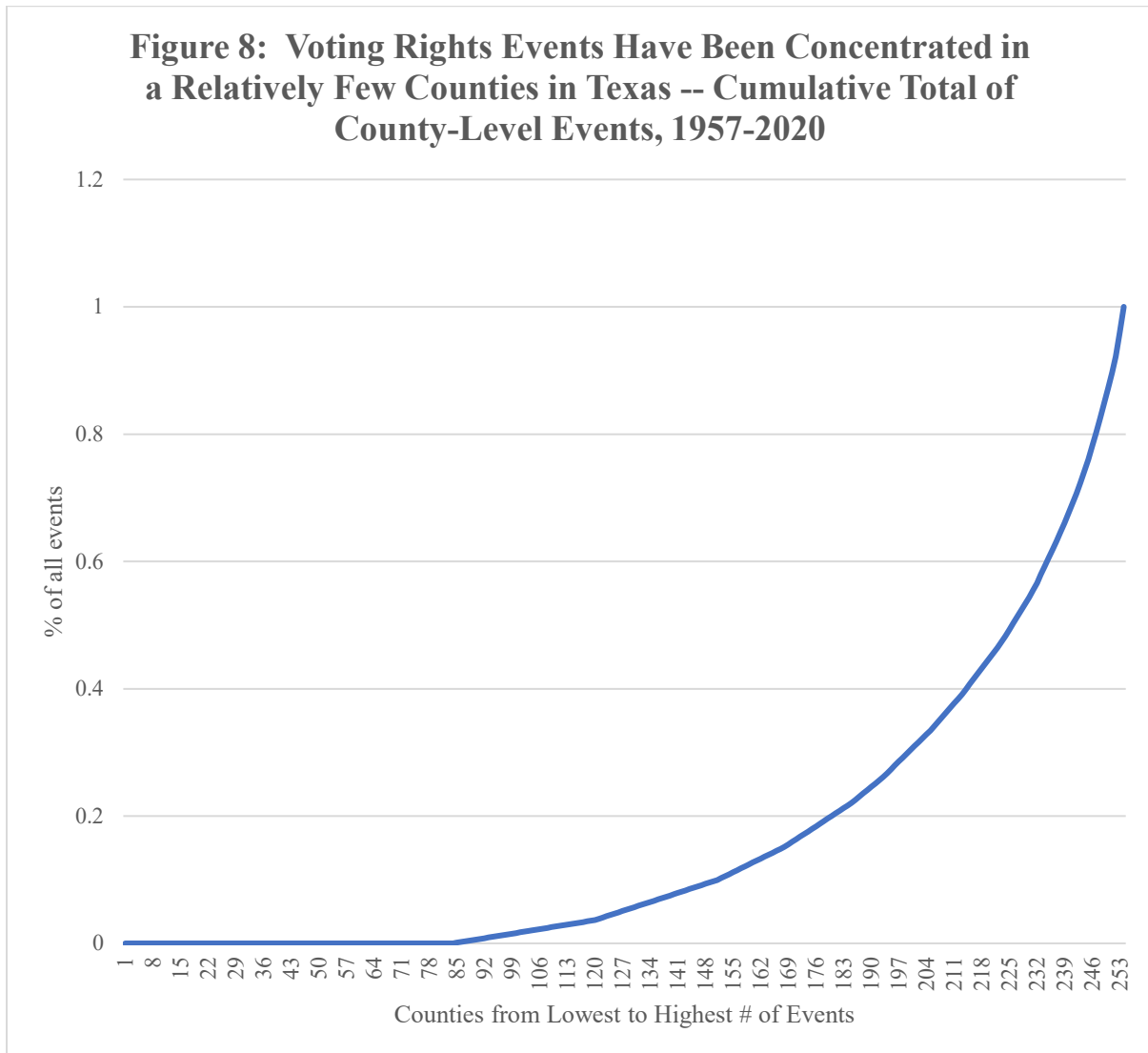
Figure 7 demonstrates that many states produced very few cases at the state level – 81% of the cases in which minorities were successful came from 12 states (all covered or partially covered under Section 5 before *Shelby*). No other state had case numbers in double digits, and 20 had zero or one case. This suggests that it might be possible to establish different coverage schemes for the state and county levels. That is, in some states, only state-level laws or practices might need to be precleared.

Figure 7: State-Level Voting Rights Events, 1958-2020

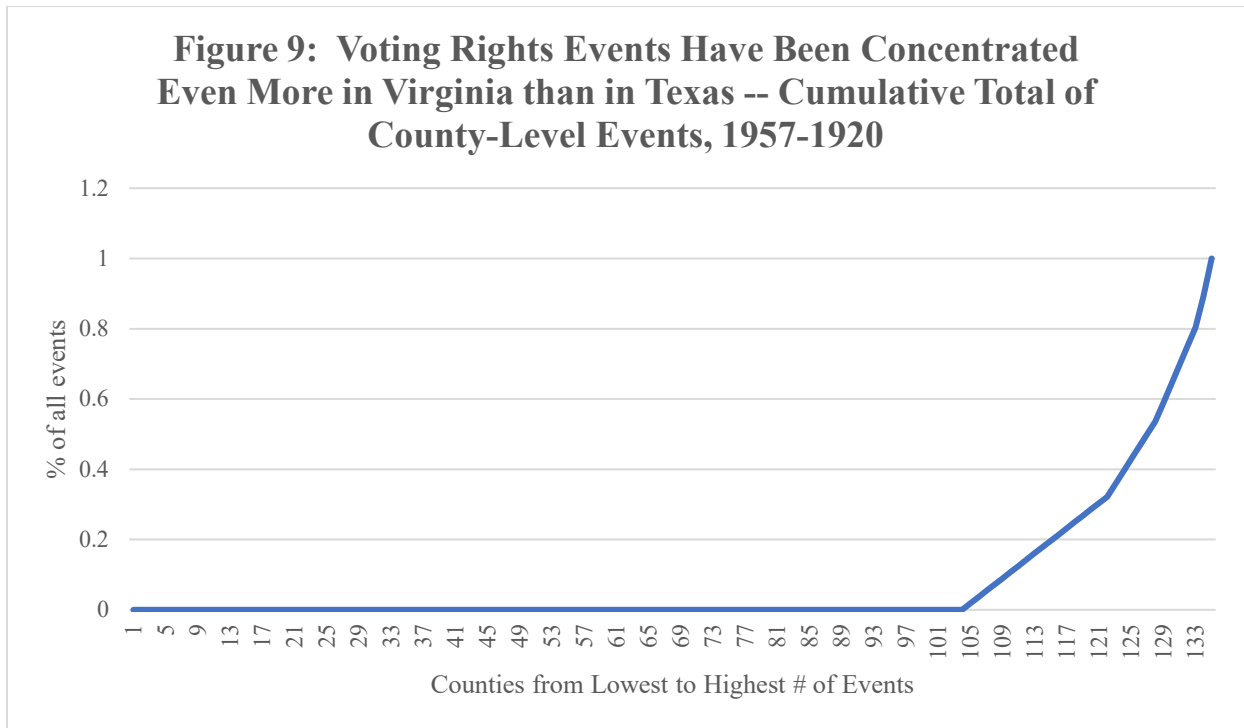


8. County-Level Cases Were Concentrated in a Few Counties

The variations at the county level were even more pronounced. Of 3142 counties or county-equivalents, 2376 had not a single voting rights violation from 1957 through 2020. In Texas, which had the largest total number of events, 83 of the state's 254 counties had no events, 36 had a single event, 30 had 2 events, 16 had 3, and 16 had 4. Counties tended to be repeat offenders. Of 984 county-level minority successes in Texas, 46% were concentrated in only 23 counties, and 61% in 40 counties. Figure 8 summarizes the concentration of events in Texas. On the horizontal axis are counties, sorted with those with the lowest number of events, zero, to the left, those with one event next on the right, those with two, further to the right, and so on to Harris County, with 40 minority victories, on the extreme right. The totals on the horizontal axis are cumulated, so that the curve does not rise to one percent of the total number of events until the 93rd lowest county. The vertical axis gives the percent of all events represented by the curve, so that the lowest 178 (of 254 total) counties represented only 20% of the events. Eighty percent of the events were concentrated in 30% of the counties.



In most states, county-level events have been even more concentrated in a relatively few counties than in Texas. Figure 9 duplicates Figure 8, except that it applies to Virginia. Of the 135 counties and city-counties in the Commonwealth, 105 had no events whatsoever. Seventy-five percent of the events occurred in 17 counties, 50% in 8 counties, and 25% in just 3 counties. While in the Deep South states that were the initial focus of voting rights attention, the events were spread out more, with nearly every county having at least a few, in other states, even in the South, a coverage formula keyed to certain counties or their characteristics would likely suffice to capture most future discriminatory events, if the past is a guide.



9. Ethnic Percentages as an Index of Voting Discrimination

What distinguished counties with no or few events from those with many events? Figure 10 looks at the Non-Hispanic white percentages in Texas counties, divided into three groups on the basis of the number of voting rights violations proven. Note that the ethnic percentages were measured at the time when violations took place, not at the most recent time. Figure 10A covers those counties with no violations. Sixty-five of the 84 counties with no violations had non-Hispanic citizen voting-age populations above 75%, and 52 were above 85% non-Hispanic white. Figure 10B displays the 101 counties with 1-4 violations. They tended to have somewhat more ethnically mixed populations – 60 were over 75% non-Hispanic white, but only 22 over 85%, and 30 were between 55% and 75%. The 69 counties with 5 or more voting rights events had, on average, much less overwhelmingly non-Hispanic white populations. Only 13 were above 75% non-Hispanic white, and none were above 85%. Nearly half, 30 of the counties, were between 45% and 65% non-Hispanic white. But 78% (767) of the total number of violations in the state (984) took place in the third group of counties.

These details about county-level voting rights events in Texas suggest two entirely commonsensical conclusions that might help to frame a new coverage scheme for Section 5 at the county level: First, one should expect few voting rights infractions where there are few minorities. Whatever the racial views of non-Hispanic whites in those counties, minorities constitute too small a percentage of the populations there to contend for power, and thus to become important objects of local discrimination. If preclearance is a “burden,” as Chief Justice Roberts asserted in *Shelby County*, these counties can be released from that burden without an expectation that minorities there will be subjected to a burden of discrimination that preclearance would be likely to lift. Second, ethnic percentages constitute a promising index of vote discrimination. Of the 69 Texas counties in the third category, with 5 or more voting rights violations, 51 had citizen voting age populations that were at least 15% Black or 15% Latino or both. A coverage scheme that targeted ethnic competition, in which one or more minority ethnic group constituted a high enough percentage to pose a threat to non-Hispanic white political power, would narrowly and fairly precisely target the discrimination that the historical record leads us to expect in the future.

Figure 10A: % Non-Hispanic White in Counties with No Violations, Texas

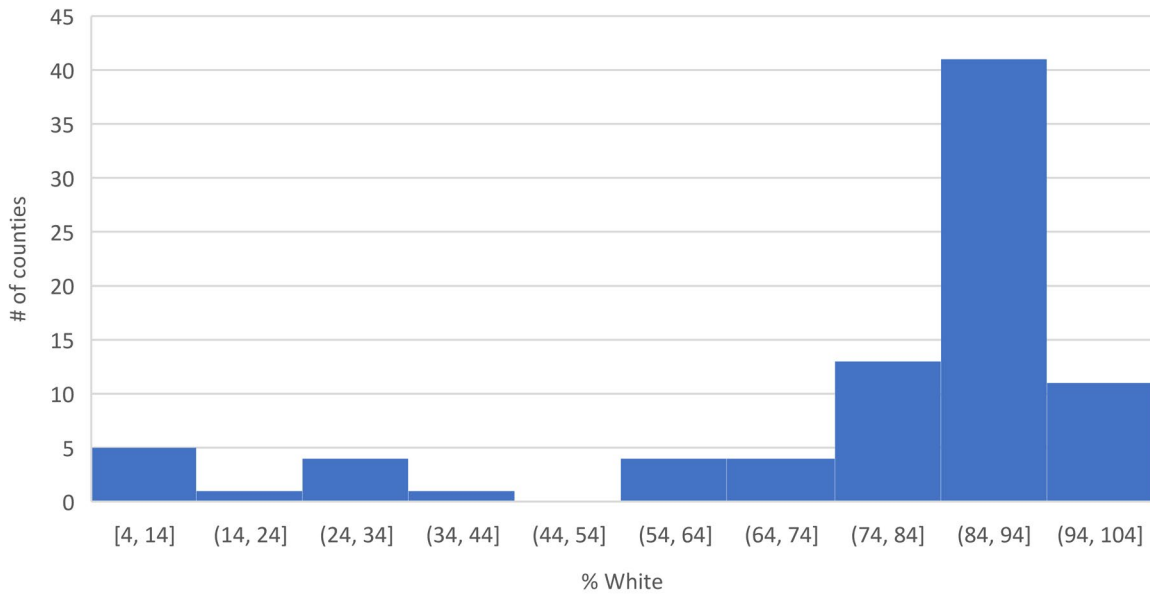
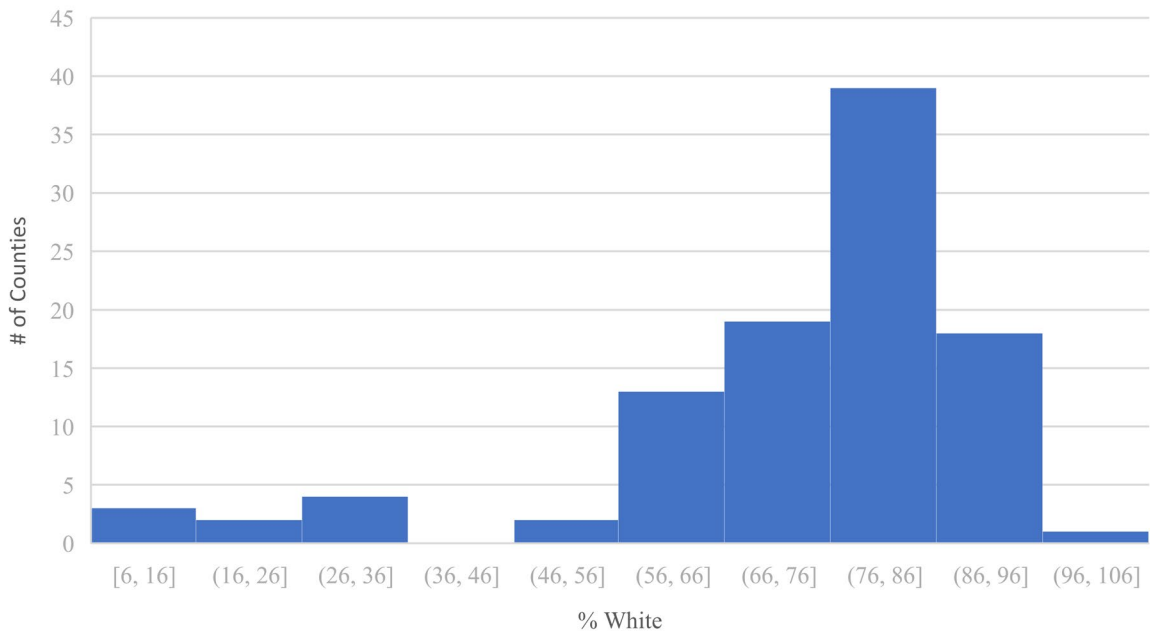
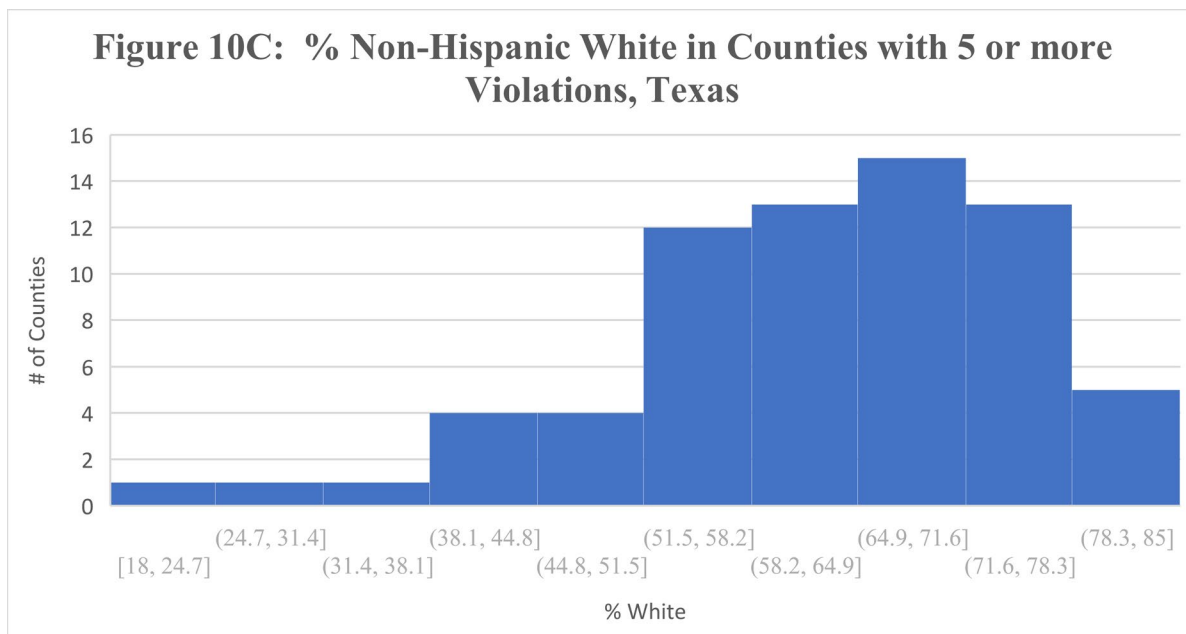


Figure 10B: % Non-Hispanic White in Counties with 1-4 Violations, Texas





C. Summary: The Implications of the History of the Voting Rights Act and the Pattern of Past Discrimination for the Design of a New Coverage Scheme

Even if the evidence of voting rights events from 1957 through 2020 shows that the pre-2013 coverage scheme tracked the pattern of geographic discrimination remarkably well, there is no choice after *Shelby County* but to devise a new one, one that responds to Chief Justice Roberts’s criticisms. Those criticisms and the information from the history of minority voting rights in the U.S. from 1957 through 2020 presented above suggests that any new coverage scheme should be based on the following principles:

First, it must be founded on demonstrable evidence and narrowly tailored to attack discrimination where it persists and not to “burden” communities where voting discrimination has not been proven. At both the state and county levels, discrimination has been highly concentrated, and it was concentrated in the same types of places over the period from 1957 through 2006. To enable the Department of Justice and the courts to explore the nuances of election laws deeply and to release areas that history has shown are unlikely to engage in discriminatory voting practices, any new coverage scheme should be focused on a limited number of states and counties.

Second, Congress should continue to heed the lesson that guided it in 1965 – that once successfully countered, discrimination often adopts new guises that are impossible to predict in

advance. Section 5 was only successful because it was malleable, attacking a myriad of ingenious tactics, as Table 1 showed. It should apply at the state, as well as at the local level, to vote dilution, as well as to vote denial, to the least common, as well as to the most common types of electoral laws that can be turned to discriminatory ends. To limit the provision to focusing only or even primarily on particular practices is to invite circumvention.

Third, Congress should set general parameters, as it did in 1965, in the four renewals of Section 5, and in numerous oversight hearings during the period, while realizing that the practical workings of the Section will be shaped by iterative conversations between the courts, the Department of Justice, and litigants or potential litigants. Those conversations might be designed from the beginning to be part of the workings of the law.

Fourth, despite the Chief Justice's emphasis on "current conditions," Congress should be aware that chronological trends in the number of cases not only reflect the degree of discrimination, but also the effects of laws and court decisions, especially by the U.S. Supreme Court. Figure 4 dramatically demonstrates the positive and negative effects of Supreme Court decisions, amendments of the Voting Rights Act, and the passage and amendments of the California Voting Rights Act on the number of successful minority voting rights events. To base a new coverage scheme on a 25- or 10-year period when court decisions made much discrimination legally invisible or at the least occluded the view is to sever the connection between discrimination and coverage, not to update it.

Fifth, it should avoid old formulas that the Chief Justice implied were "designed to punish for the past."¹⁵⁰ Instead, Congress should consider adopting a new formula that would draw indirectly from the rich record presented in this paper, unshackled from the exact scheme of the past, but based on empirical data about previous voting discrimination.

The new formula should use evidence about past discrimination to predict what sorts of state and local jurisdictions would be most likely to discriminate in the future. It should be flexible enough to fit not only the demographic changes that have already taken place since 1965, but also those that will take place in the future. A possible rationale, based on the most comprehensive view of discrimination in voting rights ever considered by Congress, is that once a single minority group comprises a significant percentage of a state or county, a dominant group is likely to try to change election laws – in unpredictable ways -- to preserve its power. Equal political opportunity therefore requires a national protective mechanism.¹⁵¹

It is important also that any new coverage scheme respond to new demographic realities. In 1960, the U.S. population was 85% non-Hispanic white, 11% Black, 3.5% Latino, 0.6%

¹⁵⁰ *Shelby County v. Holder*, 570 U.S. 529, 553 (2013).

¹⁵¹ Compare Federalist #10, where James Madison wrote of the advantages of a large republic over a small one, "it will be more difficult for unworthy candidates to practice with success the vicious arts by which elections are too often carried; and the suffrages of the people being more free, will be more likely to centre in men who possess the most attractive merit and the most diffusive and established characters." <https://guides.loc.gov/federalist-papers/text-1-10>.

Asian, and 0.3% Native American. By 2011, it was 63% white, 12% Black, 17% Latino, 5% Asian, and 0.9% Native American.¹⁵²

The demographic shifts and shifts in the terms and interpretations of discrimination laws that resulted from judicial, as well as congressional actions, transformed the identity of voting rights plaintiffs. Between 1957 and 1975, minorities successfully proved voting discrimination in 398 legal actions. Of the 375 in which the race of the plaintiff or complaining party can be readily discerned, 1 was Asian-American, 2 were Native American, 15 were Latino, and 359 were Black.¹⁵³ That is, at the beginning of the modern history of voting rights, about 95% of the successful parties were Black. The expansion of Section 5 to include language minorities in 1975 allowed the law, for the first time, to glimpse the degree of discrimination against non-Black minorities. During the eight years from the beginning of 1975 through the 1982 renewal of Section 5, there were 473 voting rights actions in which the race of the complainants could be discovered. Of these, 113 involved Latinos, Asians, or Native Americans, and 364 (77%) involved Blacks. In only 4 of the 473 were there complainants of more than one minority. Since 1982, the proportion of successful voting rights actions which can be identified by the race of the plaintiff totaled 2935. Of those, 2089 (71%) were Black, but 912 involved non-Black minorities, and 83 of the 2089 involved more than one minority. Since 1975, and especially between 1982 and 2003, the lens of the law has opened widely enough to see discrimination against all minorities.¹⁵⁴

A Section 4 formula initially designed to correct discrimination against Blacks and later extended to language minorities in certain areas may be inadequate to deal with discrimination occasioned not only by historically-based attitudes and practices, but also with attitudes and practices occasioned by the expansion of members of several minority groups into different state and local jurisdictions.

D. The Role of the Supreme Court in Uncovering and Covering Evidence of Racial Discrimination

As Figures 4 and 5 demonstrate most dramatically, the record of judicial and administrative findings of racial discrimination in voting reflects not only discrimination itself, but also judicial and congressional openings and closings of a legal lens or curtain. Open, it allows a full view of discriminatory actions. But when the curtain is partially or largely closed, as it has been since 2003, after the redistricting litigation of the 2001 redistricting cycle faded, the decided cases will become a less reliable index of the actual extent of discrimination. In particular, minority victories will underestimate discrimination. The contrast in Figure 4

¹⁵² Lisa Wade, "U.S. Racial/Ethnic Demographics: 1960, today, and 2050, *Sociological Images* (2012), <https://thesocietypages.org/socimages/2012/11/14/u-s-raciaethnic-demographics-1960-today-and-2050/>; <http://www.census.gov/population/www/documentation/twps0076/twps0076.html>, Table A-1; <https://www.census.gov/content/dam/Census/library/publications/2012/dec/c2010br-10.pdf>, p. 3.

¹⁵³ One involved both Black and Latino parties. It is counted twice here.

¹⁵⁴ The transformation of voting rights litigation after 1982 makes Justice Alito's apparent attempt to grandfather in pre-1982 practices even more painfully ironic. *Brnovich v. Democratic National Committee*, slip opinion at 17.

between the VRA cases since 2007 and the much larger number of California Voting Rights Act cases makes that point dramatically. This consideration implies that if only very recent cases are used to frame a new coverage formula, discrimination will seem less prevalent than it really is, and the geographic pattern of discrimination as measured by cases may not track actual discrimination perfectly.

Events that straddle the Supreme Court's decision in *Shelby County* illustrate how a decision of the Supreme Court can decrease the number of minority victories without changing the amount of discrimination. In 2012, the District Court of the District of Columbia denied preclearance to Texas's voter ID law in *Texas v. Holder*, finding that it would have a discriminatory effect on racial minorities.¹⁵⁵ But in 2013, after it decided *Shelby County*, the Supreme Court vacated *Texas v. Holder*, not on the basis of any new evidence or a different reading of the evidence, but on the grounds that the Section 4 coverage scheme itself had become unconstitutional.¹⁵⁶ In the racially divided city of Beaumont, Texas, opponents of the four-person Black majority on the five-person school board first tried to add two at-large seats in 2012, but the Department of Justice refused to preclear the change. The next year, the opposition tried a complicated scheme to force out three of the Black school board members, but again, the Department of Justice refused preclearance.¹⁵⁷ After *Shelby County*, however, a state court allowed Beaumont to add the two at-large seats to the school board, diluting Black political influence in a Black-student-majority school district.¹⁵⁸ In both the statewide and local cases, the facts of discrimination remained. What changed was their legal visibility.

Opponents of the John Lewis Act claim that racial discrimination in election laws and procedures has dwindled so much that there is no need for further legislation. For example, T. Russell Nobile, Senior Counsel for Judicial Watch, Inc., testifying before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the House Judiciary Committee on July 27, 2021, asserted that "The record and data do not support the claim that voting rights are somehow in peril, nor can they justify a nationwide, federal takeover of states' electoral processes."¹⁵⁹ But Mr. Nobile and his allies fail to take into account the effect of decisions of the Supreme Court on the record itself. What we can observe in the record of minority victories is not racial discrimination in its pure and complete state, but only that part – recently, only a very small part – of the discrimination that the Supreme Court has allowed us to see.

The longer historical view underlines the point. After the passage of the 15th amendment in 1870, Congress passed three major enforcement acts which were intended to prevent discrimination not only by governmental officials, but also by private individuals. The First Enforcement Act was invoked, for instance, to punish perhaps the largest single political/racial

¹⁵⁵ 888 F. Supp. 2d 113 (D.D.C. 2012).

¹⁵⁶ 570 U.S. 928 (U.S., 2013).

¹⁵⁷ See objections 2012-4278 and 2013-0895 at <https://www.justice.gov/crt/voting-determination-letters-texas>.

¹⁵⁸ Zachary Roth, "Breaking black: the right-wing plot to split a school board, MSNBC, Oct. 17, 2013, <http://www.msnbc.com/msnbc/blacks-texas-town-fear-return-old-days>.

¹⁵⁹ <https://docs.house.gov/meetings/JU/JU10/20210727/113962/HHRG-117-JU10-Wstate-NobileT-20210727.pdf>, typescript, at 8.

mass murder in American history, the 1873 Colfax Massacre.¹⁶⁰ But when some of the murderers were convicted of violations of that Act, the Supreme Court hamstrung enforcement of the right to vote freely by overturning their convictions in a crabbed interpretation of the law in *U.S. v. Cruikshank*.¹⁶¹ After the Enforcement Acts were almost entirely repealed in 1894 and several southern states amended their constitutions by adopting poll taxes and/or literacy tests, the Supreme Court first ruled in *Williams v. Mississippi* that evidence of intentional racial discrimination in Mississippi was insufficient to prove a violation of the fifteenth amendment.¹⁶² Then, when a Black lawyer proved in *Giles v. Harris* that the new Alabama suffrage provisions had been adopted with a racially discriminatory intent and that it had a racially discriminatory effect, the Supreme Court ruled that suffrage qualifications were “political questions,” effectively closing federal courts to Blacks at the time of their greatest need since the abolition of slavery.¹⁶³ Although racial discrimination in voting was unquestionably at its post-1870 height during the first half of the 20th century, the Supreme Court had drawn the curtain tight, and evidence of that discrimination was fragmentary and indistinct.

It is only 58 miles from Montgomery, Alabama, where *Giles v. Harris* originated, to Shelby, Alabama.¹⁶⁴

¹⁶⁰ Charles Lane, *The day freedom died: the Colfax massacre, the Supreme Court, and the betrayal of Reconstruction* (New York: Henry Holt and Co., 2008); LeeAnna Keith, *The Colfax massacre: the untold story of Black power, White terror, and the death of Reconstruction* (New York: Oxford Univ. Press., 2008).

¹⁶¹ 92 U.S. 542 (1876).

¹⁶² 170 U.S. 213 (1898).

¹⁶³ 189 U.S. 475 (1903).

¹⁶⁴ <https://www.distance-cities.com/distance-montgomery-al-to-shelby-al>.