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The Case For Extending And Amending The Voting Rights Act

Voting Rights Litigation, 1982-2006: A Report of the Voting Rights Project of the American Civil Liberties Union

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INTRODUCTION

Five Presidents - Lyndon Johnson (1965), Richard Nixon (1970), Gerald Ford (1975), Ronald Reagan (1982), and George H. W. Bush (1992) - have supported the enactment or reauthorization of key parts of the Voting Rights Act. Dr. Martin Luther King, Jr. said that President Johnson's support of the Voting Rights Act had helped transform the bloody assault on civil rights marchers by state troopers at the Edmund Pettus Bridge in Selma, Alabama, into a "shining moment in the conscience of man."[1] On signing the 1982 extension of the Act, which passed Congress by a vote of 389 to 24, President Reagan called the right to vote the "crown jewel of American liberties."[2]

This report describes the voting rights litigation brought, or participated in, by the Voting Rights Project of the American Civil Liberties Union after the amendment and extension of the Voting Rights Act on June 29, 1982. It documents continuing purposeful discrimination in voting against racial

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[1] Nick Kotz, Judgment Days. Lyndon Baines Johnson, Martin Luther King, Jr., and the Laws that Changed America (Boston: Houghton Mifflin, 2005), p. 324.

[2] President Ronald Reagan, Remarks on Signing the Voting Rights Act Amendments of 1982, June 29, 1982, Ronald Reagan Presidential Library, published at: http://www.reagan.utexas.edu/archives/speeches/1982/62982b.htm

minorities in the South and against American Indians in the West. It also demonstrates the urgent need for extension of the special provisions of the Act scheduled to expire in 2007: (1) Section 5 preclearance; (2) the minority language assistance provisions of Section 203; and (3) the federal examiner and election observer provisions.

Section 5 requires jurisdictions with significant histories of discrimination in voting to preclear, or get federal approval of, any new voting practices or procedures and to show that they do not have a discriminatory purpose or effect.[3] Preclearance may be granted by the Attorney General or the Federal District Court for the District of Columbia. The Senate Report that accompanied the 1982 extension of Section 5 warned that without the preclearance requirement, "many of the advances of the past decade could be wiped out overnight with new schemes and devices."[4] The minority language provisions of Section 203 require jurisdictions with significant numbers of American citizens who are limited in their ability to speak English to provide bilingual oral and

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[3] 42 U.S.C. § 1973c. A voting change has a discriminatory effect under Section 5 if it causes a "retrogression" in minority voting strength. Beer v. United States, 425 U.S. 130, 141 (1976).

[4] S.Rep. No. 97-417, 97th Cong., 2d Sess. 10(1982).

written assistance in voting.[5] The special provisions also authorize the Attorney General to assign federal examiners and election observers to insure that minorities are allowed to register and vote without intimidation or discrimination.[6] Appendix A to this report describes in more detail the special provisions set to expire in 2007, as well as the permanent provisions of the Act. Appendix B lists the jurisdictions covered by the special provisions. Appendix C contains two tables showing those local jurisdictions required to provide minority language assistance in voting pursuant to Section 203 because of their American Indian populations, and displays which of these jurisdictions are also covered under Section 5.

[5] 42 U.S.C. §§ 1973b(f)(4) and aa-1a.

[6] 42 U.S.C. §§ 1973d, e, f & k.

EXECUTIVE SUMMARY

This report discusses the involvement of the ACLU Voting Rights Project in 293 cases brought in 31 states since June 1982, the date of the last extension of the special provisions of the Voting Rights Act, challenging discrimination in voting and failure to comply with federal and state election laws.[7] The states and the number of cases brought were: Alabama (9); Arkansas (2); California (1); Colorado (1); Connecticut (1); Florida (15); Georgia (145); Illinois (1); Kansas (2); Louisiana (4); Maryland (4); Michigan (1); Minnesota (2); Mississippi (3); Missouri (2); Montana (6); Nebraska (2); New Jersey (1); New Mexico (1); New York (1); North Carolina (17); Ohio (1); Pennsylvania (1); Rhode Island (2); South Carolina (38); South Dakota (6); Tennessee (3); Texas (3); Virginia (15); Washington (2); and Wyoming (1).

I. Section 5 Has Blocked Implementation of Discriminatory Voting Changes

There have been more than 1,000 objections under Section 5 by the Department of Justice since 1982, encompassing an even greater number of voting changes in the covered jurisdictions. These objections protected millions

[7] The report discusses only those cases initiated, or participated in, by the ACLU Voting Rights Project, and does not include litigation brought independently by ACLU state affiliates, unless specifically noted. This report also discusses non-litigation interventions engaged in by the ACLU to protect the ability of minority voters to elect representatives of choice.

of voters in thousands of elections over the past two decades. A few examples from the cases discussed in this report will suffice to illustrate the continuing importance of Section 5.

The City of Albany, Georgia: 2002-2003

Following the 2000 census, the City of Albany, Georgia, adopted a new redistricting plan for its mayor and commission to replace an existing malapportioned plan, but it was rejected by the Department of Justice under Section 5. The department noted that while the black population had steadily increased in Ward 4 over the past two decades, subsequent redistrictings had decreased the black population "in order to forestall the creation of a majority black district." The letter of objection concluded it was "implicit" that "the proposed plan was designed with the purpose to limit and retrogress the increased black voting strength in Ward 4, as well as in the city as a whole."[8] A subsequent court ordered plan remedied the vote dilution in Ward 4.[9] But in the absence of Section 5, elections would have gone forward under a plan in which purposeful discrimination was "implicit," and which could only have been

[8] J. Michael Wiggins, Acting Assistant Attorney General, to Al Grieshaber Jr., September 23, 2002.

[9] Wright v. City of Albany, Georgia, 306 F. Supp. 2d 1228 (M.D. Ga. 2003).

challenged in time consuming vote dilution litigation under Section 2, in which the minority plaintiffs would have borne the burden of proof and expense.

Charleston County, South Carolina: 2003-2004

In 2003, South Carolina enacted legislation adopting the identical method of elections for the board of trustees of the Charleston County School District that had earlier, in a case involving the county council, been found to dilute minority voting strength in violation of Section 2.[10] Under the pre-existing system, school board elections were non-partisan, multi-seat contests decided by plurality vote, which allowed minority voters the opportunity to "bullet vote," or concentrate their votes on one or two candidates and elect them to office. That possibility would have been effectively eliminated under the proposed new partisan system.

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

[10] United States v. Charleston County and Moultrie v. Charleston County Council, 316 F. Supp. 2d 268 (D. S.C. 2003), aff'd 365 F.3d 341 (4th Cir. 2004), cert. den'd, 125 S. Ct. 606 (2004).

> every black member of the Charleston County delegation voted against the proposed change, some specifically citing the retrogressive nature of the change. Our investigation also reveals that the retrogressive nature of this change is not only recognized by black members of the delegation, but is recognized by other citizens in Charleston County, both elected and unelected.[11]

Section 5 thus prevented the state from implementing a new and retrogressive voting practice, one which everyone understood was adopted to dilute black voting strength and insure white control of the school board.

Georgia Redistricting: 1982-1983

A three-judge court in the District of Columbia denied preclearance to Georgia's infamous 1980 congressional redistricting plan finding that it was adopted with "a discriminatory purpose in violation of Section 5."[12] The decision was affirmed by the Supreme Court.[13]

Other Examples

Numerous other Section 5 objections are discussed in detail in this report. The objections in Florida include: state restrictions on registration and voting (1998). The objections in Georgia include: Adel, annexations (1982); Augusta, high school diploma requirement & annexations (1987); Augusta, date of

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

[12] Busbee v. Smith, 549 F. Supp. 494, 517 (D. D.C. 1982).

[13] Busbee v. Smith, 549 U.S. 1166 (1983).

referendum (1988); Augusta, consolidation (1989); Bibb County, special election (1988); Butler, majority vote requirement (1992); Clay County, candidate high school diploma requirement (1993); College Park, redistricting (1983); East Dublin, numbered posts and majority vote requirement (1991); Glynn County, consolidation (1982 & 1984); Griffin, redistricting (1985); Hinesville, majority vote requirement (1991); Jesup, redistricting and numbered posts and majority vote requirement (1986); Kingsland, numbered posts (1983); La Grange, redistricting (1993 & 1994); Lamar County, redistricting (1986); Lumber City, numbered posts and majority vote requirement (1988 & 1989); Lyons, redistricting (1985); Macon, deannexation (1987); Marion County, redistricting (2002); Millen, relocation of polling place (1995); Newnan, redistricting (1984); Newton, numbered posts (1997); Putnam County, redistricting (2002); Randolph County, redistricting (1993); Rome, staggered terms (1987); Sumter County, redistricting (1982); Tignall, numbered posts, staggered terms, and majority vote requirement (2000); Waynesboro, majority vote requirement (1994); Wrens, majority vote requirement (1986); and Wrightsville, relocation of polling place (1992). Objections in Louisiana include: state photo ID requirement (1994); and St. Francisville, redistricting (1993). Objections in Mississippi include: statewide dual registration (1997); and Perry County, redistricting (1991). Objections in North Carolina include: Ahoskie, annexations (1989); Edgecomb County,

residency districts (1984); Laurinburg, annexations (1994); Martin County, residency districts (1986); Mt. Olive, redistricting (1994); and Rocky Mount, annexations (1984). The objections in South Carolina include: state legislative redistricting (1994); Batesburg, majority vote requirement (1986); Batesburg-Leesville, majority vote requirement (1993); Clinton, annexations (2002); Edgefield County, redistricting (1984); Edgefield County school district, redistricting (1987); Elloree, staggered terms and majority vote requirement (1984); Hemingway, annexations (1994); Johnston, redistricting (1992 & 1993); Orangeburg, redistricting (1985 & 1992); Sumter County, annexations (1985 & 1986); and Sumter County, redistricting (2002).

II. There Is a Continuing Pattern of Bloc Voting and Racial Polarization in the Covered Jurisdictions

One of the most sobering facts to emerge from this report, as well as from the decisions in other cases, is the continuing presence of racially polarized voting. While much progress has been made in minority registration and office holding, the persistence of racial bloc voting shows that race remains dynamic in the political process, particularly in the covered jurisdictions. A few examples will suffice.

Racially Polarized Voting in South Carolina: 1984-2004

The three-judge court in Burton v. Sheheen, decided in 1992, relied upon the stipulation of the parties "that since 1984 there is evidence of racially polarized voting in South Carolina."[14] A subsequent three-judge court in Smith v. Beasley, decided in 1996, found that "[i]n South Carolina, voting has been, and still is, polarized by race. This voting pattern is general throughout the state."[15] In Colleton County Council v. McConnell, decided in 2002, the three-judge court made similar findings: "[v]oting in South Carolina continues to be racially polarized to a very high degree in all regions of the state and in both primary and general elections."[16] In 2004, the court of appeals affirmed the finding of a district court in South Carolina "that voting in Charleston County Council elections is severely and characteristically polarized along racial lines."[17]

Racially Polarized Voting in Indian Country: 1986-2004

In invalidating South Dakota's 2000 legislative redistricting plan as diluting Indian voting strength in the area of the Pine Ridge and Rosebud Sioux Indian Reservations, the court found "'legally significant' white bloc voting."[18]

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[14] Burton v. Sheheen, 793 F. Supp. 1329, 1357-58 (D. S.C. 1992).

[15] Smith v. Beasley, 946 F. Supp. 1174, 1202 (D.S.C. 1996).

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

[17] Moultrie v. Charleston County Council, 365 F.3d 341, 350 (4th Cir. 2004).

[18] Bone Shirt v. Hazeltine, 336 F. Supp. 2d 976, 1017 (D.S.D. 2004).

The court struck down at-large elections in Blaine County, Montana, finding that racially polarized voting "made it impossible for an American Indian to succeed in an at-large election."[19] In invalidating at-large elections in Big Horn County, the court made similar findings that "there is racial bloc voting," and "there is evidence that race is a factor in the minds of voters in making voting decisions."[20]

Racially Polarized Voting in Georgia: 2002

The District Court for the District of Columbia, in a Section 5 preclearance action involving Georgia's legislative redistricting plan, found there were areas of the state where "white voters consistently vote against the preferred candidates of African Americans."[21]

Racially Polarized Voting in Tennessee: 1993-1994

A three-judge court found that in West Tennessee there is "a high level of white bloc voting which usually enables the majority to defeat the black community's candidate of choice," and that racial polarization is so extreme that "black candidates cannot expect to succeed in majority-white districts."[22]

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[19] United States v. Blaine County, Montana, 363 F.3d 897, 914 (9th Cir. 2004), cert. den'd, Blaine County v. United States, 125 S. Ct. 1824 (2005).

[20] Windy Boy v. County of Big Horn, 647 F. Supp. 1002, 1013 D. Mont. 1986).

[21] Georgia v. Ashcroft, 195 F. Supp. 2d 25, 31 (D. D.C. 2002).

[22] RWTAAAC v. McWherter, 836 F. Supp. 453, 458, 462 (W.D. Tenn 1993).

Another court found in 1994 that "the level of racial bloc voting is increasing in Hamilton County making it more difficult than ever for a black to win a countywide judicial office."[23]

[23] Cousin v. McWherter, 840 F. Supp. 1210, 1215 (E.D. Tenn. 1994).

Other Examples

This report is replete with other findings by courts, and the Department of Justice in Section 5 objection letters, of continuing racial bloc voting, e.g., in Alabama (Chambers County, 1976); Colorado (Montezuma County, 1998); Connecticut (Bridgeport, 1993); Florida (DeSoto County, 1994; Escambia County, 1982; Glades County, 2004; and Fort Pierce, 1993); Georgia (Adel, 1982; Augusta, 1989; Baldwin County, 1983; Bleckley County, 1991; Charlton County, 1971; Clarke County, 1991; College Park, 1983; Cook County, 1982; Dooly County, 1980; Glynn County, 1982; Griffin, 1981; Hinesville, 1991; Jefferson County, 1986; Jesup, 1986; Kingsland, 1983; LaGrange, 1993; Lamar County, 1986; Long County, 1976; Lumber City, 1988; Lyons, 1985; Marion County, 2000; Newnan, 1984; Putnam County, 2002; Randolph County, 1993; Rome, 1987; Spalding County, 1981; Statesboro, 1980; Sumter County, 1983; Tignall, 2000; Wilkes County, 1978; Waynesboro, 1994; and Wrens, 1986); Maryland (Worcester County, 1994); North Carolina (Ahoskie, 1989; Edgecombe County, 1984; Laurinburg, 1994; Martin County, 1986; Mt. Olive, 1994; Rocky Mount, 1984; Sampson County, 1988; Wayne County, 1986); South Carolina (Batesburg, 1986; Batesburg-Leesville, 1993; Clinton, 2002; Edgefield County, 1986; Elloree, 1984; Johnston, 1992; Laurens County, 1987; Mullins, 1988; Orangeburg, 1992; and Sumter County,

1984); Virginia (Blackstone, 1986; Brunswick County, 1992); Louisiana (St. Francisville, 1993); Mississippi, 1987; and Nebraska (Thurston County, 1995).

III. Continuing Hostility to Minority Political Participation

Aside from patterns of polarized voting, this report and other evidence shows that the temptation to manipulate the law in ways that will disadvantage minority voters is as great and irresistible today as it was in 1982, when Congress last reauthorized Section 5. The recent Supreme Court brief filed by the State of Georgia in Georgia v. Ashcroft[24] provides a vivid, present day example of the willingness of one of the states covered by Section 5 to manipulate the laws to diminish the protections afforded racial minorities.

In its brief, the state resurrected the anti-Voting Rights Act rhetoric of prior years and argued that Section 5 "is an extraordinary transgression of the normal prerogatives of the states." State legislatures were "stripped of their authority to change electoral laws in any regard until they first obtain federal sanction." The statute was "extraordinarily harsh," and "intrudes upon basic principles of federalism." As construed by the lower court, the state said, Section 5 was "unconstitutional."[25] But the arguments the state made about the districts

[24] 539 U.S. 461 (2003).

[25] Brief of Appellant State of Georgia, pp. 28, 31, 40-1.

at issue were far more hostile to minority voting rights than even its anti-Voting Rights Act rhetoric.

One of the state's arguments was that the retrogression standard of Section 5 should be abolished in favor of an "equal opportunity" to elect standard, which it defined as "a 50-50 chance of electing a candidate of choice."[26] A 50-50 chance to win is also a 50-50 chance to lose. Given the fact that blacks are elected primarily from majority black districts, if the state were allowed under Section 5 to adopt a plan providing minority voters with only a 50-50 chance of electing candidates of their choice in the majority black districts, the number of blacks elected to the legislature could be reduced by half, or even more. The Supreme Court rejected the state's invitation to rewrite Section 5.

The state argued further that a district provided minority voters an equal opportunity to elect their candidates of choice when it contained only a 44% black voting age population. The adoption of that standard would have permitted the state to abolish all of its previously majority black districts. It would also have turned blacks into second class voters, with bloc voting white majorities controlling most, if not all, of the legislative districts.

[26] Georgia v. Ashcroft, 195 F. Supp. 2d 25, 66 (D. D.C. 2002).

Georgia further demonstrated its disregard for minority voting rights in Georgia v. Ashcroft by arguing that minorities should never be allowed to participate in the preclearance process. Thus, the very group for whose protection Section 5 was enacted would have no say on how a proposed change might impact the minority community. The Supreme Court, once again, rejected the state's argument, an argument which can charitably be described as irresponsible.

Restrictive Photo ID Requirements for Voting

More recently, the Georgia legislature, in a vote sharply divided on racial and partisan lines, passed a new voter identification bill which had the dubious distinction of being the most restrictive in the United States. To vote in person - but not by absentee ballot - a voter would have to present one of five specified forms of photo ID. Those without such an ID would have to purchase one for $25. Not only are there laws on the books that make voter fraud a crime, but there was no evidence of fraudulent in-person voting to justify the stringent photo ID requirement. The new requirement would also have an adverse impact upon minorities, the elderly, the disabled, and the poor. A challenge to the photo ID law was filed by a coalition of groups, including the ACLU, and on October

18, 2005, the federal court enjoined its use on the grounds that it was in the nature of a poll tax, as well as a likely violation of the equal protection clause.[27]

States other than Georgia have also enacted new photo ID requirements for voting, and it has often been in response to the increased participation of a minority group in the electoral process. Following the 2002 elections in South Dakota, for example, which saw a surge in Indian political activity, the legislature passed laws that placed additional requirements for voting, including requiring photo identification at the polls. State Rep. Tom Van Norman, a member of the Cheyenne River Sioux Tribe, said the legislation targeted and retaliated against new Indian voters because they were a big factor in a close senatorial race. During legislative debate on another bill which would have made it easier for Indians to vote, an opponent of the measure said, "I, in my heart, feel that this bill . . . will encourage those who we don't particularly want to have in the system." Alluding to Indian voters, he said "I'm not sure we want that sort of person in the polling place."[28]

Other Examples

[27] Common Cause/Georgia v. Billups, Civ. No. 4:05-CV-0201-HLM (N.D. Ga.).

[28] Bone Shirt v. Hazeltine, 200 F. Supp. 2d 1150, 1026 (D.S.D. 2002).

Other examples of discrimination against minority voters discussed in this report include: discriminatory annexations and deannexations;[29] challenges by white voters or elected officials to majority minority districts;[30] pairing black incumbents in redistricting plans;[31] refusing to draw majority minority districts;[32] refusing to appoint blacks to public office;[33] maintaining a racially exclusive sole commissioner form of county government;[34] refusing to designate satellite voter registration sites in the minority community;[35] refusing to accept "bundled" mail-in voter registration forms;[36] refusing to allow registration at county offices;[37]

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[29]Adel, Ga., 1982; Ahoskie, N.C., 1989; Augusta, Ga., 1987; Clinton, S.C., 2002; College Park, Ga., 1979; Emporia, Va. 1987; Foley, Ala., 1989 & 1993; Hemingway, S.C., 1994; Laurinburg, N.C., 1994; Macon, Ga., 1987; Rocky Mount, N.C. , 1984; Sumter County, S.C., 1985 & 1986.

[30] Cocoa, Fla., 1994; Ga., congressional, house, and senate redistricting, 1990; Georgetown County, S.C., 1983; La., congressional redistricting, 1994; Mont., legislative redistricting, 2003; N.C., congressional redistricting, 1991-2001; Perry County, Miss. , 1993; Putnam County, Ga., 1997; S.C., house and senate redistricting, 1996; S.C. congressional redistricting, 1996 & 1998; St. Francisville, La., 1995; Telfair County, Ga., 1986; Union County, S.C., 2002; Va., congressional redistricting, 1995; S.D. redistricting, 1996).

[31] West Palm Beach, Fla., 1990.

[32] Bossier Parish, La., 1992; Ga., congressional redistricting, 1982.

[33] Ben Hill County, Ga., 1988; Johnson County, Ga., 1983.

[34] Bleckley County, Ga., 1985; Wheeler County, Ga., 1993.

[35] Columbus/Muscogee County, Ga., 1984.

[36] Ga., 2004.

[37] Fulton County, Ga., 1986.

refusing to comply with Section 5 or Section 5 objections;[38] transferring duties to an appointed administrator following the election of blacks to office;[39] white opposition to restoring elections to a majority black town;[40] requiring candidates for office to have a high school diploma or its equivalent;[41] prohibiting "for sale" and other yard signs in a predominantly white municipality;[42] disqualifying black elected officials from holding office or participating in decision making;[43] relocating polling places distant from the black community;[44] refusing to hold elections following a Section 5 objection;[45] maintaining an all white self-perpetuating board of education;[46] challenges to the constitutionality of the NVRA;[47] failure to provide bilingual ballots and assistance in voting;[48] county

[38] Ga., judicial elections, 1989; Charlton County, Ga., 1985; Ga., soil and water conservation elections, 2004; Douglasville, Ga., 1996; Greene County, Ga., 1985; Rochelle, Ga., 1984; La., 1995; S.D. , 1976-2002.

[39] Kingston, Ga., 1987.

[40] Keysville, Ga., 1990.

[41] Clay County, Ga., 1993; Augusta, Ga., 1987.

[42] Avondale Estates, Ga., 2000.

[43] Sumter County, Ga., 1998; Thomaston, Ga., 1986; Beaufort County, S.C., 1983).

[44] Millen, Ga., 1995; Wrightsville, Ga., 1992.

[45] Butler, Ga. 1995.

[46] Thomaston, Ga., 1981.

[47] La., 1995; Va., 1995; S.C., 1995.

governance by state legislative delegation;[49] challenges to the constitutionality of the Voting Rights Act;[50] packing minority voters to dilute their influence;[51] and using discriminatory punch card voting systems.[52]

IV. The Continued Need for Section 5

Much progress has been made in minority voting rights and office holding in recent times, but it has been made in large measure because of the existence of Section 5 and the other provisions of the Voting Rights Act. One of the principal conclusions of Quiet Revolution in the South: The Impact of the Voting Rights Act 1965-1990, was that the increase in minority office holding was the result of "the Voting Rights Act of 1965 and its 1982 amendments. Quite simply, had there been no federal intervention in the redistricting process in the South, it is unlikely that most southern states would have ceased their practice of diluting

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[48] Michigan, Buena Vista and Clyde Townships, 1992; Bennett County, S.D., 2002.

[49] S.C., 1999 .

[50] Sumter County, S.C., 1982; Blaine County, Mont., 2005.

[51] Buffalo County, S.D., 2003; S.D., legislative redistricting, 2002.

[52] Ga., 2001; Fla., 2001; Calif., 2001; Ill., 2001; Oh. 2002.

the black vote."[53] The fact that Section 5 has been so successful is one of the arguments in favor of its extension in 2007, not its demise.

The persistent, widespread patterns of racial bloc voting found by the courts underscore the need for extension of Section 5, as do the continuing, well documented efforts of elected officials to dilute minority voting strength and deter minority political participation.

That is apparent from the findings of violations of Section 2 of the Voting Rights Act in cases discussed in this report, as well as the decisions of jurisdictions not to contest Section 2 claims and enter into consent decrees. The central role of Section 5 is further apparent from the redistricting that follows each decennial census. As the discussion of redistricting litigation in this report makes clear, in the absence of Section 5 minority voters would become increasingly marginalized during the redistricting process.

The right to vote is, indeed, "preservative of all rights."[54] As long as the tradition of racial discrimination in voting continues, the protection of Section 5 remains essential to the health of American democracy.

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[53] Lisa Handley and Bernard Grofman, "The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations," in Quiet Revolution in the South: The Impact of the Voting Rights Act 1965-1990, Chandler Davidson and Bernard Grofman, eds. (Princeton; Princeton University Press, 1994), 336.

[54] Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

Section 5 Has an Important Deterrent Effect

Aside from blocking the implementation of discriminatory voting changes, Section 5 has a strong deterrent effect. In 2005, the Georgia legislature redrew its congressional districts, but before doing so it adopted resolutions providing that it must comply with the non-retrogression standard of Section 5. The plan it drew maintained the black voting age population in the two majority black districts (represented by John Lewis and Cynthia McKinney) at almost exactly their pre-existing levels, and it did the same for the two other districts (represented by Sanford Bishop and David Scott) that had elected black members of Congress.[55] There was no objection by the Department of Justice when the plan was submitted for preclearance. That does not mean, however, that Section 5 did not play a critical role in the redistricting process. Rather, it means Section 5 encouraged the legislature to ensure that any voting changes would not have a discriminatory effect on minority voters, and that it would not become embroiled in the preclearance process.

V. The Courts Routinely Apply the Voting Rights Act

[55] HB 499 (2005)

Section 5 continues to play a critical role because it is routinely applied by the federal courts to prevent retrogression and protect the equal right of minority voters to participate in the political process.

South Carolina

The three-judge court in Colleton County Council v. McConnell, the litigation filed after the South Carolina governor and legislature deadlocked over redistricting in 2001, concluded that it was obligated to comply with Sections 2 and 5 of the Voting Rights Act and proceeded to draw plans that maintained the state's existing majority black congressional district and actually increased the number of majority black house and senate districts.[56]

Mississippi

In Mississippi, which lost a congressional seat as a result of the 2000 census, both the state court and the federal court became involved in the redistricting process and drew plans relying upon the non-retrogression standard of Section 5 which maintained one of the districts as majority black.[57]

Georgia

[56] Colleton County Council v. McConnell, 201 F. Supp. 2d 618, 655-56, 661, 666 (D.S.D. 2002).

[57] Smith v. Clark, 189 F. Supp. 2d 529, 535, 540 (S.D.Miss. 2002).

A three-judge court in Georgia appointed a special master to prepare court ordered plans after the state failed to enact remedial plans for the house and senate. Under the special master's plan, nearly half of the black house members were paired, or placed in a house district with one or more other incumbents. A number of the paired black incumbents were chairs or officers of house committees, and some were also senior members of the house. Their loss would inevitably have adversely affected the representation of the black community in the state legislature.

The Georgia Legislative Black Caucus, represented by the ACLU, sought leave to participate as amicus curiae, which was granted. It argued that the pairing of black incumbents caused a retrogression in minority voting strength within the meaning of Section 5, and created a discriminatory result within the meaning of Section 2. The three-judge court agreed that court ordered plans should "comply with the racial-fairness mandates of § 2 of the Act, as well as the purpose-or-effect standards of § 5," and instructed the special master to draw another plan taking into account the unnecessary pairing of incumbents. As the court found in adopting the new plan, there was "no retrogression" from the pre-existing benchmark plans.[58]

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[58] Larios v. Cox, 314 F. Supp. 2d 1357, 1360, 1366 (N.D. Ga. 2004).

Also in Georgia, in implementing a court ordered plan for the City of Albany in 2003, the court emphasized that "[i]n drawing or adopting redistricting plans, the Court must also comply with Sections 2 and 5 of the Voting Rights Act."[59] Under the court ordered plan, blacks were 50% of the population of Ward 4, and a substantial majority in four of the other wards.

South Dakota

The district court in South Dakota adopted a court ordered plan for the house and senate in 2005 to cure a Section 2 violation in a vote dilution suit by Native Americans. In creating new majority Indian districts, the court held it had adhered to the state's "redistricting principles," which included "protection of minority voting rights consistent with the United States Constitution, the South Dakota constitution, and federal statutes."[60] The area in question included Todd and Shannon Counties, both of which are covered by Section 5.

[59] Wright v. City of Albany, Georgia, 306 F. Supp. 2d 1228, 1235, 1238 (M.D. Ga. 2003), and Order of December 30, 2003.

[60] Bone Shirt v. Hazeltine, 387 F. Supp. 2d 1035, 1042 (D.S.D. 2005).

POLICY RECOMMENDATIONS

I. Section 5 of the Voting Rights Act Should Be Extended for 25 Years

Section 5 should be extended for 25 years because there is still strong evidence of discrimination in voting, racially polarized voting, and manipulation of minority voters by covered jurisdictions. Section 5 has also blocked the implementation of numerous discriminatory voting changes, has a strong deterrent effect, and is routinely applied by the courts. Section 5 is still needed to protect the rights of minority voters.

II. Section 5 Should Be Amended to Provide that a Voting Practice Adopted with a Non-Retrogressive Discriminatory Purpose Should Be Denied preclearance

The Problem Created by Bossier II

Bossier Parish, Louisiana, adopted a redistricting plan for its 12 member school board in 1992. The parish was 20% black, but all of the districts were majority white, despite the fact that a plan could be drawn containing two majority black districts. No black person had ever been elected to the school board, and it was undisputed that the plan adopted by the parish split black communities purposefully to avoid creating a majority black district. One board member said he favored black representation on the board, but "a number of other board members opposed the idea." Another board member said "the Board was hostile to the creation of a majority-black district." The Attorney General

concluded she was "not free to adopt a plan that unnecessarily limits the opportunity for minority voters to elect their candidates of choice."[61]

The District of Columbia court, however, precleared the parish's plan. It held the 1992 plan was no worse than the preexisting plan, in that neither contained any majority black districts, and thus there was no "retrogressive intent."[62] The Supreme Court affirmed in a decision known as Bossier II.[63] It held "in light of our longstanding interpretation of the 'effect' prong of § 5 in its application to vote dilution claims, the language of § 5 leads to the conclusion that the 'purpose' prong of § 5 covers only retrogressive dilution."[64] Thus, an admittedly discriminatory plan, that was the product of intentional discrimination and had an undeniable discriminatory effect, was nonetheless granted preclearance under Section 5. The majority further held that denying preclearance to a voting change on the grounds that it was enacted with a discriminatory but nonretrogressive purpose "would also exacerbate the substantial' federalism costs that the preclearance procedure already exacts, . . .

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[61] This history is set out in Reno v. Bossier Parish School Bd., 528 U.S. 320, 324, 348 (2000) ("Bossier II").

[62] Reno v. Bossier Parish School Bd., 7 F. Supp. 2d 29, 31-2 (D. D.C. 1998).

[63] In Reno v. Bossier Parish School Bd., 520 U.S. 471 (1997), known as "Bossier I," the Court ruled that a voting practice could not be denied preclearance under Section 5 merely because it violated the results standard of Section 2, that a retrogressive effect was required.

perhaps to the extent of raising concerns about § 5's constitutionality."[65] The dissenters (Justices Souter, Stevens, Ginsburg and Breyer) concluded that:

> the full legislative history shows beyond any doubt just what the unqualified text of § 5 provides. The statute contains no reservation in favor of customary abridgment grown familiar after years of relentless discrimination, and the preclearance requirement was not enacted to authorize covered jurisdictions to pour old poison into new bottles.[66]

Had the Bossier II standard been in effect in 1982, the District of Columbia court would have been required to preclear Georgia's congressional redistricting plan, which was found by the court to be the product of purposeful discrimination. In that instance, the state had increased the black population in the Fifth District over the benchmark plan, but kept it as a district with a majority of white registered voters. The remaining nine congressional districts were all solidly majority white. As Joe Mack Wilson, the chief architect of redistricting in the house told his colleagues on numerous occasions, "I don't want to draw nigger districts."[67] He explained to one fellow house member, "I'm not going to draw a honky Republican district and I'm not going to draw a nigger district if I

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[64] Bossier II, 528 U.S. at 328.

[65] Id. at 336.

[66] Id. at 366.

can help it."[68] Since the redrawn Fifth District did not make black voters worse off than they had been under the preexisting plan, and even though it was the product of intentional discrimination, the purpose was not technically retrogressive and so, under Bossier II, the plan would have been unobjectionable. Such a result would be a parody of what the Voting Rights Act stands for.

III. Section 5 Should Be Amended to Provide that Voting Practices that Diminish the Ability of Minority Voters to Elect Candidates of Choice Should Be Denied Preclearance

The Decision in Georgia v. Ashcroft

In Georgia v. Ashcroft,[69] the Supreme Court vacated the decision of a three-judge court denying preclearance to three state senate districts contained in Georgia's 2000 redistricting plan because, in its view, the district court "did not engage in the correct retrogression analysis because it focused too heavily on the ability of the minority group to elect a candidate of its choice in the majority-minority districts."[70] Although blacks were a majority of the voting age population in all three districts, the district court held the state failed to carry its

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[67] Busbee v. Smith, 549 F. Supp. 494, 501 (D. D.C. 1982).

[68] Id., Deposition of Bettye Lowe, p. 36.

[69] 539 U.S. 461 (2003).

[70] Id. at 490.

burden of proof that the reductions in black voting age population from the benchmark plan would not "decrease minority voters' opportunities to elect candidates of choice."[71] The Supreme Court held that while this factor "is an important one in the § 5 retrogression inquiry," and "remains an integral feature in any § 5 analysis," it "cannot be dispositive or exclusive."[72] The Court held other factors, which in its view the three-judge court should have considered, included: "whether a new plan adds or subtracts 'influence districts'--where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process;" and whether a plan achieves "greater overall representation of a minority group by increasing the number of representatives sympathetic to the interest of minority voters."[73]

The Supreme Court opined that "Georgia likely met its burden of showing nonretrogression," but concluded: "We leave it for the District Court to determine whether Georgia has indeed met its burden of proof."[74] But before the district court could reconsider and decide the case on remand, a local three-judge court

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[71] Georgia v. Ashcroft, 195 F. Supp. 2d 25, 89 (D. D.C. 2002).

[72] Id., 539 U.S. at 480, 484, 486.

[73] Id. at 482-83.

[74] Id. at 487, 489.

invalidated the senate plan on one person, one vote grounds,[75] and implemented a court ordered plan.[76] As a consequence, the preclearance of the three senate districts at issue in Georgia v. Ashcroft was rendered moot.

The dissent in Georgia v. Ashcroft (Justices Souter, Stevens, Ginsburg and Breyer) argued Section 5 had always meant "that changes must not leave minority voters with less chance to be effective in electing preferred candidates than they were before the change."[77] The dissenters also argued that the majority's "new understanding" of Section 5 failed "to identify or measure the degree of influence necessary to avoid the retrogression the Court nominally retains as the § 5 touchstone."[78]

The Problems with Georgia v. Ashcroft

The majority opinion introduced new, difficult to apply, and contradictory standards. According to the Court, the ability to elect is "important" and "integral," but a court must now also consider the ability to "influence" and elect "sympathetic" representatives. The Court took a standard that focused on the ability to elect candidates of choice, that was understood and applied, and turned

[75] Larios v. Cox, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), aff'd 124 S. Ct. 2806 (2004).

[76] Larios v. Cox, 314 F. Supp. 2d 1357 (N.D. Ga. 2004).

[77] Id. at 494.

it into something subjective, abstract, and impressionistic. The danger of the Court's opinion is that it may allow states to turn black and other minority voters into second class voters, who can "influence" the election of white candidates but cannot elect candidates of their choice or of their own race. That is a result Section 5 was enacted expressly to avoid.

Georgia v. Ashcroft was decided in 2003, after most of the redistricting following the 2000 census had been completed, but at least one case decided prior to Ashcroft applied an "influence" theory to the serious detriment of minority voters. In 1993, a three-judge court made extensive findings of past and continuing discrimination and extreme racial bloc voting in Rural West Tennessee, but refused to require a majority black senate district in that part of the state because of the existence of three "influence" districts in which blacks were 31% to 33% of the voting age population.[79] The court acknowledged that as a factual matter blacks did not have the equal opportunity to elect candidates of their choice under the existing senate plan, but it was also of the view that white elected officials were often responsive to the needs of blacks and that "adding an

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[78] Id. at 495.

[79] The court's findings, which are discussed in detail in this report, are at RWTAAAC v. McWherter, 836 F. Supp. 447, 457, 459, 460-61, 463, 466 (W.D.Tenn. 1993). The court's subsequent refusal to order a remedial plan is at RWTAAAC v. McWherter, 877 F. Supp. 1096 (W.D.Tenn. 1995).

additional majority-minority district in western Tennessee would actually reduce the influence of black voters in the Tennessee Senate." It found "most probative" for this proposition the testimony of a white senator, Stephen Cohen, from west Tennessee concerning passage of a bill to make the birthday of Martin Luther King, Jr. a state holiday. According to Senator Cohen, the bill passed the state senate by only one vote (17 to 16), with Senator Cohen and another white senator from west Tennessee voting with the majority. Senator Cohen concluded, and the district court found, that the creation of an additional black senate district would cause the election of "at least one more conservative white senator" who "would have been inclined to vote against the Martin Luther King holiday" ensuring that the measure would not have passed.[80] Senator Cohen and the court, however, were mistaken. According to the Senate Journal, only eight senators voted against the Martin Luther King, Jr. bill, with 18 "Ayes" and six "Present, not voting."[81] The bill would have passed without Senator Cohen's vote. What the court's "influence" theory in fact accomplished was to deprive African American voters in Rural West Tennessee of the opportunity to elect a candidate of their choice to the state senate.

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[80] Id., 887 F. Supp. 1096, 1106 (W.D.Tenn. 1995).

[81] Tennessee Senate Journal, May 24, 1984, p. 2831.

The inherent fallacy of the notion that influence can be a substitute for the ability to elect is apparent from the Shaw v. Reno[82] line of cases, which were brought by whites who were redistricted into majority black districts. Rather than relish the fact that they could "play a substantial, if not decisive, role in the electoral process," and perhaps could achieve "greater overall representation . . . by increasing the number of representatives sympathetic to the[ir] interest," white voters argued that placing them in "influence" districts, i.e., majority black districts, was unconstitutional, and the Supreme Court agreed.[83] In addition, if "influence" were all that it is said to be, whites would be clamoring to be a minority in as many districts as possible. Most white voters would reject such a suggestion out of hand.

IV. Federal Observers Are Needed to Prevent Voter Harassment

The appointment of federal examiners to register voters has been extremely important over the years. For example, from 1964 to 1967, the percentage of African Americans registered to vote in counties in Mississippi in

[82] 509 U.S. 630 (1993).

[83] See, e.g., Johnson v. Miller, 515 U.S. 900 (1995).

which examiners were appointed increased from 8.1% to 70.9%.[84] While the examiner provisions have been superseded by state and federal laws, such as the National Voter Registration Act of 1993 (NVRA), the observer provision of the Act remains important to ensure that minorities are not discriminated against or intimidated while voting.[85] Since 1966, a total of 25,000 non-partisan, impartial observers have supervised elections to ensure that minorities can exercise their fundamental right to vote. Congress should now renew the observer provision of the act to ensure that minorities continue to be protected from harassment at the polls.

V. Voting Assistance for Language Minorities Is Still Needed

The Voting Rights Act requires election officials in certain cities, counties, and states to provide assistance to those U.S. citizens who have difficulty speaking or reading English. Under Section 203 of the act, in those jurisdictions where language minority voters make up a significant portion of the population, U.S. citizens who are speakers of Spanish, Native American languages, Asian languages, and Alaska natives can get help voting.

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[84] U.S. Commission on Civil Rights, Political Participation (Washington; U.S. Government Printing Office, 1968), 247.

[85] 42 U.S.C. § 1973f.

As anyone who has voted can attest, there are sometimes complicated issues on the ballot, which can be difficult to understand, even for native speakers of English. The Voting Rights Act promotes fairness at the ballot box because it allows U.S. citizens with disabilities or difficulty speaking English the opportunity to get help at the polls. Congress should renew the expiring provisions of the act so all Americans have equal access to the ballot box.

VI. Recovery of Expert Fees Should Be Allowed in Voting Rights Cases

While the Department of Justice has an important role to enforce the Voting Rights Act, the vast majority of voting rights law suits have been brought by private lawyers and civil rights groups. Unfortunately, the Supreme Court has ruled that winning parties in civil rights cases cannot recover expert witness fees as part of the costs they are entitled to receive.[86] This decision has had a chilling effect on voting rights litigation because it requires lawyers and non-profit organizations to front tens of thousands of dollars in expert witness fees that can never be recovered. It also greatly undermines the purpose of fee awards in civil rights cases, which is to ensure that victims of discrimination can maintain access to the courts. Litigating voting rights cases is particularly expensive because expert witnesses are needed to present demographic

evidence, analyze and present statistical evidence of racial bloc voting, and testify about the "totality of circumstances" surrounding racial discrimination in the jurisdiction. For all these reasons, Congress should amend the attorney's fee provision of the Voting Rights Act to permit the recovery of expert fees and expenses.

[86] West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83 (1991).

ALABAMA

STATEWIDE ISSUES

1980 Redistricting

Figures v. Hunt

In 1980, Alabama had seven congressional districts, and despite the fact that African Americans wee a quarter of the population, all the districts were majority white. Ten years later, the 1990 census showed the districts were malapportioned. It also showed that the African American population was compact and contiguous enough to create two majority black districts, but the Alabama legislature adjourned in 1991 without enacting a new congressional redistricting plan, and the governor refused to call a special session to redraw the districts. Paul Wesch, an Alabama resident, filed a lawsuit challenging the malapportionment of the existing districting plan.[87] A three-judge district court undertook to create an interim redistricting plan for the 1992 congressional elections and considered several proposed plans, one of which created two majority black districts.

Meanwhile, the Alabama legislature reconvened and on March 5, 1992, adopted a congressional redistricting plan which created one majority black

[87] Wesch v. Hunt, Civ. No. 91-0787, (S.D. Ala.).

district (District 7 – 66.66% black). On March 6, 1992, Secretary of State Billy Joe Camp filed a motion asking the court to adopt the state's plan for purposes of the 1992 elections. On March 9, 1992, the court denied Camp's motion and ordered into effect a modified version of one of the six proposed plans. The court's plan was similar to the one the legislature had adopted, but its District 7 had marginally greater black population of 67.53%. The court also ordered the state to conduct the 1992 congressional elections in accordance with the court ordered plan unless the legislature's plan received preclearance no later than noon on March 27, 1992.[88]

On March 11, 1992, the state submitted the plan to the Department of Justice for preclearance. The ACLU, which represented intervenors in the Wesch lawsuit, wrote to the department and urged it to reject the state's redistricting plan because it divided concentrations of black residents among several majority white districts and failed to create a second majority black district. The Department of Justice expedited its consideration of the plan and, shortly before the March 27 deadline, entered an objection, determining that "the fragmentation of black population concentrations outside of the one district with a black voting age population majority was unnecessary," and it appeared "that the elimination

[88] Id, Order of March 9, 1992.

of this identified fragmentation would enhance the ability of black voters to elect representatives of their choice."[89]

The ACLU then filed a motion requesting the district court to modify its redistricting plan in light of the Attorney General's objection and find that a second majority black district should be created. The court summarily denied the ACLU's motion.[90] The ACLU appealed the district court's order to the Supreme Court, arguing that the district court ignored the requirements of Section 5 by refusing to modify its one-district plan. On February 22, 1993, the Supreme Court affirmed the judgment of the lower court without offering any reasoning for its decision.[91]

Selective Prosecution

Smith v. Meese

In 1984, the Department of Justice announced a shift in its policy regarding criminal investigations of election crimes. Prior to that time, the department focused mostly on crimes that affected the integrity of federal

[89] John R. Dunne, Assistant Attorney General, to Jimmy Evans, Attorney General of Alabama, March 27, 1992.

[90] Wesch v. Hunt, Order of April 2, 1992.

[91] Figures v. Hunt, 507 U.S. 901 (1993).

elections, rather than local elections, such as those for county commissioner, city council, etc. The new policy provided that the department would investigate "political participants" who "seek out the elderly, socially disadvantaged, or the illiterate, for the purpose of subjugating their electoral will."[92]

After the policy was announced, the department started an extensive investigation into voting activity in five counties in Alabama's black belt counties with black majorities, and in which blacks had gained control over some part of county government. Several dozen political activists were indicted, all involved with African American political efforts.

In 1985, the ACLU filed suit on behalf of nine individuals from these black belt counties against the Attorney General and other federal officials alleging that they were "engaged in a concerted and unlawful effort both to interfere with black citizens' associational and political activities in Alabama's 'Black Belt' and to discourage them from exercising their right to vote."[93] Plaintiffs asserted that black citizens had for years complained to federal officials of unlawful conduct by white officials and candidates, including withholding of absentee ballots from black voters, assisting in the casting of unlawful absentee ballots by white voters,

[92] Quoted in Smith v. Meese, 821 F.2d 1484, 1487 (11th Cir. 1987).

[93] Smith v. Meese, 617 F. Supp. 658 (M.D. Ala. 1985).

intimidating black voters on or before election day, buying votes, multiple voting, and tampering with voting machines. Plaintiffs contended that the prosecutions against them were selective, in that the "crimes" the federal government now chose to investigate and prosecute were no different from those of local whites that the government had ignored for years.

The complaint further alleged that the federal government targeted well known black leaders who were largely responsible for a dramatic increase in black voter registration; that defendants intended the references in the new policy to "poor, elderly , and socially disadvantaged" to mean black voters; and that federal agents knowingly conducted "witchhunt-type" probes of constitutionally protected behavior. Among the people who had been indicted were Albert Turner and his wife. Albert Turner, the state director of the Southern Christian Leadership Conference (SCLC), had been an aide to Dr. Martin Luther King Jr. and had led one of the mules that pulled the carriage in Dr. King's funeral procession. The complaint also alleged that federal agents intensively interrogated poor, elderly, and social disadvantaged black voters concerning political organizations of which they were members; suggested that constitutionally protected activities were violations of federal law; misinformed black voters about their eligibility to cast absentee ballots; and warned black voters not to discuss the agent's questions with attorneys for black leaders who

were under criminal investigation. Among the evidence produced in one of the criminal cases was a statement a Department of Justice spokesperson was said to have made to a college student that the investigations were part of a "new policy . . . brought on by the 'arrogance on the part of blacks' in these counties."[94]

The plaintiffs in Smith v. Meese sought to represent a class of all black citizens in five Black Belt counties whose political activities had been interfered with, chilled, or made more difficult by defendants' conduct, who had been victims of voter fraud or intimidation committed by whites, or who intended to run for elective office, and whose electoral support would be diminished as a result of defendants' conduct. Plaintiffs did not seek to block or require the prosecution of any individual, or have the court review individual decisions to investigate and prosecute. Rather, plaintiffs asked the federal court to stop the federal government from following a deliberate policy of discriminatory investigations and prosecutions.

The district court dismissed the complaint, holding that plaintiffs lacked sufficient injury to have standing, and that the separation of powers doctrine precluded the court from reviewing defendants' investigative and prosecutorial

[94] Cited in United States v. Gordon, 817 F.2d 1538, 1540 (11th Cir. 1987).

decisions.[95] The plaintiffs appealed, and the court of appeals reversed and remanded for further proceedings.

The appellate court noted that in the past it had enjoined a policy of state prosecutions aimed at discouraging black citizens from registering to vote and freely exercising their right to vote.[96] It would be anomalous, the court said, if the federal Constitution protected citizens from violations of their rights by state but not federal officials. It held that the doctrine of separation of powers did not shield federal officials from suit challenging discrimination based on race. Acknowledging that the decision to prosecute is generally a matter for executive discretion, the court concluded that "[i]f the facts are as plaintiffs allege, this case presents one of those 'rare situations' in which federal court intervention in the prosecutorial and investigative process is appropriate."[97]

The court of appeals also held that plaintiffs had adequately pleaded an injury that was addressable in federal court. Plaintiffs had standing because the injury was not limited to selective prosecution, but "the broader harm from an unconstitutional pattern and policy of discriminatory prosecutions and

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[95] Smith v. Meese, 617 F. Supp. at 661..

[96] E.g., United States v. McLeod, 385 F.2d 734 (5th Cir. 1967).

[97] Smith v. Meese, 821 F.2d 1484, 1493 (11th Cir. 1987).

investigations."[98]

Albert Turner and his wife, along with another individual, were tried together and acquitted by a jury. Another SCLC activist, Spiver Gordon, was convicted of mail fraud and providing false information to election officials. The mail fraud convictions were set aside on appeal, and the case was vacated for consideration of Gordon's claim of selective prosecution and his challenge to the government's use of its six peremptory challenges to remove every black person from his jury.[99] Several others who were charged entered guilty pleas.

Following remand of the ACLU suit, the government elected not to pursue its case against Gordon and terminated further prosecutions of Black Belt political leaders. Plaintiffs accordingly dismissed their complaint.

The 1986 Democratic Gubernatorial Primary

Henderson v. Graddick

Curry v. Baker

The 1986 Democratic primary election for governor of Alabama resulted in a run off between Charles Graddick, the incumbent attorney general, and

[98] Id., at 1495.

[99] United States v. Gordon, 817 F.2d 1538 (11th Cir. 1987), 836 F.2d 1312 (11th Cir. 1988).

William Baxley, the incumbent lieutenant governor. Alabama does not have party registration, but the rules of the state Democratic Party expressly prohibited voters who had voted in the first primary of another party from voting in the Democratic Party's run off primary. The party's rule, adopted in 1979, had been precleared under Section 5.

In the three week period between the first and second primary, the state Democratic Party made efforts to ensure that the anti-crossover rule was enforced, suggesting procedures for election officials to follow, such as questioning each voter if they voted in the Republican primary, not allowing persons to vote if they did, but allowing all to vote a challenge ballot if they so requested.

Graddick, however, openly called on those who had voted in the Republican primary to vote for him in the Democratic primary. And two days before the run off, he had a letter hand delivered to state election officials contending that the Democratic Party's anti-crossover rule was unconstitutional. These letters were written on the Attorney General's letterhead, signed by the chief of the voter fraud division, and warned that any attempt to enforce the party's rule could subject election officials to civil liability under state and federal law.

The result of the run off primary was the closest in Alabama history to

that point, with Graddick winning by 8,756 votes, out of about 930,000 cast. African American plaintiffs, represented by the ACLU, filed suit contending that Graddick's actions constituted new election procedures which violated the preclearance provisions of the Voting Rights Act, and sought to enjoin the outcome of the run off.[100]

The court heard evidence that about 13,000 of 33,000 persons who had voted in the first Republican primary had crossed over to vote in the Democratic Party run off, and that between 84% and 88% of those voted for Graddick. The testimony also showed that Baxley got 95% of the black vote. The court found that it was "absolutely clear that as a candidate and, more importantly, as the Attorney General, Mr. Graddick made every effort to get voters to violate the anti-crossover rule," and that he was "to a large degree successful in blocking election officials from attempting to enforce the rule."[101] The court concluded that the Voting Rights Act had been violated and turned to the question of remedy.

The court further found "[a] fair evaluation of this evidence makes clear that there is a likelihood that the net crossover votes cast for Mr. Graddick

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[100] Henderson v. Graddick, 641 F. Supp. 1192 (M.D. Ala. 1986).

[101] Id., at 1241.

exceeded his narrow margin of victory, and that he would not have been nominated except for the illegal crossover votes." The court held that "[t]o allow this election result to stand would reward the perpetrator who deliberately caused a violation" of Section 5, and prohibited the Democratic Executive Committee from certifying Graddick as the gubernatorial nominee based on the run off results. But reciting its limited authority pursuant to Section 5, it refused to declare Baxley the nominee. Instead, it directed the party to hold a new run off unless the Party determined, adhering to "the stringent rules under Alabama law for an election contest," that Baxley received the majority of legally cast votes.[102]

The Democratic Party subsequently determined that Baxley had won the run off, and certified him as the nominee. Graddick then asked the federal court to enjoin the certification, but it refused to do so, noting that it had taken the least disruptive remedy it could to vindicate plaintiffs' rights and ensure that Graddick did not benefit from his illegal acts. Citing Alabama law allowing state courts to review party contests, it held it had no authority to sit as a court of appellate review for decisions of the party.[103]

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[102] Id., at 1197-98, 1203, 1205.

[103] Id., at 1209.

Graddick and his supporters then filed an action in another federal district court in Alabama against the Democratic Party.[104] The plaintiffs in the first case, again represented by the ACLU, intervened. The second court held that the state party committee that heard the election contest violated due process and ordered a new runoff primary. The central holding of the district court was that because the precise number of illegal votes could not be determined, the only permissible remedy for the illegal votes was a new election.

The defendants appealed, and the court of appeals reversed. It rejected the district court's holding that proof was required of "the specific number of votes illegally cast." For multiple reasons, including the intentional violations of state and federal law and interference with subpoenas for the collection of election records, the court of appeals held that the Graddick plaintiffs were in a poor position to complain about the use of polling data and expert testimony to extrapolate the final figure. It held that the political party acted consistent with state and federal law in using "the most reliable evidence available to protect the fairness of the election process." And, notably, the case was remanded to the chief judge of the district - not the trial judge - with directions to dismiss the

[104] Curry v. Baker, Civ. Nos. 86-G-1617-S, 86-G-1626-S (N.D. Ala.)

complaint without further proceedings.[105]

Graddick sought a stay from the Supreme Court, and it was denied, bringing the litigation to an end. But the contested primary and Democratic intra-party rankling likely played a role in the outcome of the November general election. Guy Hunt, the Republican nominee, won, becoming the first Republican elected governor in Alabama's history.

[105] Curry v. Baker, 802 F.2d 1302, 1318-19 (11th Cir. 1986).

Challenging Alabama's Disfranchising Laws

Hunter v. Underwood

At the beginning of the 20th century, Alabama joined other former Confederate states in adopting state constitutional provisions specifically intended to deny former slaves the right to vote. These disfranchising provisions were part of the Redemption Period, the "redeeming" of white control and the end of Reconstruction. At Alabama's constitutional convention assembled in May 1901, the question was not whether to disfranchise blacks, but how to do so with the measures being upheld by federal courts.

John Knox, the president of the convention said in his opening address: "And what is it we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State."[106] Delegate William A. Handley, III, was equally blunt: "Now we are not begging for 'ballot reform' or anything of that sort, but we want to be relieved of purchasing the Negroes to carry elections. I want cheaper votes."[107]

In enumerating crimes that would trigger disfranchisement, the suffrage committee chose offenses they believed were "peculiar to the Negro's low

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[106] Quoted in Underwood v. Hunter, 730 F.2d 614, 619 (11th Cir. 1984); see also Hunter v. Underwood, 471 U.S. 222, 229 (1985).

[107] Id.

economic and social status."[108] The disfranchising provisions included an eclectic list of specific crimes such as "assault and battery on the wife," "living in adultery," "being convicted as a vagrant or a tramp," and miscegenation, plus crimes of "moral turpitude," and all crimes punishable by imprisonment in the penitentiary (felonies). Some more serious non-felony offenses were not included, such as second-degree manslaughter and assault on a police officer.[109]

Represented by the ACLU, two voters who lost their right to vote for a misdemeanor which the registrars classified as a crime of moral turpitude - the offense of presenting a worthless check - challenged the disfranchisement of misdemeanors. A class of plaintiffs and of defendant election officials were certified. Plaintiffs established that the laws were racially motivated and continued to have a racially discriminatory impact. The evidence of racial impact included testimony of a defense expert witness that within a year of its adoption in 1901, the law had disfranchised ten times as many blacks as whites. And at the time of trial, in the two counties where plaintiffs lived, which included the

[108] Id., 730 F.2d at 619.

[109] Hunter v. Underwood, 471 U.S. at 226-27.

cities of Birmingham and Montgomery, the evidence showed that blacks were at least 1.7 times as likely as whites to be disfranchised for misdemeanors.[110]

The district court initially rejected the claims, granted summary judgment on some points and dismissed the racial discrimination claim, holding that plaintiffs failed to state a claim on which relief could be granted. The court of appeals reversed, and on remand the district again ruled for defendants. [111]

On the second appeal the court held for plaintiffs on the merits. The court of appeals recited the extensive evidence, introduced through expert witnesses for both sides, of the discriminatory intent which motivated the suffrage provisions. That there was racial motivation was not in serious dispute. For example, the court of appeals noted that defendants' expert testimony that statements at the convention that the laws were designed to deny the vote to the "corrupt and the ignorant" referred specifically to blacks and lower-class whites. [112] The court did not credit an intent to discriminate against poor whites as a defense and found that the laws would not have been enacted but for the racial animus towards blacks. Similarly, the state's argument that disfranchising

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[110] Hunter v. Underwood, 730 F.2d at 620.

[111] Hunter v. Underwood, 604 F.2d 367 (5th Cir. 1979).

[112] Hunter v. Underwood, 730 F.2d at 620-21. See also, Hunter v. Underwood, 471 U.S. at 231-32.

persons for conviction of certain crimes is a legitimate interest was rejected, the court holding there was no evidence that the laws were actually intended to serve that interest, and further that if a "good government" purpose was the motivation for the law, all misdemeanors would have been included. The argument that registrars were currently implementing the laws with no discriminatory intent was also rejected. The court said "[n]either their impartiality nor the passage of time, however, can render immune a purposefully discriminatory scheme whose invidious effects still reverberate today."[113]

The state appealed and made the same arguments to the Supreme Court. In a 1985 opinion authored by then Associate Justice William Rehnquist, the Court unanimously held the court of appeals followed the correct constitutional analysis.[114] The Court held that in view of the proof of racial motivation and continuing racially discriminatory effect, the state law violated the Fourteenth Amendment. The Court's opinion is noteworthy is several respects. It found a Fourteenth Amendment violation based on current effects evidence that would not have been sufficient by itself to support an inference of an intent to

[113] Hunter v. Underwood, 730 F.2d at 621.

[114] Hunter v. Underwood, 471 U.S. at 225.

discriminate. This suggests that if evidence of intent to discriminate is present, the racial impact may be fairly small yet still establish a constitutional violation. Second, the Supreme Court rejected the argument that events since 1901, including court decisions that had invalidated some of the disfranchising provisions, meant the law could be adopted today and be constitutional. The Court's response was that "[w]ithout deciding whether [the section of the 1901 constitution] would be valid if enacted today, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to that effect."[115] In short, discriminatory motive does not become of less legal significance by the mere passage of time.

Though this decision is a significant vindication of the right to vote and invalidated suffrage restrictions that were on the books for 84 years, it is also noteworthy that it took nearly seven years of litigation to vindicate plaintiffs' rights.

COUNTY AND MUNICIPAL LITIGATION IN ALABAMA

Autauga County

[115] Hunter v. Underwood, 471 U.S. at 233.

Medders v. Autauga

The ACLU had first represented black citizens in Autauga County, Alabama, in 1973, in a federal law suit which successfully challenged the malapportionment of the five county board of education election districts.[116] That lawsuit resulted in the creation of two multi-member districts, one electing three school board members and the other electing two members, but the plan was not submitted for Section 5 preclearance.

In March 1992, the attorney for the Autauga County Board of Education was notified by the Justice Department that the existing apportionment scheme that had been ordered by the federal court in 1973 was vulnerable to challenge because the plan had never been precleared, and the multi-member districts were likely objectionable. Not long thereafter, the school board received a letter from the Alabama Democratic Conference (ADC), a predominantly black political organization, threatening a lawsuit unless the board adopted a fair redistricting plan with five single member districts.

The school board responded by reopening the litigation and filing a complaint against the ADC and the Department of Justice, and seeking a declaratory judgment that the multi-member plan was constitutional. The court

[116] Medders v. Autauga County, No. 3805-N (M.D. Ala. February 22, 1973).

allowed two black citizens to intervene, and they and the ADC filed a counterclaim alleging that "the multi-member district plan is malapportioned, dilutive of the black vote, and violative of [the Voting Rights Act]."[117]

The litigation was resolved by a consent decree in which the existing plan was declared malapportioned and its further use enjoined. The school board also agreed to adopt the same five single member district plan used by the county commission which was favored by the plaintiffs. The court directed the school board to seek preclearance, and modified the election schedule so that the new plan could be implemented in the 1992 elections.

Baldwin County and the City of Foley

Dillard v. City of Foley

As a result of Section 2 litigation, the City of Foley, Alabama, was required to abandon its at-large elections in 1989, and adopted a form of government consisting of a mayor and five council members elected from single member districts.[118] Following the change to district elections, the first African American in history was elected to the city council.

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[117] Id., Consent Decree, June 17, 1992.

[118] Dillard v. City of Foley, Alabama, Civ. No. 87-T-1213-N (M.D. Ala.), Order of May 16, 1989.

Between 1975 and 1987, the city had annexed 12 areas, but failed to submit them for preclearance until 1989. The Attorney General precleared nine of the annexations, which contained no population and were not planned for residential development, but objected to the remaining three annexations. According to the Attorney General:

> The submitted residential annexations were adopted in 1983, 1984, and 1986, and include white residential areas contiguous to the city limits. It appears that the city took an active role in obtaining these annexations, by encouraging property owners to petition for annexation and by obtaining local legislation to adopt one of the annexations, and also obtained at least one federal grant to improve one of the annexed areas.[119]

The letter noted further that at the time the white areas were being annexed, a black residential area known as Mills Quarters sought annexation but was denied, and there was "no nonracial explanation for the rejection of the Mills Quarters petition."

In 1993, the city again annexed an area scheduled for residential development, and again the Department of Justice entered an objection:

> Our analysis of the submitted annexation reveals that it, like the annexations objected to in 1989, reflects a continuation of the city's previously noted practice of annexing areas that can be expected to contain predominantly white population, while discouraging the annexation of areas of predominantly black population.[120]

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[119] James P. Turner, Acting Assistant Attorney General, to Fred G. Mott, November 6, 1989.

[120] James P. Turner, Acting Assistant Attorney General, to A. Perry Wilbourne, August 30, 1993.

The Attorney General noted again the city's "continued failure to annex majority black areas, such as Mills Quarters or the area of Beulah Heights."

The plaintiffs in the original Section 2 lawsuit, represented by the NAACP Legal Defense and Educational Fund and the ACLU, filed a motion for further relief in September 1994.[121] They asked the court to require the city to adopt and implement a nondiscriminatory annexation policy, annex Mills Quarters and Beulah Heights, and fully comply with Section 5.

As a result of negotiations, the parties entered into a consent decree which, over the objections of several county residents and the neighboring city of Gulf Shores, was signed by the court on October 30, 1995. The decree found plaintiffs had established "a prima facie violation of § 2 of the Voting Rights Act and the United States Constitution."[122] It further provided for binding annexation referenda in areas adjacent to the city, including Mills Quarters and Beulah Heights, with areas receiving majority support being immediately incorporated into the city. Both Mills Quarters and Beulah Heights were

[121] Dillard v. City of Foley, Alabama, Civ. No. 87-T-1213-N (M.D. Ala. 1994).

[122] Dillard v. Foley, 926 F. Supp. 1053, 1059 (M.D. Ala. 1995).

subsequently annexed into the city, and the annexations were precleared on July 1, 1996.[123]

This case clearly illustrates the decisive role played by Section 5 in protecting the rights of minority residents in the Foley area, as well as the continuing significance of race in local politics.

[123] Deval L. Patrick, Assistant Attorney General, to A. Perry Wilbourne, July 1, 1996.

Chambers County

Reese v. Yeargan

Chambers County, Alabama, was created in 1832 from former Creek Indian territory. It is located in the east-central part of the state and is bounded on the east by the Chattahoochee River. In 1984, black residents of the county, represented by the ACLU, the ACLU of Alabama, and the Southern Poverty Law Center, brought suit challenging the method of elections for the county commission, the county board of education, and the city councils of LaFayette and Lanett, as violating the Constitution and Section 2.[124] No black person within living memory had ever been elected to any of the four governing bodies, despite the fact that blacks had run for office and were 36% of the county's population.

Chambers County also had a history of adopting voting procedures later found objectionable under Section 5. Historically, the county's five commissioners were nominated in primary elections from single member districts and elected at-large in the general election. Nomination in the primary was tantamount to election. In 1973, nomination by district primary was eliminated and replaced with elections at-large. The change was submitted for

[124] Reese v. Yeargan, Civ. No. 84 H-1081-E (M.D. Ala.).

preclearance and the Attorney General objected because it was "dilutive of minority voting strength":

> We reach this conclusion because two of the proposed districts, Districts 1 and 2, constitute or approximate black majorities, and thus not allowing these districts to select candidates for the county commission but having all candidates selected at-large reduces the minority voting strength in these districts.[125]

In response to the objection, the county commission adopted a plan providing for single member districts, one of which was majority (57%) black, while the other contained a black population of 49%. The plan was precleared.

The board of education, following the lead of the county commission, also had adopted at-large elections in 1975. Historically, the school board consisted of five members, four of whom were elected from single member districts with the fifth member elected at-large. The 1975 plan created two residency districts with all board members elected at-large, by numbered posts and majority vote. In objecting to the change, the Attorney General noted one of the proposed residency districts was approximately 54% black, and:

> to require candidates to run at-large county-wide decreases, from a 54% majority in proposed District 2 to a 34% minority in the county, the potential of blacks to elect a candidate of

[125] J. Stanley Pottinger, Assistant Attorney General, to John W. Johnson, Jr., March 8, 1976.

> their choice. In our view such minimization is dilutive of black voting strength.[126]

The Attorney General further found:

> In a county such as Chambers, which we understand has a history of racial discrimination and a pattern of racial bloc voting, such a dilution denies blacks a realistic opportunity to participate in the political process.

Following the objection, the board of education proposed a plan providing for five members, four of whom were elected from single member districts with the fifth elected at-large. One of the districts was 49.4% black, and another 46.2%. The plan was precleared by the Department of Justice.

Based on the 1980 census, the districts for the county commission were malapportioned with a deviation of 46%. The districts for the school board were also malapportioned with a deviation of 37%.

LaFayette, the county seat, was 57% black, and had a mayor and five council members, all elected at-large. The Town of Lanett was 31% black, and also had a mayor and five council members elected at-large.

The suit filed by black residents in 1984 alleged that at-large elections for LaFayette and Lanett diluted minority voting strength, and that the districting plans for the county commission and school board were malapportioned and

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[126] J. Stanley Pottinger, Assistant Attorney General, to John W. Johnson, Jr., March 10, 1976.

diluted minority voting strength. The defendants moved to dismiss the complaint as failing to state a claim, but the district court denied the motions. After discovery, all defendants agreed to settle and adopt remedial plans.

In September 1985, the court entered a consent decree in which the county commission and the two towns were required to increase the representation of blacks on appointed boards and commissions, as well as the number of black employees working in non-janitorial positions. The size of the county commission was increased to six members, with all elected from single member districts, two of which were majority black. The membership of the board of education was also increased to six, with all members elected from single member districts, two of which were majority black. LaFayette and Lanett were required to adopt single member districts, two of which were majority black, for election of their five member councils. The new plans were implemented in 1987.

Section 5 has played, and continues to play, an important role in Chambers County, where racial bloc voting and polarization are evident.

CONNECTICUT

The City of Bridgeport

Bridgeport Coalition for Fair Representation v. City of Bridgeport

In 1993, the ACLU and the ACLU of Connecticut filed a lawsuit against Bridgeport, Connecticut, challenging its method of city council elections as diluting Hispanic and black voting strength in violation of Section 2 and the Constitution.[127] At the time, 25% of the city's 73,000 residents were black, and 26.5% were Latino.

The city council consisted of 20 members elected from 10 two-member districts. Although it was possible to draw a plan in which blacks and Hispanics were a majority in two districts each (thus giving minorities a potential of four seats on the city council), the challenged plan contained only two majority-minority districts overall, one in which blacks were packed at the level of 85%, and another in which Hispanics were packed at the level of 82%. As a result, black and Hispanic candidates had realized only limited success in city elections, and primarily in the two majority-minority districts.

Bridgeport had a significant history of discrimination. In a 1979 consent degree, the city acknowledged the existence of racial segregation in its public

[127] Bridgeport Coalition for Fair Representation v. City of Bridgeport, Civ. No. 93-1476 (D. Conn.).

schools.[128] Three years later, in 1982, a federal court held that the city and its Board of Police Commissioners discriminated against minority police officers in job assignments, disciplinary proceedings, and terms of employment.[129] In another case, the court found the city has "a long history of and strong reputation for discriminating against black and Hispanic persons in its hiring of firefighters."[130]

The plaintiffs in the 1993 voting case filed a motion for preliminary injunction, which was granted. The court found:

> *Neighborhoods were largely segregated.
>
> *"White bloc voting is evident."
>
> *"Officials have discouraged minority voting."
>
> *"Voting in Bridgeport is markedly racially polarized."
>
> *"There is evidence of discrimination in Bridgeport against Latinos and African-Americans in common. In part as a result, each have lower levels of income, employment and education."

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[128] Crumpton v. Chop, Civ. No. B-75-381 (D. Conn.) (consent decree).

[129] Bridgeport Guardians v. Delmonte, 553 F. Supp. 601, 607-618 (D. Conn. 1982).

[130] Association Against Discrimination in Employment v. City of Bridgeport, 479 F. Supp. 101, 104 (D. Conn. 1979).

> *"Of ten districts, two compact African-American majority and two compact Latino majority districts can be created, each with a minority VAP of 50% or more."
>
> *"A fifth, compact, combined majority-minority district can be created. It is preferable to create majority districts for each group."
>
> *"No minority committee members took part in drawing the map recommended to the Council. In several instances lines were drawn for political expediency, to accommodate individual's district preferences."[131]

As a remedy, the court ordered that:

> Defendants will, within 60 days herefrom, establish City Council districts which include two African-American majority-minority districts, two Latino majority-minority districts and one majority-minority district in which the combination of African-American and Latino voters constitutes a majority of all voters therein. Defendants will further, within 120 days hereof, conduct elections to the City Council in the voting districts established in compliance with this order.[132]

The city appealed and the Court of Appeals for the Second Circuit affirmed the district court's preliminary injunction. It remanded the case, however, for modification of the dates of compliance:

> Without intending to limit the district court's discretion on remand, we suggest that the timetable should provide for the municipal general election to be held on the date of the already scheduled general election on November 8, 1994,

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[131] Bridgeport Coalition for Fair Representation v. City of Bridgeport, 1993 WL 742750, at *3-4 (D. Conn. October 27, 1993).

[132] Id. at *7

> and that the next subsequent general election of City Council members should occur in November 1995.[133]

The city petitioned the Supreme Court for a writ of certiorari which was granted. It remanded the case with instructions to vacate the judgment of the district court for further consideration in light of the intervening decision in Johnson v. DeGrandy, which reaffirmed that a finding of minority vote dilution under Section 2 depended upon an analysis of the "totality of the circumstances." [134]

On remand, plaintiffs moved to reinstate the preliminary injunction, arguing that DeGrandy presented no new issues. The city opposed the motion, and itself moved for summary judgment, arguing that a lack of proportionality in the city's plan did not by itself prove vote dilution, and that the additional majority-minority districts proposed by plaintiffs were racial gerrymanders. On February 1, 1995, the district court denied the motions of both parties.

The case settled in March 1995, and the city implemented a plan that maintained 10 multimember districts, each electing two members, with numbered posts and a district residency requirement. The plan created two majority black districts, two majority Hispanic districts, and one coalition district

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[133] Bridgeport Coalition For Fair Representation v. City of Bridgeport, 26 F.3d 271, 278 (2d Cir. 1994).

[134] 512 U.S. 1283 (1994).

in which the combined black and Hispanic population comprised a majority of the district. The mayor is elected at-large.

FLORIDA

STATEWIDE ISSUES

Protecting Voter Privacy and Enforcing Section 5

Spencer v. Harris

In 1998 Florida enacted numerous election law changes.[135] Because five Florida counties are covered by Section 5, the legislation was submitted to the Attorney General for preclearance. The changes made extensive use of the voter registrant's social security number (SSN), requiring disclosure of the last four digits on several documents related to registration and voting. The Attorney General approved many of the changes, including one that required the four digit number on the application for an absentee ballot.[136] But the Attorney General objected to other sections, including four which involved absentee ballot procedures and the four digit SSNs.[137] The objection was based on the cumbersome nature of the procedures and the statutory mandate to reject ballots if the procedures were not followed.

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[135] 1998 Florida Laws, ch. 98-129.

[136] Id., Section 13.

[137] Id., Sections 14, 16 and 20.

One of the sections that was denied preclearance concerned the procedure for voting and returning an absentee ballot. Beyond requiring disclosure of the voter's four digit SSN on the return envelopes, which contain the voter's certificate, the certificate had to be witnessed, and, if the witness was not a notary or election official, the witness had to be a registered voter, had to place his or her voter registration number and other information on the return envelope, and could be a witness for no more than five voters. Failure to comply with these requirements could result in rejection of the ballot.

Because Florida had begun implementing some of those changes in covered counties without preclearance, the Attorney General was able to point to specific discriminatory effects:

> Our analysis has revealed that during the limited time the State chose to implement the unprecleared absentee voting requirements–where the covered counties sent absentee ballots to voters with the new state law requirements printed on the absentee voter certificate–the votes of minority electors would have been more likely than white voters to be considered "illegal" and thus not counted. Minority voters were more likely to fail to meet one of the State's new requirements than were white voters. For example, in Hillsborough County twice as many black absentee voters as white absentee voters failed to meet one of the State's new requirements.[138]

[138] Bill Lann Lee, Acting Assistant Attorney General, to Robert A. Butterworth, August 14, 1998, and on request for reconsideration, to George L. Wass, June 1, 1999.

The legal effect of the objections was that voters could be required to reveal their four digit SSN on an absentee ballot application, but they did not have to place it on the ballot return envelope, and election officials were not authorized to reject their ballot based on the absence of the number. And as a practical matter, the four digit number on the absentee ballot application was useless because election officials had nothing to match it against.

Norris and Grace Spencer were registered voters of Monroe County, Florida, one of the five counties covered by Section 5. The Spencers, who spent the summers in Tennessee, wanted to vote in the September 2000 primary and had applied for absentee ballots. Grace Spencer had been a victim of identity theft, and the couple had suffered severe financial difficulties as a result. The person who had stolen her credit identity had incurred hospital bills, unpaid loans, and other transactions.

The Spencers were informed, correctly, that under Section 13 of the new statute, they were required to disclose the last four digits of their SSNs in order to be issued an absentee ballot. That was one of the sections which had been precleared. The Spencers preferred to forego their right to vote rather than expose their SSNs on the absentee ballot request forms. Under Florida law, the numbers could be exposed to the public during the vote canvassing procedure.

The Spencers declined to reveal their numbers and their applications were denied.

Represented by the ACLU, the Spencers sued Secretary of State Katherine Harris, challenging the statute as violating the 1974 Privacy Act and the First and Fourteenth Amendments.[139] In particular, Section 7 of the Privacy Act makes it unlawful for "any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number."[140]

Plaintiffs moved for a preliminary injunction so they would be able to vote in the primary and November general election. Because defendants claimed the statute was a fraud prevention measure, plaintiffs pointed out that Florida did not require SSNs for voter registration. Consequently, election officials had nothing to check the number against and disclosing any part of plaintiffs SSNs would not combat fraud or serve any other purpose.

Despite this evidence, the district court denied the motion, and plaintiffs' appeal of the denial was rejected by the court of appeals.[141] The district court

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[139] Spencer v. Harris, No. 4:00cv292-WS (N.D. Fla.).

[140] Public Law 93-579, 88 Stat. 1896.

[141] Spencer v. Harris, Order of August 31, 2000; unpublished opinion affirming denial of preliminary injunction, No. 00-14748, December 1, 2000.

subsequently granted the state's motion to dismiss, holding that plaintiffs could not sue under the Privacy Act and that the disclosure requirement was not sufficiently burdensome to violate the Fourteenth Amendment.[142]

While plaintiffs' motion for reconsideration was pending, the state legislature repealed the SSN requirements along with the other new procedures. It did so in part because the state could not get preclearance, but also because of the controversy surrounding irregularities association with the 2000 presidential election. The state then moved for the case to be dismissed as moot. Plaintiffs agreed and also moved that the prior opinion and judgment be vacated and set aside. The district court agreed and the opinion and judgment were vacated and set aside and the case dismissed as moot.[143]

This case clearly illustrates how Section 5 protected Florida voters from burdensome procedures which have a retrogressive racial effect and interfere with the ability of voters to cast their ballots and have them counted.

Inez Williams v. Snipes

[142] Id., Order of March 21, 2001.

[143] Id., Order of June 19, 2001.

Inez Williams, who was 77 years old and had been a naturalized citizen for 30 years, moved from New York to Broward County in 2004. She was a regular voter, and submitted an application to register to vote in her new home state of Florida in sufficient time to participate in the August 31, 2004 primary. Line 2 of the Florida registration form asks, "Are you a U.S. citizen?" and provides "Yes" and "No" check boxes. Line 17 of the form contains an oath with the statement, "I am a U.S. citizen." Ms. Williams signed the oath but did not check the box on line 2, which she regarded as redundant. Her voter registration application was not acted on by Broward County officials, and so she was unable to vote in the primary. On October 1, 2004, the county notified Ms. Williams that it had rejected her application because she had not checked the box on line 2, but the rejection came too late for her to submit a new application before the registration cutoff date for the general election.

On October 5, 2004, the ACLU of Florida wrote a letter to the election supervisor and secretary of state that their actions violated federal law and were a misinterpretation of state law. On October 12, 2004, the ACLU of Florida wrote another letter to the same officials with the same information and offered to resolve the matter without litigation. The letters got no response.

Represented by the ACLU and Florida Rural Legal Services, Ms. Williams then sued the secretary of state and the county supervisor of elections of

Broward County.[144] She asserted a claim under the Civil Rights Act of 1964, which prohibits election officials from denying a voter application for any omission that is not material to determining a person's qualifications.[145] Because Williams' application indicated - under oath - that she was a citizen, she claimed there could be no clearer example of an omission on a registration form not being material to the applicant's qualification. Williams made a similar claim under state law, which merely required "[a]n indication that the applicant is a citizen of the United States."[146]

After the suit was filed, the Broward County supervisor of elections agreed to register Ms. Williams, and she was eligible to vote in the 2004 general election. The litigation was voluntarily terminated.

The Counting of Provisional Ballots

AFL-CIO v. Hood

In 2001, Florida adopted a statute permitting voters whose names did not appear on the precinct list to cast a provisional ballot, but none of their votes

[144] The case was filed as a motion to intervene in a related case, Florida Democratic Party v. Hood, No. 4:04 CV 405 (N.D. Fla.).

[145] 42 U.S.C. § 1971(a)(2)(B).

[146] Fla. Stat. § 97.053(5)(a).

would be counted unless officials later determined the voter was eligible to vote at the precinct where the ballot was cast.[147] Four individual voters, joined by several labor unions, filed a petition in Florida state court challenging that part of the statute which required the rejection of all votes cast by a legally registered voter.[148] They reasoned that even though a voter who cast a ballot in the wrong precinct might not have been eligible to vote in some local contests, the voter was nevertheless eligible to vote for all statewide offices. The petitioners contended that discarding votes cast by qualified and registered voters violated the state constitution which guaranteed the right to vote, and that no state interest justified rejecting those votes.

At the request of counsel for petitioners, the ACLU made available evidence to be presented to the trial court. The evidence was drawn from the ACLU's participation in litigation challenging election practices in 2000, as well as other research. This evidence showed that the confusion of voters and election officials about precinct location was inherent in almost any election structure and was certainly present in Florida. The ACLU of Florida had presented testimony about these problems to the U.S. Commission on Civil Rights, and while

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[147] Fla. Stat. § 101.048.

[148] AFL-CIO v. Hood, 885 So.2d 373 (2004).

supporting provisional ballots, opposed the restrictions on counting legal votes.[149] For example, after the 2000 census, Miami-Dade County increased the number of its precincts from 614 to 744, and otherwise changed precinct lines affecting more than 125,000 voters. Additionally, four hurricanes in 2004 caused additional confusion among voters about polling place relocations.

The ACLU brief also compared the state law to Florida's Eight Box Law adopted in 1889, which required voters to place their ballots for different offices in the correct box or the votes would not be counted. In the guise of election reform, the effect of the law was to reject legal votes. The Eight Box Law was both a memory and literacy test, and had been enacted by the state after Reconstruction to disfranchise black voters.

The trial court denied relief, and the petitioners appealed to the state supreme court. The ACLU, People for the American Way Foundation, and the Advancement Project submitted an amicus brief discussing the evidence and supporting the counting of all legal votes. The state supreme court refused to accept the amicus brief and affirmed the dismissal of the petition, holding that the state constitution authorized the legislature to regulate elections, and that electors were required to comply with election requirements. The court

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[149] Testimony Before the United States Commission on Civil Rights, September 17, 2004, Courtenay Strickland, Voting Rights Project Director, ACLU of Florida.

concluded that the legislature reasonably may have determined that the challenged regulation was "necessary to ensure the integrity of the election process."[150]

The Counting of Absentee Ballots

Friedman v. Snipes

In October 2004, Miami-Dade and Broward Counties supposedly delivered thousands of absentee ballots to the post office, but for reasons that were never made clear they were never received by the voters. Broward County subsequently sent out some 4,300 replacement ballots, but many voters did not receive them in time to mark them and return them to the supervisor of elections by 7:00 p.m. on election day, the deadline for having them counted under state law.

Three voters who, though no fault of their own, did not receive their absentee ballots in a timely manner, but who mailed or sent them by courier on election day, had their ballots rejected for failure to comply with the state law deadline for receipt of ballots. Represented by the ACLU of Florida and Florida Rural Legal Services, with the assistance of the ACLU Voting Rights Project and

[150] AFL-CIO v. Hood, 885 So. 2d at 376.

the National Voting Rights Institute, they filed a class action suit to have their votes, and the votes of others similarly situated, counted.[151]

The secretary of state had carved out a major exception to the 7:00 p.m. election day rule in order to settle a lawsuit brought by the United States requiring Florida to comply with federal law regulating overseas voters. The settlement provided that overseas ballots would be counted if they were voted on election day and were received by election officials within ten days after an election. The ACLU plaintiffs contended the ten day rule should apply to all absentee ballots. They claimed that the rejection of their ballots violated the Civil Rights Act of 1964, which prohibits rejecting votes for an act or omission which is not material to the voter's qualifications, as well as the First and Fourteenth Amendments.

The court, narrowly construing the Civil Rights Act and the Fourteenth Amendment, denied the plaintiffs' motion for a preliminary injunction, which would have allowed their votes to be preserved and counted. It held the rejection of the ballots was reasonable, nondiscriminatory, and did not violate

[151] Friedman v. Snipes, No. 04-22787-CIV (S.D. Fla.).

federal law. It further held that to grant relief to the plaintiffs would deny equal protection to absentee voters in the other 65 counties in Florida.[152]

Following the court's order, plaintiffs dismissed their complaint without prejudice to explore other options, including whether other litigation could be brought or legislation enacted to remedy the problem of voters failing to receive absentee ballots in a time manner.

[152] Friedman v. Snipes, 345 F. Supp. 2d 1356, 1381 (S.D. Fla. 2004).

COUNTY AND MUNICIPAL LITIGATION IN FLORIDA

Brevard County and the City of Cocoa

Stovall v. City of Cocoa

Located in Brevard County, on Florida's east coast, the City of Cocoa is adjacent to the Kennedy Space Center, where many of its residents work. Twenty miles north is the community of Mims, where Harry and Harriette Moore founded the Brevard County NAACP in 1934. Harry Moore became executive director of the state NAACP and pursued equal pay for African American teachers, voter registration, and the investigation of lynchings. On Christmas night of 1951, the Moores were murdered by a bomb placed under their bedroom floor. Generally considered to be the first assassination of a civil rights leader in the country, the murders remain unsolved to the present day.

According to the 1990 census, the population of Cocoa was 17,722 and 28% African American. Despite this substantial minority population, only two African Americans had ever been elected to the five member city council, and none had been elected since 1981. In 1993, eight city residents, represented by the ACLU and the NAACP Legal Defense Fund, challenged the use of at-large voting and numbered posts to elect the city council.[153]

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[153] Stone v. City of Cocoa, No. 93-257-CIV-Orl-18 (M.D. Fla.).

After the lawsuit was filed one of the plaintiffs, Rudolph Stone, was appointed to fill a vacancy on the city council. He was then dropped as a plaintiff and substituted as a defendant in the litigation. Stone subsequently ran unopposed and was elected to a full three-year term.

While discovery was underway, the parties entered into settlement negotiations and ultimately agreed upon a system for the election of the Cocoa City Council whereby four members would be elected from single member districts and one member, who would also serve as mayor, would be elected at-large. The plan included one district that was 69.7% African American in voting age population. Because Cocoa's minority community was bounded on two sides by city limits and by the Atlantic Ocean on another, the majority-minority district was extremely compact. The plan and proposed consent decree were agreed to by a split vote of the city council, with council member Stone voting with the 3 to 2 majority.

Four white voters, as amici, filed objections to the proposed consent decree, claiming the plan was an unconstitutional racial gerrymander, and that Stone, as an African American and former plaintiff, should not have been allowed to vote on adoption of the plan under Florida's conflict of interest laws. After briefing and a hearing, the district court rejected the parties' proposed consent decree and held that Stone should have abstained from voting on the

proposed plan because "as an African-American candidate he stood to gain inordinately from the vote."[154] Plaintiffs appealed and the Eleventh Circuit reversed and remanded.

The Eleventh Circuit noted that "every one of the incumbents, not just Stone, had an interest in shaping districts favorable to his or her reelection." The court "decline[d] to believe" that the district court considered race as a disqualification for voting on the decree and instead "surmise[d] that the district court simply failed to think the matter through thoroughly."[155]

Following the decision of the court of appeals, the city sought to renege on its agreement and filed a motion in the district court to withdraw the consent decree. Defendants acknowledged they had entered into the agreement but took the position they were not bound by it because it had not been approved by the district court, and that the agreement violated the equal protection clause of the Fourteenth Amendment.[156] The district court, in a one word order, granted the motion. Plaintiffs again appealed, and again the court of appeals reversed and remanded.

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[154] Id., Order of October 25, 1994, quoted in George v. City of Cocoa, 78 F.3d 494, 497 (11th Cir. 1996).

[155] Id., 78 F.3d at 498, 499 n. 7.

[156] Motion filed April 25, 1996.

The court of appeals held the city was bound by its agreement, but was not foreclosed from challenging the plan under the Shaw v. Reno line of cases. The court adhered to prior law rejecting the need for full evidentiary hearings on settlements, which would defeat the purpose of settlements, but held the district court should hold a hearing on whether the defendants had reasonable grounds for believing the preexisting plan might have violated the Voting Rights Act.[157]

The district court, despite plaintiffs' repeated motions to set a trial date, did not hold the required hearing until August 1999, more than two years after being directed to do so by the court of appeals. The city called one witness. After hearing from the plaintiffs' demographic expert, and before the plaintiffs' expert on racially polarized voting testified, the court ended the hearing. Four days later the court entered an order finding that the consent decree did not violate the Shaw v. Reno line of cases. The court noted that "[a]lthough the City decided to adopt the consent decree to increase minority access to voting and to settle the present litigation, race neutral factors were the dominant considerations in the drawing of the districts." Based on the city minutes and the testimony of plaintiffs' expert, the court found the plan to be based on such race neutral criteria as population equality, contiguity, compactness, and respect for

[157] Stovall v. City of Cocoa, 117 F.3d 1238 (11th Cir. 1997).

existing precinct boundaries. The city council did not appeal, and the consent decree was implemented in the November 1999 election.

Though plaintiffs ultimately prevailed in Cocoa, the case illustrates too well the barriers that blacks still face in trying to gain equity in the electoral process. The agreed upon majority black district was extremely compact and regular in shape - it was virtually a square - and followed existing precinct lines. Yet, due to opposition from local whites and the intransigence of the city council and the trial court, it took two appeals, expenses exceeding $50,000, and five years to resolve the litigation.

DeSoto County and the City of Arcadia

In December 1990, the ACLU and Florida Rural Legal Services filed suit on behalf of black voters in DeSoto County in west central Florida challenging at-large elections for the five member board of commissioners and five member school board as diluting minority voting strength.[158] A year later, the ACLU and Florida Legal Services filed suit on behalf of black voters challenging at-large elections for the City of Arcadia, the DeSoto County seat.[159] The cases were

[158] Johnson v. DeSoto County Board of Commissioners and School Board, No. 90-366-CIV-FTM-17D (M.D. Fla.).

[159] Washington v. Arcadia City Council, No. 91-40-CIV-FTM-17 (M.D. Fla.).

consolidated.

Johnson v. DeSoto County Board of Commissioners and School Board

In 1990, the population of DeSoto County was 23,865, of whom 15.39% were black and 9.56% were Hispanic. Although the black population was relatively small, it was possible to draw a reasonably compact majority black district based on a five seat format. No African American had ever been elected to either board and blacks had a depressed socio-economic status, which was reflected in low levels of voter registration. In 1993, the black voter registration rate was 41.57%, compared to 59.67% for whites. Three years later, black voter registration had risen to 60.02%, but white registration had also risen to 81.54%.

The district court granted plaintiffs' motion for summary judgment as to the school board, finding that at-large elections violated Section 2. The court noted that two prior decisions of the court of appeals held the 1947 Florida law authorizing at-large elections for school boards had been enacted with discriminatory intent. The statute was passed in response to the abolition of the all white primary and to replace a preexisting system of single member district elections for school boards. According to the court of appeals, "the conclusion

that the change had an invidious purpose is inescapable."[160]

In granting the plaintiffs' motion for summary judgment, the district court also established that the at-large system had discriminatory effects, finding that:

> *There has never been an African American candidate for the board of commissioners.
>
> *Only two African Americans have run for county-wide public office in DeSoto County, losing both times.
>
> *There have been no African American applicants for DeSoto County Administrator or County Attorney, and no African American has served in either capacity.
>
> *75% of African Americans who are school board employees are aides or service workers.
>
> *African American teachers have decreased in number each year between 1987-90.
>
> *African American full-time school board employees have decreased in number each year between 1987-90.

"This evidence," the court concluded, "is more than minimally sufficient, in combination with Plaintiff's proof of discriminatory intent, to establish a § 2 violation."[161] The court ruled that plaintiffs' claims against the board of commissioners would have to be resolved after a trial on the merits.

The school board appealed and the appellate court reversed. Resorting to legal parsing, it held the findings of the appellate courts that the 1947 law had

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[160] McMillan v. Escambia County, Fla., 638 F.2d 1239, 1245 (11th Cir. 1981). Accord, NAACP v. Gadsden County School Board, 691 F.2d 978 (11th Cir. 1982).

[161] Johnson v. DeSoto County Board of Commissioners, 868 F. Supp. at 1380.

been adopted with an invidious purpose were findings of fact, and did not establish "as a matter of law that the 1947 Act was motivated by an intent to discriminate."[162] It also held that racially discriminatory intent alone could not establish a violation of Section 2 and directed the trial court to reconsider its ruling.

On remand, the district court again found the at-large system had been established with a discriminatory intent.[163] However, the case was assigned to a new judge for a final decision regarding the school board and the board of commissioners, who ruled that population changes since the 1990 census showed it was now impossible to draw a majority black district, and thus there could be no Section 2 violation. The plaintiffs appealed but the decision was affirmed.[164]

Washington v. Arcadia City Council

In 1990, the City of Arcadia had a population of 6,488, of whom 29.98% were black and 9.11% were Hispanic. The city's five member council was elected at-large, and the black population was sufficiently compact that two majority black districts could be drawn. Only one black person had ever won a seat under

[162] Johnson v. DeSoto County Board of Commissioners, 72 F.3d 1556, 1561 (11th Cir. 1996).

[163] Johnson v. DeSoto County Board of Commissioners, 995 F. Supp. 1440 (M.D. Fla. 1998).

[164] Johnson v. DeSoto County County Board of Commissioners, 204 F.3d 1335 (11th Cir. 2000).

the at-large system.

The black community in Arcadia had been discriminated against in employment and had a depressed socio-economic status. By 1993, only 13 (12%) of the city's 107 full time employees were black. The Arcadia Housing Authority, which was appointed by the city council, had no African American members until 1980. On February 19, 1981, a federal court entered a judgment against the Arcadia Housing Authority finding that its executive director had "willfully maintained racially segregated housing."[165] In 1989, 41% of African Americans and 54.67% of Hispanics in the city lived below the poverty level, compared to 14.19% of whites. The majority of blacks (56.2%) and Hispanics (53.94%) over age 25 had no high school diploma, while more than two-thirds (67%) of whites did.

Seven months after the law suit was filed, a second black candidate was elected to the city council in September 1991. Two years later, the African American incumbent who had served for 22 years was forced into a runoff and was defeated. One year later, another black candidate - after having first been appointed - was elected. At the time of the trial, therefore, two (40%) of the five city council members were African American. The district court concluded that

[165] Brown v. Melton, CA No. 79-85-FTM-K (M.D. Fla.).

the candidates of choice of black voters were not now usually defeated by whites voting as a bloc and dismissed plaintiffs' Section 2 claim. Because blacks had acquired slightly more than proportional representation on the city council, plaintiffs decided not to appeal the decision.

Escambia County

Florida v. McMillan

Prior to the amendment of Section 2 in 1982 to incorporate a discriminatory results standard, minority plaintiffs, represented by private counsel, filed suit challenging at-large elections for the five member Escambia County, Florida, Board of Commissioners. The district court invalidated the at-large system as diluting minority voting strength, and the court of appeals affirmed.[166] Among the findings of the trial court were "a consistent pattern of racially polarized voting," no blacks elected to the commission, a history of racial discrimination, continuing racial segregation, a depressed minority socio-economic status, and that there were "two separate [racial] societies in Escambia County."[167] The Supreme Court agreed to review the case, and the ACLU filed

[166] McMillan v. Escambia County, Florida, 688 F.2d 960 (5th Cir. 1982).

[167] Id. at 962-67.

an amicus brief urging the court to affirm based upon the intervening amendment of Section 2, rather than sending the case back to the court of appeals for a resolution of the statutory issue. Amicus noted that the findings of the lower courts that the at-large system had discriminatory results and denied blacks equal access to the political process were sufficient to establish a Section 2 violation without remanding for further consideration. On March 27, 1984, the court issued a brief opinion vacating and remanding the case to the court of appeals for decision on the Section 2 issue.[168] On remand, the court of appeals again affirmed the decision of the district court, concluding that the at-large system violated amended Section 2.[169]

Glades County

Thompson v. Glades County

Glades County, located in south-central Florida, is huge in size but has a tiny population. According to the 2000 census, the total population is 10,576, 10.5% of which is African American. The county is about two-thirds the size of Rhode Island, though 204 of its 988 square miles are under Lake Okeechobee. It

[168] Escambia County, Florida v. McMillan, 466 U.S. 48 (1984).

[169] McMillan v. Escambia County, Florida, 748 F.2d 1037 (5th Cir. 1984).

lies at the southeastern edge of the lake and in 1928 was in the path of the first recorded Category 5 hurricane to hit the United States. The hurricane breeched the lake's dike and the flooding killed approximately 2,500 Floridians.

Glades County is extremely economically depressed, with employment dependent mostly on citrus farming. Typical of rural counties, African Americans do not fare well compared with whites: per capita income of blacks is half that of whites and the unemployment rate of blacks is double that of whites. Also, of adults age 25 or older, 70% of blacks do not have a high school degree, compared to 40% of whites.

In 1998, Billie Thompson became the first African American to run for the Glades County school board, and only the second African American to run for county-wide office. She got 42% of the vote in the Democratic primary against the incumbent, but was defeated. Thompson and other black residents of the county, represented by the ACLU, filed suit in 2000 challenging the at-large method of electing the five-member county commission and board of education, as diluting minority voting strength in violation of Section 2 and the Constitution.[170]

[170] Thompson v. Glades County, No. 2:OO-cv-212 (M.D. Fla.).

A trial was held in October 2001, but a decision was not rendered for nearly three years. The court found "white voters in Glades County tend to vote as a bloc so as to usually defeat the candidates of choice of African American voters." It also found "the size of Glades County makes at-large campaigning for elective office difficult, and more so for African Americans," and that African Americans had far less income, education, and access to automobiles, and that black public employees were employed in lower paying jobs.[171]

Door-to-door campaigning is critical to success in a rural county like Glades, but according to Thompson, as "a black person and black female" she was "very apprehensive" about campaigning in some areas of the county.[172] A school board member who is part American Indian testified to the same effect that "[s]he felt uncomfortable campaigning in some of the very rural parts of the county where she did not know people."[173]

Despite its findings, the court ruled there was no Section 2 violation because there was no remedy. Plaintiffs had drawn an illustrative five member plan with one district containing an African American voting age population of

[171] Id., Order of August 27, 2004.

[172] Id., Trial Transcript, p. 23.

[173] Id., Order of August 27, 2004.

50.23%. The district also had a Hispanic voting age population of 15.23%, and the evidence showed that African American and Hispanics voted cohesively. The plan had an overall deviation of 8.6%.

The court held it was not permitted to impose a plan with an 8.6% deviation, and African Americans would be a minority in an equal population plan. It further held a 50.23% African American voting age population was not viable: "To translate the statistical majority into reality would require that every voting-age African American be registered to vote, actually vote, and vote for the same person."[174] The court thus placed an unprecedented burden on Section 2 plaintiffs, because it effectively required them to prove it was impossible for a minority candidate to be outvoted in a remedial plan. Of course, no group - black, white, Hispanic or other - registers and turns out at 100%. The evidence of minority voter cohesion and racially polarized voting showed that in the illustrative district the white minority would not be able to defeat the choice of African American voters, and all the more so because of the presence of Hispanic voters. Plaintiffs' appealed the decision of the trial court to the Eleventh Circuit, where it is pending.

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[174] Id.

Hendry County

Robinson v. Hendry County Board of Commissioners

As a result of the 1970 amendments of the Voting Rights Act, Hendry County became one of five Florida counties subject to the preclearance provisions of Section 5. Located in rural, south central Florida, the county was 16.73% black, 22.34% Hispanic, and 72.14% white. However, because elections were at-large, and because of the prevalence of racial bloc voting, only one black candidate had run for the board of commissioners (in 1968), and none had run for the school board. And, no African American had ever been elected to, or served on, either body.

In January 1991, the ACLU and Florida Rural Legal Services filed suit on behalf of black voters challenging at-large elections for the five member board of commissioners and five member school board.[175] After a motion to dismiss filed by the defendants was denied, the parties reached a settlement in October 1991. Pursuant to the settlement, five single member districts were established for the board of education and school board, one of which was majority black. The Hispanic population in the county was very dispersed, and it was not possible to draw a majority Hispanic district. However, under the new plan one district

[175] Robinson v. Hendry County Board of Commissioners, No. 91-13-CIV-FTM-15 (D) (M.D. Fla).

contained a Hispanic population of 31%.

The consent decree acknowledged that the new plan "provides plaintiffs, as African-American residents of Hendry County, and all the African American voters of the county, a greater opportunity than previously existed to elect candidates of their choice through the creation of single-member districts."[176] Plaintiffs' attorneys prepared a joint submission for preclearance, and the voting change was approved by the Department of Justice on May 11, 1992.

The plan was implemented at the primary in September 1992. An African American was nominated for the county commission and for the school board from the majority black district. Neither had opposition in the general election, and they became the first blacks ever to serve on the commission and school board.

Palm Beach County and the City of Belle Glade

Burton v. Belle Glade

On Thanksgiving Day in 1960, Edward R. Murrow's CBS documentary on the plight of farm workers, "Harvest of Shame," traced migrant workers as they followed the crops up the eastern United States and contrasted the lives of the

[176] Id., Order of October 17, 1991.

workers and their families from small towns like Belle Glade and Immokalee with the affluence of coastal Palm Beach County. "Harvest of Shame" portrayed a reality that continues to the present. Palm Beach County produces a wealth of fruits and vegetables for the nation, and while the coastal side of the county includes extraordinary affluence, the farm workers mostly live in public housing.

The U.S. Department of Agriculture built two housing centers for farm workers in western Palm Beach County, adjacent to the City of Belle Glade. For decades the housing was racially segregated by official policy and ordinances. The centers, Okeechobee Center and Osceola Center, are now owned and operated by the Belle Glade Housing Authority (BGHA), though it is still funded by the Farmers Home Administration (FHA). The City Council of Belle Glade appoints housing authority members. One housing center, Osceola, was annexed into Belle Glade in 1961 when it was all white and segregated by law; the black center, Okeechobee, was not.[177] As cited in a memorandum in the authority's minutes, one of the reasons given by public officials for annexing the white center was that the annexation would enable the Osceola residents to "have the right to vote in the community; offer themselves as candidates for the office

[177] Burton v. Belle Glade, 178 F.3d 1175, 1190 (11th Cir. 1999).

of City Commissioner; and be able to be appointed to the various boards governing city operation."[178]

In 1977, the housing projects were compelled by litigation to desegregate. In response, the Belle Glade housing authority requested the city to deannex Osceola Center which would gain African American residents for the first time. The request was remarkable because deannexation would increase the cost to residents of some governmental services and the housing authority had the fiduciary responsibility to promote affordable housing for agricultural workers. The request to deannex Osceola Center was ultimately withdrawn due to opposition from the Florida Rural Legal Services attorneys who represented plaintiffs in the litigation.[179]

Okeechobee Center remained 92% black, 8% Hispanic and 0% white as of 1994. Over the years the city and the housing authority repeatedly refused to annex the formerly all black project, including a 1995 request from a center resident. As with Osceola, annexation of Okeechobee would have economically benefited the residents and the housing authority. But annexation would also

[178] BGHA Minutes, January 24, 1961.

[179] BGHA Minutes, May 25, 1977; City Minutes, July 19, 1977.

likely have turned Belle Glade, whose population was 50% black, into a majority black city.

In 1995, local residents, represented by the ACLU, sued the city and the housing authority.[180] Plaintiffs contended the decision to annex the white housing center but not the African American housing center was racially motivated, that the segregation of the two projects constituted de jure discrimination, and that continuing to keep Okeechobee residents out of the city was one of the effects of discrimination that was required to be dismantled or eradicated to the extent practicable.

At the end of discovery, plaintiffs moved for summary judgment on their vote denial and Fourteenth Amendment claims. The city moved for summary judgment based on a 1974 state statute which required annexed land to be contiguous to existing city boundaries. The Okeechobee Center was contiguous to a highway the city had annexed, and the city had annexed other areas after 1974 that were contiguous only to that same highway. The district court held that the 1974 statute provided "a perfectly good excuse not to annex," in 1995, and the "perfectly good excuse, and not racist reasons, caused the lack of

[180] Burton v. Belle Glade, 966 F. Supp. 1178 (S.D.Fla. 1997).

annexation."[181] As for the refusal of the city and housing authority to annex in 1973 and 1961, the court said those claims were barred by the state's four year "personal injury tort statute of limitations."[182] Although plaintiffs had not moved for summary judgment on their Section 2 vote dilution claim, the district court dismissed it on the grounds that Section 2 did not authorize annexation as a remedy.

The plaintiffs appealed but the court of appeals agreed with the district court that a discriminatory act had to have taken place within a four year statute of limitations.[183] The court of appeals' opinion would have made all challenges to Jim Crow laws impossible. Brown v. Board (1954) would have been dismissed for failure to file suit in the 19th century. The landmark one person, one vote decision of Reynolds v. Sims (1964) would have been rejected because the last time the Alabama legislature had been reapportioned was in 1900.

As for plaintiffs' Section 2 claim, the court of appeals held that the district court did not error in concluding annexation was an inappropriate remedy.[184]

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[181] 966 F. Supp. at 1185.

[182] Id. at 1182.

[183] Burton v. Belle Glade, 178 F.3d 1175 (11th Cir. 1999).

Seminole County

de Treville v. Joyner

In August 2004, David de Treville, a former Florida resident, was living in Germany when he submitted a voter registration application by fax to Seminole County, Florida. As his last permanent residence, Florida was the appropriate place for de Treville to register and vote, as specified by the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA). Seminole County received the fax in early August, but it never got the signed original copy of the fax which de Treville had mailed. In October, after the voter registration deadline had passed, the county informed de Treville that his faxed application was not acceptable because the signature was not an "original."

In mid-October, the ACLU filed suit on de Treville's behalf, asserting that the county's rejection of his voter registration violated the National Voter Registration Act, the Constitution, and the Civil Rights Act of 1964, which forbids disqualifying potential voters for any error or omission in an application that is not material to determining eligibility.[185] This provision was intended to address

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[184] 178 F.3d at 1200.

[185] de Treville v. Joyner, Civ. No. 6:04 CV 01533 (M.D. Fla.).

the practice of disqualifying minority registrants on the pretext that their application forms were incomplete.

In his law suit, de Treville further contended that the county's failure to notify him of its refusal to accept his application prior to the registration deadline violated his right to vote. After suit was filed, the county supervisor of elections agreed to register de Treville, and the suit was voluntarily dismissed.

St. Lucie County and the City of Fort Pierce

Coleman v. Fort Pierce

Now a part of Florida's fast developing "Treasure Coast," Fort Pierce and its neighboring central Atlantic communities were long overshadowed by the bustling resorts to the south. Founded during the second Seminole War, Fort Pierce grew slowly with the encouragement of the United States Congress, which in 1842 offered settlers 160 acre plots, provided they were willing to bear arms and cultivate the land for five years. Over the next century, Fort Pierce was notable for its anti-integration activism. Three days after the Supreme Court's ruling in Brown v. Board (1954), a kerosene soaked cross burned on a ridge above the city's black neighborhood.

Fort Pierce was governed by a five member city commission, including one mayor-commissioner, elected at-large. Although African Americans were

42% of the city's population, no black person had ever served as mayor and no more than one black person had ever served at one time on the city commission.

In 1992, African American residents of Fort Pierce, represented by the ACLU and Florida Rural Legal Services Corporation, sued the city claiming that the at-large elections, with staggered terms and a majority vote requirement, diluted minority voting strength in violation of Section 2.[186] Following discovery, the city commission agreed to adopt a new election system dividing the city into two districts, one of which would be majority black. Each district would elect two commissioners, while the mayor would continue to be elected at-large.

The parties presented a consent order to the court, which conducted a hearing to determine the propriety of the proposed redistricting plan. Among the court's findings were:

> *[T]he minority community is extremely cohesive – minority candidates usually getting more than ninety percent of the African-American vote.
>
> *[W]hites usually vote as a bloc to defeat the candidate of choice of the minority, particularly when African-American candidates have run for city counsel positions when there is already an African-American incumbent.

[186] Coleman v. Fort Pierce, 92-14157-CIV-PAINE (S.D. Fla.).

> *White cross-over [voting] averaged less than twelve percent.
>
> *Plaintiffs have tendered evidence demonstrating the existence of the three Gingles elements to establish a Section 2 violation.[187]

The new plan was implemented, and as of 2006, two of the city's five commissioners are African American.

West Palm Beach

Anderson v. West Palm Beach City Commission

West Palm Beach was founded in 1894 by Henry Flagler, a pioneer of South Florida's resort industry, to house the workers that would service more upscale communities. Even before it became a center of controversy during the 2000 presidential election, West Palm Beach struggled with voting. By the early 1990s, the city had grown to more than 67,000 residents, with black and Hispanic citizens constituting 31% and 14% of the population, respectively. The city commission was composed of five members elected at-large, with candidates required to run from residency districts.

In 1990, the city redrew its residency districts and placed two black incumbents in the same district, but no white incumbents were similarly paired.

[187] Id., Order of September 24, 1993.

The city commission's vote on the redistricting plan was three in favor and two against, with African American commissioners casting the negative votes. The first black incumbent, a popular teacher and minister who had received a majority of both black and white votes in his district, then retired from city politics. Subsequently, the second black incumbent lost to another black candidate in a racially polarized election, with the winner getting a majority of white votes and the loser a majority of black votes. All prior successful black candidates had received a majority of black votes.

In 1994, African American residents of West Palm Beach, represented by Florida Rural Legal Services Corporation and the ACLU, brought suit against the city, challenging the at-large voting system as violating Section 2.[188] The complaint further alleged that other election features such as a majority vote requirement, staggered terms, and non-partisan elections also diluted African American voting strength. To bolster their claim of vote dilution, plaintiffs produced evidence from city commission minutes and newspapers showing that West Palm Beach adopted at-large elections immediately after the abolition of the white primary in 1946.[189]

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[188] Anderson v. West Palm Beach City Commission, 94-8135-CIV-ZLOCH (S.D. Fla.).

[189] 1947 Fla. Laws ch. 24981, Section 4 (8).

In a consent decree issued in January 1995, West Palm Beach adopted a plan containing five single member districts. Two of the new districts had African American majorities, while a third district included a Hispanic voting age population of 37.9%.[190]

[190] Anderson v. West Palm Beach City Commission, Order of January 27, 1995.

GEORGIA

STATEWIDE ISSUES

1980 Congressional Redistricting

Busbee v. Smith

Georgia's 1980 congressional redistricting was denied preclearance by the District Court for the District of Columbia in July 1982, a month before the scheduled expiration of Section 5 and shortly after Congress voted to extend the preclearance provisions of the Voting Rights Act for an additional 25 years. Had Section 5 been allowed to lapse, the court would have been without jurisdiction to enforce its objection, and nothing would have prevented the state from simply reenacting or implementing the objected-to plan.

When the state reapportioned its congressional districts after the 1980 census, it resorted to its old strategy of trying to minimize black voting strength in the Atlanta area. The 1980 census data showed that the state's 10 congressional districts drawn in 1972, while severely malapportioned, were still majority white with the exception of the fifth district. It contained a slight black population majority of 50.33%.

The new plan drawn in 1981 maintained white majorities in nine of the ten districts, and increased the black population in the Fifth District to 57%.

Although majority black in both total and voting age population, the district actually contained a 54% white majority among registered voters.[191]

The state submitted its plan for preclearance and argued that the Fifth District's configuration could not be discriminatory because it increased the black percentage over the 1972 plan. The attorney general did not agree and denied Section 5 approval.

The state then filed a declaratory judgment action in the District Court for the District of Columbia arguing that under the retrogression standard of Section 5 it was entitled to have its congressional reapportionment plan precleared. The Supreme Court had previously held that the purpose of Section 5 was to maintain the status quo in voting and that a plan that was either ameliorative or nonretrogressive, could not violate the "effect" standard of the statute.[192] The state, however, still had to prove that its plan was not the product of intentional discrimination against black voters. The Georgia Black Legislative Caucus, represented by the ACLU, sought and was granted leave to intervene to urge an objection to the state's plan.

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[191] Busbee v. Smith, 549 F. Supp. 494, 499 (D.D.C. 1982).

[192] Beer v. United States, 425 U.S. 130, 141 (1976).

Given Georgia's record of discrimination in voting, it would not have been surprising if the 1981 congressional redistricting process had been influenced by race.[193] What is surprising is how pervasive and overt that influence actually was.

Julian Bond, a state senator at that time, introduced a bill at the beginning of the legislative session creating a Fifth District that was 69% black. The Bond plan had the support of two white members of the senate, Thomas Allgood, the Democratic majority leader from Augusta, and Republican Paul Coverdell.[194] In large measure as a result of their endorsement, the final plan adopted by the senate contained a 69% black Fifth District.

The leadership of the house rejected the Bond plan for the Fifth District. State Representative Joe Mack Wilson, a Democrat from Marietta, was chair of the house reapportionment committee and the person who, by all accounts, dominated the redistricting process in the lower chamber. And as he was wont to say, he "hated" blacks and Republicans.

"Nigger" was an active, working part of Wilson's vocabulary. Blacks were simply "niggers," and he regularly denigrated legislation that benefited blacks as

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[193] For a discussion of that record, see Laughlin McDonald, A Voting Rights Odyssey: Black Enfranchisement in Georgia (Cambridge: Cambridge Univ. Press, 2003).

[194] Busbee v. Smith, Deposition of Thomas Allgood, p. 15-6.

"nigger legislation." During the redistricting fight, he told his colleagues on numerous occasions that "I don't want to draw nigger districts."[195] Bettye Lowe, a house member, recalls that Wilson told her in no uncertain terms that "I'm not going to draw a honky Republican district and I'm not going to draw a nigger district if I can help it."[196]

The speaker of the house, Tom Murphy, was also opposed to the Bond plan. "I was concerned," he said later, "that . . . we were gerrymandering a district to create a black district where a black would certainly be elected."[197] According to the District of Columbia court, Murphy "refused to appoint black persons to the conference committee [to resolve the dispute between the house and senate] solely because they might support a plan which would allow black voters, in one district, an opportunity to elect a candidate of their choice."[198]

After the defeat of the Bond plan in the house, the fragile coalition in the senate in support of the plan broke down. Several senators approached Allgood and said, "I don't want to have to go home and explain why I was the leader in getting a black elected to the United States Congress." Allgood acknowledged

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[195] Id., 549 F. Supp. at 501.

[196] Id., Deposition of Bettye Lowe, p. 36.

[197] Id., 549 F. Supp. at 520.

that it would put a senator in a "controversial position in many areas of [Georgia]" to be perceived as having supported a black congressional district. He finally told his colleagues to vote "the way they wanted to, without any obligations to me or to my position," and "I knew at that point the House plan would pass."[199]

Based upon the racial statements of members of the legislature, as well as the absence of a legitimate, nonracial reason for adoption of the plan, the conscious minimizing of black voting strength, and historical discrimination, the District of Columbia court concluded that the state's submission had a discriminatory purpose and violated Section 5. The court also held that the legislature had applied different standards depending on whether a community was black or white. Noting the inconsistent treatment of the predominantly white North Georgia mountain counties and metropolitan Atlanta, the court found that "the divergent utilization of the 'community of interest' standard is indicative of racially discriminatory intent."[200]

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[198] Id. at 510, 520.

[199] Id., Deposition of Thomas Allgood, pp. 42-5.

[200] Id., 549 F. Supp. at 517.

As for Joe Mack Wilson, the court made an express finding that "Representative Joe Mack Wilson is a racist."[201] The Supreme Court affirmed the decision on appeal.[202]

Joe Mack Wilson, who had been flogged by the court for his racism, took great umbrage. At a meeting of the all-white Rotary Club of Marietta he said he was just the "fall guy," and complained bitterly that "in modern times, if you don't condescend and give in to everything black people want, you're tagged a racist."[203]

Forced yet again by the Voting Rights Act to construct a racially fair plan, the general assembly in a special session enacted an apportionment for the fifth district with a black population exceeding 65% and the plan was approved by the court. John Lewis, one of the leaders of the Civil Rights Movement, was elected from the fifth district in 1986 and has served in Congress ever since.

1990 Redistricting

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[201] Id. at 500.

[202] Busbee v. Smith, 459 U.S. 1166 (1983).

[203] The Atlanta Constitution, August 3, 1982.

Following the 1982 extension of the Voting Rights Act and the amendment of Section 2, there was a significant increase in minority office holding, particularly at the congressional level. Seventeen of the majority-minority congressional districts in the South, most of them newly created, elected a black representative in the 1992 elections. There were also significant increases in the number of African Americans elected to state legislatures, again primarily from majority black districts.[204]

Social scientists and the courts have frequently commented on the "tipping phenomenon," a form of racial backlash that occurs when whites perceive there has been "too much" integration and flee a neighborhood, or take their children out of the public schools.[205] The 1992 elections were undoubtedly a tipping event for many whites who believed that their districts had become "too black." Many of them filed suit asking the courts to redraw their districts so that whites would again be in the majority with the ability to exercise their traditional privilege of electing members of Congress.

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[204] 1990 U.S. Census, Population and Housing Profile, Congressional Districts of the 103rd Congress, C.Q. Weekly Report, V. 51, 3473-87; David A. Bositis, Redistricting and Representation: The Creation of Majority-Minority Districts and the Evolving Party System in the South (Joint Center for Political and Economic Studies, 1995), 46-7.

[205] A. Leon Higginbotham, Jr., et al., "Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences," 62 Fordham L. Rev. 1593, 1632 n.194 (1994); Richard H. Pildes, "The Politics of Race," 108 Harvard L. Rev. 1359, 1392 (1995).

The first of the so-called "reverse discrimination" voting cases to reach the Supreme Court was Shaw v. Reno, in which the Court held that white plaintiffs had standing to challenge a majority black congressional district in North Carolina, which they characterized as being "dramatically irregular in shape." [206] Subsequently, in Miller v. Johnson, the Court invalidated the majority black Eleventh Congressional District in Georgia on the grounds that race was the predominant factor in drawing district lines, and the state had subordinated its traditional districting principles to race without having a compelling reason for doing so. [207] The ACLU's involvement in Shaw/Miller litigation in Georgia is discussed below.

Miller v. Johnson

Due to an increase in population between 1980 and 1990, Georgia was entitled to increase its number of congressional districts from 10 to 11. The existing plan contained one majority black district, the Fifth, represented by John Lewis. In August 1991, the Georgia legislature adopted a congressional redistricting plan based on the new census containing two majority minority

[206] 509 U.S. 630, 633 (1993).

[207] 515 U.S. 900 (1995).

districts--the Fifth and the Eleventh. A third district, the Second, had a 35.4% black voting age population.[208]

The state submitted the plan for preclearance, but the Attorney General objected to it. The legislative leadership, he concluded, was "predisposed to limit black voting potential to two black majority districts," and had not made a good faith attempt to "recognize the black voting potential of the large concentration of minorities in southwest Georgia" in the area of the Second District. He also found that the state had provided only pretextual reasons for failing to include the minority population in Baldwin County in the Eleventh District.[209]

Following another objection to a second plan, the state adopted a third plan which contained three majority black districts, the Fifth, the Eleventh, and the Second. The plan was precleared on April 2, 1992.[210] At the ensuing elections black candidates were elected from each of the three majority black districts, John Lewis from the Fifth, Cynthia McKinney from the Eleventh, and Sanford Bishop from the Second.

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[208] Miller v. Johnson, 515 U.S. 900, 906 (1995); Johnson v. Miller, 864 F. Supp. 1354, 1363 n.5 (S.D. Ga. 1994).

[209] Miller v. Johnson, 515 U.S. at 906-07; Joint Appendix, pp. 99, 105-07.

[210] Johnson v. Miller, 864 F. Supp. at 1366-67.

Following the decision in Shaw v. Reno, a lawsuit was filed by white plaintiffs claiming that the Eleventh Congressional District was unconstitutional. One of the plaintiffs was George DeLoach, a white man who had been defeated by McKinney in the 1992 Democratic primary. The plaintiffs claimed that the district was "segregated," and asked the court to redraw it so that DeLoach, in their words, could "run again without the outcome being predetermined on the basis of race."[211] The ACLU represented a bi-racial group of intervenors who sought to defend the constitutionality of the challenged plan.

Although the Eleventh District was not as irregular in shape as the district in Shaw v. Reno, the district court found it to be unconstitutional, holding that the "contours of the Eleventh District . . . are so dramatically irregular as to permit no other conclusion than that they were manipulated along racial lines."[212] Although it invalidated the state's plan, the three-judge court acknowledged the transcendent importance of race in the political life of the state. "No one can deny," the court said, "that State and local governments of Georgia in the past utilized widespread, pervasive practices to segregate the

[211] Miller v. Johnson, Brief of Appellees, p. 29 n.28.

[212] Johnson v. Miller, 864 F. Supp. at 1378.

races which had the effect of repressing Black citizens, individually and as a group."[213]

The state, the intervenors, and the United States appealed the decision of the district court, but the Supreme Court affirmed. It did not find the Eleventh District was bizarrely shaped, but it held the state had "subordinated" its traditional redistricting principles to race without having a compelling reason for doing so. The court criticized the plan for splitting counties and municipalities and joining black neighborhoods by the use of narrow, sparsely populated "land bridges."[214]

The Supreme Court sent the case back to the district court for the adoption of a new plan. On remand the district court allowed the plaintiffs to amend their complaint to challenge the majority black Second District, which the court then held was unconstitutional for the same reasons it had found the Eleventh District to be unconstitutional.[215] The court gave the legislature an opportunity to enact a remedial plan, but after several weeks of wrangling and uncertainty over how to

[213] Id., Statement of Judicial Notice.

[214] Miller v. Johnson, 515 U.S. at 908, 921.

[215] Johnson v. Miller, 922 F. Supp. 1552, 1553 (S.D. Ga. 1995).

apply the Court's decision, the legislature adjourned without adopting a congressional plan.

After the legislature failed to redistrict the congressional delegation, the district court issued its own plan on December 13, 1995. The court's plan was a complete remapping of the state and contained only one majority black district.[216] Because of racial bloc voting, the court held, a district containing "the percentage of black registered voters as close to fifty-five percent as possible was necessary . . . to avoid dilution of the Fifth District minorities' rights."[217]

Georgia had appealed the decision of the district court invalidating the Eleventh District. But it refused to appeal the court's redistricting order. The intervenors and the United States filed notices of appeal, and the state switched sides and joined the white plaintiffs in defending the court ordered plan.

No doubt believing that the Supreme Court would not require it to draw more than one majority black district, the state did a remarkable about face and reinvented the facts surrounding the first redistricting plan it had adopted in 1991, containing two majority black districts. In its brief in the Supreme Court in the first case involving the Eleventh District, the state had argued that the 1991

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[216] Id. at 1566, 1563-64.

[217] Id. at 1568, 1570-71 (Appendices A and B to the opinion of the district court).

plan was a reasonable expression of state policy and that race was not the predominant factor in redistricting:

> It is undisputed that the General Assembly as a whole found the initial [1991 congressional redistricting] plan enacted to be reasonable. It was not perceived as a 'racial gerrymander.' . . . There is, in fact, no evidence that any legislator or reapportionment staffer ever believed the initial plan to be offensive as a racial gerrymander.[218]

The state repeatedly stressed "the undisputed consensus of all of the legislators involved - both white and black, Republican and Democrat - that the first plan was reasonable."[219]

But in the case involving the new court ordered plan, the state took an entirely different view of things. To the extent that the legislature had initially drawn a plan containing two majority black districts, the state now argued, there was "uncontradicted evidence that that was the product of the perceived need to do so in order to satisfy the DOJ's demands." The 1991 plan, formerly described as "reasonable" and supported by "the undisputed consensus of all of the legislators," was now dismissed as the tainted product of "the illegal excesses of the DOJ."[220] The Supreme Court upheld the district court's remedial plan, but as

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[218] Miller v. Johnson, No. 94-631, Brief of Appellants Miller, p. 49.

[219] Id. at 18.

[220] Abrams v. Johnson, No. 95-1425, Brief of Appellees Miller, pp. 10, 25.

the four dissenters pointed out, the Department of Justice's direct involvement "took place after adoption of the 1991 Plan."[221]

Although they ran in majority white districts under the court ordered plan, both McKinney and Bishop were reelected. Their elections, however, were still racially polarized. Although McKinney got only 13% of the white vote in the Democratic primary, she won the nomination because she got most of the black vote, while whites mainly stayed home or voted in the Republican primary. White turnout was only 11% of registered voters compared to 31% for blacks. As a consequence, the electorate in the Democratic primary was majority black. In the general election, most black voters cast ballots for McKinney, while approximately 70% of whites voted for her white Republican opponent. A majority of whites similarly voted for Bishop's white opponent in the general election in the reconfigured Second district.[222]

McKinney, who describes herself as "a child of the Voting Rights Act," has credited her victory to the fact that she was initially elected in a majority black

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[221] Abrams v. Johnson, 521 U.S. 74, 106 (1977) (Breyer, J., dissenting).

[222] Allan J. Lichtman, Table I, Ecological Regression Estimates: Black versus White Elections 1996 U.S. House Elections, State of Georgia, Bloc Voting; Table 3, Ecological Regression Estimates: Black v. White Elections, 1996 U.S. House Elections, State of Georgia, Turnout.

district. "My victory says more about the power of incumbency than anything else," she has said.[223]

The legislature also adopted new state house and senate redistricting in 1991, and for the first time used all single member districts for both houses. The Attorney General precleared the change to districts but objected to certain features of the house and senate plans. He concluded that the legislature had fragmented concentrations of black population in a number of areas of the state to minimize the number of majority black districts and to ensure the reelection of white incumbents at the expense of black voters.[224]

Following an objection to a second plan on similar grounds,[225] the general assembly enacted a third plan in 1992, which was precleared. It created 13 majority black senate districts, an increase of five over the 1980 plan, and 41 majority black house districts, an increase of 11 over the 1980 plan.

The ink on the first decision in the congressional case had scarcely dried when the lawyers for the white plaintiffs publicly announced that they intended

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[223] Washington Post, November 26, 1996, p. A15.

[224] John R. Dunne, Assistant Attorney General, to Mark H. Cohen, January 21, 1992.

[225] John R. Dunne, Assistant Attorney General, to Mark H. Cohen, March 20, 1992.

to take the state to court over its legislative redistricting as well. They claimed that 17 house and five senate districts had been "racially gerrymandered."[226]

During its special session in 1995, the legislature had been unable to redistrict the congressional delegation, but it did redistrict the house and senate. Using the threat of litigation as an occasion, or an excuse, it reduced the black percentages in 13 districts.

Robert Holmes, a long time member of the Georgia House of Representatives and a political science professor at Clark-Atlanta University, has described redistricting as "a struggle for political survival" in which "everyone seeks to maximize his or her own position." Reducing the black population in the house and senate districts was an example of that struggle, he says, and was designed primarily to protect white incumbents, some of whom were among the leadership in the general assembly. According to Holmes, the "real agenda" of the house leadership was not concern that its plan might be challenged in court, but "to protect white Democratic committee chairs, the Majority Leader, and a few other close allies of [house] Speaker Murphy."[227]

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[226] Robert A. Holmes, "Reapportionment Strategies in the 1990s: The Case of Georgia," in Bernard Grofman, ed., Race and Redistricting in the 1990s (New York: Agathon Press, 1998), p. 212.

[227] Id. at 207, 214.

In the senate, the black percentages in two majority black districts represented by whites were reduced from 62% to 43% and from 59% to 42%. In the house, the black percentages were reduced in 11 majority black districts. In District 141, represented by white majority leader Larry Walker, the black percentage was dropped from 59% to 26%. In District 159, represented by white committee chair Bob Hanner, the black percentage was lowered from 62% to 43%. In District 178, represented by another white committee chair, Henry Reaves, the black percentage was reduced from 63% to 27%. The black percentages were also reduced to below voting age majorities in two districts with black incumbents, Districts 31 (Carl Von Epps) and 173 (E. C. Tillman).[228]

The total losses in majority black districts were two in the senate and eight in the house. The state submitted the new plan for preclearance, confident that this reduction in minority voting strength would be approved by the Department of Justice in light of the recent congressional redistricting decisions.

The plaintiffs in the congressional case, despite the fact that a new plan had been adopted and submitted for preclearance, filed suit challenging the 1992 legislative plan. Except that they now claimed that 12 of the state's senate

[228] Id. at 218.

districts and 26 of its house districts were unconstitutional.[229] The Attorney General initially objected to the special session plan but withdrew the objection on October 15, 1996.

Five months later, after court ordered mediation and the parties settled the law suit agreeing upon a plan which reduced the number of majority black senate districts from 11 to 10 compared to the 1995 special session plan, and the number of majority black house districts from 33 to 30.

From the point of view of black voters and the legislative black caucus, the settlement was an exercise in damage control based on the likelihood that the court would have abolished even more of the majority black districts. And though the total number of majority black districts was reduced, the number of black caucus members at the beginning of the 1998 legislative term stood at 44, an increase of four compared to 1993.[230] Most of the formerly majority black districts which had been converted into majority white districts had elected whites in the first place. And in those which elected blacks, the incumbents, such as Von Epps, were able to hold onto their seats. The 1990 redistricting showed that the state was not willing to protect majority black districts when it thought

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[229] Johnson v. Miller, Civ. No. 196-040 (S.D. Ga.).

[230] Joint Center for Political and Economic Studies, Number of Black Elected Officials in the United States, by State and Office, January 1998 (www.jointctr.org).

the courts would not require it, that it was willing to abolish majority black districts to aid white incumbents, and that the process was driven significantly by partisanship to which the interests of minority voters were subordinated.

2000 Redistricting

Following the 2000 census, Georgia enacted redistricting plans for both houses of its legislature and congressional delegation and sought preclearance in the Federal District Court for the District of Columbia. The three-judge court precleared the house and congressional plans, but objected to three districts in the senate plan on the grounds that the state had not carried its burden under Section 5 of proving that the reduction of the black voting age population would not have a retrogressive effect on minority voting strength.[231]

The state enacted a remedial plan, which increased the black population in the three senate districts at issue, and it was precleared.[232] The state also appealed the decision denying preclearance to its original senate plan. On appeal, the Supreme Court vacated and remanded because the three-judge court

[231] Georgia v. Ashcroft, 195 F. Supp. 2d 25, 56 (D.D.C. 2002). Under the proposed plan, compared to the pre-existing plan, the black voting age population (BVAP) in SD 2 had been reduced from 60.58% to 50.31%, in SD 12 from 55.43% to 50.66%, and in SD 26 from 62.45% to 50.8%.

[232] Id., 204 F. Supp. 2d 4 (D.D.C. 2002).

had not considered the existence of so-called "influence districts" in denying preclearance to the original senate plan.[233]

A separate lawsuit had also been filed in federal court in Georgia challenging the state's plans on a variety of grounds, including that they were partisan gerrymanders and violated one person, one vote. After the decision of the Supreme Court, the federal court in Georgia dismissed the challenge to the precleared congressional plan, but invalidated the precleared house plan and the precleared remedial senate plan on the grounds that they violated one person, one vote.[234] The court gave the state an opportunity to propose remedial plans, but it failed to do so. The court then proceeded to draw and implement plans for the house and senate which rendered the proceeding in the District of Columbia court moot. The involvement of the ACLU in the litigation in the Supreme Court and in the federal court in Georgia is discussed below.

Georgia v. Ashcroft

The ACLU, representing a number of Georgia civil rights organizations, filed an amicus brief in the Supreme Court addressed primarily to the arguments

[233] Georgia v. Ashcroft, 539 U.S. 461 (2003).

[234] Larios v. Cox, 300 F. Supp. 2d 1320 (N.D. Ga. 2004).

the state had raised in its brief.[235] The state's brief provides a dramatic, present day example of the continued willingness of one of the states covered by Section 5 to manipulate the laws to diminish the protections afforded racial minorities.

In its brief the state resurrected its anti-Voting Rights Act rhetoric from prior years and argued that Section 5 "is an extraordinary transgression of the normal prerogatives of the states." State legislatures were "stripped of their authority to change electoral laws in any regard until they first obtain federal sanction." The statute was "extraordinarily harsh," and "intrudes upon basic principles of federalism." As construed by the three-judge court, the state said, the statute was "unconstitutional."[236] But the arguments the state advanced on the merits were far more hostile to minority voting rights than its anti-Voting Rights Act rhetoric.

One of the state's principle arguments was that the retrogression standard of Section 5 should be abolished in favor of a coin toss, or an "equal opportunity"

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[235] Brief Amicus Curiae of Georgia Coalition for the Peoples' Agenda in Support of Appellees. The coalition included the NAACP, Southern Christian Leadership Conference, RAINBOW/PUSH, Concerned Black Clergy, Georgia Association of Black Elected Officials, and Georgia Coalition of Black Women. In addition to the ACLU, the amicus was represented by the Lawyers' Committee for Civil Rights Under Law and the NAACP Legal Defense and Educational Fund.

[236] Brief of Appellant State of Georgia, pp. 28, 31, 40-1. For a discussion of the state's opposition to the extensions of the Voting Rights Act in 1970, 1975, and 1982, see McDonald (2003), pp. 139-40, 154-55, 175-76.

to elect, standard based on Section 2 of the Voting Rights, which it defined as "a 50-50 chance of electing a candidate of choice."[237] The Supreme Court rejected the state's invitation to rewrite Section 5 and held that "[w]e refuse to equate a §2 vote dilution inquiry with the §5 retrogression standard. . . . Instead of showing that the Senate plan is nondilutive under §2, Georgia must prove that its plan is nonretrogressive under §5."[238]

Had the state's proposed coin toss standard been adopted, it would have had a severe negative impact upon minority voting strength. A 50-50 chance to win is also a 50-50 chance to lose. If the state were allowed under Section 5 to adopt a plan providing minority voters with only a 50-50 chance of electing candidates of their choice in the existing majority black districts, the number of blacks elected to the Georgia legislature would by definition be cut essentially in half.

The state argued further that "the point of equal opportunity is 44.3% BVAP, which means that 'there's a 50-50 chance of electing a candidate of choice' in a district with an open seat and with 44.3% BVAP."[239] The adoption of

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[237] Georgia v. Ashcroft, 195 F. Supp. 2d at 66.

[238] Georgia v. Ashcroft, 539 U.S. at 478-79.

[239] Georgia v. Ashcroft, 195 F. Supp. 2d at 66. See also Brief of Appellant State of Georgia, p. 16 (blacks have "an equal chance of winning an open-seat election where the BVAP was 44%").

Georgia's standard for an equal opportunity would have permitted the state to abolish all of its majority black districts. While whites would have been able to control the outcome in the overwhelming majority of districts in the state, black voters would have been able to elect only half of the candidates of their choice--and as a practical matter far less than that--in the so-called "equal opportunity" districts. Blacks would have been turned essentially into second class voters; they could elect candidates of their choice, but only if they were white. One court likened such an electoral scheme to the comment attributed to Henry Ford that "[a]ny customer can have a car painted any color he wants so long as it is black."[240]

The arguments advanced by the state also failed to take into account the "chilling effect" upon black political participation, and the "warming effect" upon white political participation, caused by the transformation of a majority black district into a majority white district. Once a district is perceived as no longer being majority black, black candidacies and black turnout are diminished, or "chilled," while white candidacies and white turnout are enhanced, or "warmed."[241] Tyrone Brooks, a long time member of the Georgia legislature and

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[240] Citizens for a Better Gretna v. City of Gretna, La., 636 F. Supp. 1113, 1121 (E.D. La. 1986).

[241] See Colleton County v. McConnell, 201 F. Supp. 2d 618 (D.S.C. 2002), Supplemental Report of Prof. James W. Loewen, p. 2 ("[s]ocial scientists call the political impact of believing that one's

chair of the Georgia Association of Black Elected Officials, said that "when a district is changed from majority black to majority white it depresses the level of black political activity. The enthusiasm, the spirit, the sense that blacks have a chance are all diminished."[242] A formerly majority black district, particularly one without a black incumbent, would "perform" in a different way after being transformed into a majority white district.

A pattern of blacks winning almost exclusively from majority black legislative districts is particularly evident in Georgia. Under the 1992 plan, as under the 1982 plan, black electoral success was confined almost exclusively to the majority black districts. Of the 40 blacks elected to the house and senate under the 1992 plan, all but one was elected from a majority black district. The lone exception was Keith Heard from House District 89 (42% black) in Clarke County, the home of the University of Georgia. Whites, on the other hand, not only won all but one of the majority white districts, but also won 14 (26%) of the majority black districts.[243]

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racial or ethnic group has little hope to elect the candidate of its choice the 'chilling effect'").

[242] Laughlin McDonald interview with Tyrone Brooks, September 8, 2003.

[243] Members of the Georgia General Assembly, Senate and House of Representatives, Second Session of 1993-94 Term (1994); Johnson v. Miller, Civ. No. 194-008 (S.D.Ga.), trial transcript, Vol. 4, p. 237, Stipulations Nos. 61-63, Joint Ex. 11.

The same pattern of polarized voting has continued under the 2002 plan. Of the 10 blacks elected to the state senate, all were elected from majority black districts (54% to 66% black population). Of the 38 blacks elected to the state house, 34 were elected from majority black districts. Of the three who were elected from majority white districts, two (Keith Heard and Carl Von Epps) were incumbents. The third black (Alisha Thomas) was elected from a three-seat district (HD 33).[244]

Given the continuing levels of white bloc voting identified by the District of Columbia court,[245] white candidates are prohibitive favorites to win in most majority white legislative districts in Georgia, and indeed throughout the South. Abolishing majority black districts, or providing black voters an opportunity to elect candidates of their choice only in districts with reduced black populations that provide a 50-50 chance of losing, would have caused a significant reduction in the number of black office holders. The state's advocacy of such positions, and its attempt to implement them, are compelling reasons Section 5 should be extended.

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[244] Members of the General Assembly of Georgia, First Session of 2003-2004 Term.

[245] Georgia v. Ashcroft, 195 F. Supp. 2d at 69.

Georgia further demonstrated its disregard for minority voting rights by arguing in its Supreme Court brief that minorities should be excluded from the preclearance process. According to the state, "[n]ot a word in the Voting Rights Act hints that private citizens possess a right to intervene and arrogate to themselves the enormous responsibilities and power of the Attorney General."[246] The state's argument was audacious at the least, for it was directly contrary to decisions of the Court recognizing an implied cause of action to enforce Section 5, as well as subsequent acts of Congress making the right of a private cause of action to enforce the Voting Rights Act explicit. The Supreme Court rejected the state's argument, holding that "[p]rivate parties may intervene in §5 actions."[247]

The state also argued that no rights of minorities would be "impeded" by denying intervention because they could always challenge a precleared voting change under Section 2.[248] The state failed to note that the ability to challenge a voting practice on retrogression grounds does not exist under Section 2. In addition, the burden of proof is on the submitting jurisdiction under Section 5, but is upon minority plaintiffs in a Section 2 "results" case. Once a voting change

[246] Georgia v. Ashcroft, 539 U.S. 461, Brief of Appellant State of Georgia, p. 41.

[247] Georgia v. Ashcroft, 539 U.S. at 477.

[248] Brief of Appellant State of Georgia, pp. 41 n.11, 43.

is precleared, a presumption of legality attaches and minority rights and interests would by definition be "impeded" in their ability to challenge it. The very purpose of Section 5 was "to shift the advantages of time and inertia from the perpetrators of the evil [of discrimination in voting] to its victims,"[249] a purpose which the state chose to ignore.

Larios v. Cox

After the state failed to enact remedial plans for the house and senate, the Georgia three-judge court appointed a special master to prepare court ordered plans. Under the special master's plan, nearly half of the black house members, i.e., 18 (46.15%), were paired, or placed in a house district with one or more other incumbents. As a result of the pairing, a disproportionate number of African American house members would likely not have been returned to office following the next election.[250]

A number of the paired black incumbents were chairs or officers of house committees, and some were also senior members of the house.[251] Their loss

[249] South Carolina v. Katzenbach, 383 U.S. at 328.

[250] About a third (36.69%) of white house members were also paired with one or more other incumbents.

[251] See, Members of the General Assembly of Georgia, Senate and House of Representatives, First

would inevitably have adversely affected the representation of the black community in the state legislature.

The Georgia Legislative Black Caucus, represented by the ACLU, sought leave to participate as amicus curiae, which was granted. It argued that the pairing of black incumbents caused a retrogression in minority voting strength within the meaning of Section 5, and created a discriminatory result within the meaning of Section 2. The three-judge court agreed that court ordered plans should "comply with the racial-fairness mandates of § 2 of the Act, as well as the purpose-or-effect standards of § 5," and instructed the special master to draw another plan taking into account the unnecessary pairing of incumbents. A new plan was drawn and it unpaired all the black incumbents, except in one instance where pairing was unavoidable. As the court found in adopting the new plan, there was "no retrogression" from the pre-existing benchmark plans. Indeed, the number of majority black senate districts (13) was the same, while the number of majority house districts was actually increased from 39 to 44.[252] The state

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Session of 2003-2004 Term.

[252] Larios v. Cox, 314 F. Supp. 2d 1357, 1360, 1366 (N.D.Ga. 2004).

appealed, but the Supreme Court affirmed the decision of the three-judge court.[253]

In the absence of Section 5, the kind of plan adopted by the legislature would almost certainly have been far different from the one it adopted under federal oversight. In addition, the plan drawn by the three-judge court would likely have been different in its treatment of majority black districts in the absence of the non-retrogression standard of Section 5. The continued need and efficacy of Section 5 are apparent.

The partisan fight over redistricting, however, continued even after implementation of the court ordered plan. The Republican dominated legislature enacted a new congressional plan in 2005, but before doing so it passed formal resolutions that any redistricting had to comply with Section 5, and the new plan did exactly that. The black percentages in the majority black districts (represented by John Lewis and Cynthia McKinney), as well as the black percentages in the majority white districts that had elected blacks (Rep. David Scott and Rep. Sanford Bishop), were kept at almost exactly the same levels as under the plan that had been passed by the Democratic controlled legislature in 2002. The Republican controlled general assembly was obviously determined

[253] Cox v. Larios, 542 U.S. 947 (2004).

that it would not have a Section 5 retrogression dispute on its hands after it passed the new 2005 plan.

The Grand Jury Method of Appointing School Boards

During Reconstruction the legislature provided for locally elected school boards as part of a larger plan to establish a system of public education in the state. At the elections held in 1871 some blacks were elected, though the precise number is unknown. The following year the legislature, then under the control of white Redeemers, abolished the system of elected school boards and replaced it with a system of appointments by the grand jury. The grand jurors, who were required to be freeholders as well as "upright and intelligent persons," were in practice all white. Their selection of school board members insured that they would also be all white. As Representative Isaac Russell, an ardent Democrat and a white supremacist explained, "the old law often resulted in the election of ignorant men, and as the grand jury is most generally composed of the most intelligent men in the county, selections thus made would be good."[254]

[254] Atlanta Daily Sun, December 5, 1871.

The state constitution allowed counties to abolish the grand jury method of school board selection by a vote of a majority of the voters of the county.[255] Over the years, nearly all of Georgia's 159 counties had opted for elected boards; some of them spurred to action no doubt by the legally mandated desegregation of their grand juries. In a 1967 opinion, the Supreme Court had called into question the constitutionality of the state's entire "segregated system" of jury selection.[256] Recognizing that the courts would throw out indictments and convictions handed down by racially exclusive juries, Georgia enacted legislation in 1967 requiring jury lists to fairly represent "any significantly identifiable group in the county."[257] By the mid 1980s, only 27 of the state's county school districts still retained the grand jury appointment system.[258]

Johnson County – Grand Jury Appointment of School Boards

Wilson v. Powell

[255] Article VIII, Section V, Paragraph IV.

[256] Whitus v. Georgia, 385 U.S. 545, 548 (1967).

[257] Ga. Laws 1967, p. 251.

[258] Georgia Department of Education, 1987-88, Georgia Public Schools, Georgia School Board Members and System Superintendents, Methods of Selection 4, 12 (November 1988).

The first challenge to the grand jury appointment of school boards was brought in 1983 by the ACLU on behalf of black voters in Johnson County, the home of Heisman Trophy winner Hershel Walker.[259] The county had a black population of 31%, but no black person had ever been appointed by the grand jury to serve on the board of education. The failure of the grand jury to appoint blacks was not surprising given that the county did not allow blacks to serve on juries until the mid-1960s, and then only within the limits of tokenism and Jim Crow. John Folsom, who worked for a local ice house before it was put out of business by the electric refrigerator, was the first black person to serve on a Johnson County grand jury, but he was made to sit upstairs in the balcony reserved for "colored" spectators. "I just sat up there," Folsom recalls. "I was just a figurehead."[260]

The board of education initially sought to have the suit dismissed, but the court refused. The parties subsequently agreed to replace the grand jury system with district elections, although they disagreed both on the specifics of the election plan and its method of implementation. In November 1984, the district court adopted the plaintiffs' proposed plan and ordered a special election held in

[259] Wilson v. Powell, Civ. No. 383-14 (S.D. Ga.).

[260] Atlanta Constitution, December 30, 1984.

January 1985. At the election, a black candidate was elected from a majority black district, the first African American ever to serve on the board of education.[261]

Two months later, Senator Culver Kidd of Milledgeville called for statewide legislation to abolish the grand jury appointment system. "The courts are going to demand it," he said. "So why not go ahead and get rid of that headache and save the taxpayers a lot of money."[262] It was not until five years later that the general assembly heeded Senator Kidd's advice.

Ben Hill County – Grand Jury Appointment of School Boards

Vereen v. Ben Hill County

A second challenge to the grand jury appointment system was brought in 1988 against Ben Hill, a sparsely populated county on the state's eastern coastal plain, halfway between Albany and Waycross and not far from the spot where Jefferson Davis, President of the Confederacy, was captured by Union troops on May 10, 1865. Although blacks were 30% of the population in Ben Hill County, the grand jury had never appointed a black person to serve on the board of

[261] Id., Order of October 2, 1984.

[262] Atlanta Journal, December 30, 1984.

education. Black residents of the county, represented by the ACLU, filed suit in federal court in 1988 alleging that the grand jury had systematically excluded them from service on the board of education, and that the 1872 grand jury law had been enacted with a racially discriminatory purpose in violation of Section 2 and the Constitution.[263] The plaintiffs asked the court to invalidate the grand jury appointment system in Ben Hill and the other counties in the state that still used it.

Both sides agreed to try the discriminatory purpose claim first, since if plaintiffs prevailed on it the more time consuming inquiry into the effect of the system in each county would have been minimized or avoided. Shortly after the complaint was filed the grand jury in Ben Hill broke with its 166 year old tradition of white only appointments, and put James Wilcox, an African American, on the board of education.

The contemporaneous record of the adoption of the grand jury selection statute made out a strong case that the legislature in 1872 had been motivated by a desire to exclude blacks from service on school boards. Four respected southern historians - Peyton McCrary, Dan Carter, Emory M. Thomas, and Edward J. Larson - who testified in the case agreed that the grand jury system

[263] Vereen v. Ben Hill County, 743 F. Supp. 864 (M.D. Ga. 1988).

had been adopted to ensure that blacks would not serve on local school boards. According to McCrary, one of the witnesses for the plaintiffs, race may not have the been the only motive for the legislature's adoption of the grand jury appointment system, but "that was the clearest motive of which I found evidence. . . . It is the most important motive."[264] Carter, another plaintiffs' witness, said "the evidence supports the belief that the grand jury system was adopted in order to either minimize or totally eliminate black representation on the school boards."[265]

Thomas, who testified on behalf of the defendants, said "race was a factor" in the decision to adopt the grand jury appointment statute, although he believed other factors were present as well and was not prepared to say which was "dominant." Since the chances of blacks serving on juries were slim, giving the grand jury the power to make appointments "further removed education from any chance of black participation, certainly in a supervisory capacity," a result which, according to Thomas, the legislature "intended."[266]

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[264] Vereen v. Ben Hill County, Declaration of Dr. Peyton McCrary, Plaintiffs' Exhibit 63, p. 106.

[265] Id., Deposition of Dan T. Carter, July 24, 1989, p. 33.

[266] Id., Deposition of Emory M. Thomas, July 25, 1989, pp. 8, 10-2, 55.

Larson, another witness for the defendants, generally shared Thomas's views. Based upon "the general activities of that particular legislature, of the timing, of the general context of the situation," he said, the legislature "certainly assumed that they were also consolidating white dominance. I don't think they would have adopted this bill unless they thought that it would also do that."[267]

The district court essentially ignored the testimony of the historians and ruled that the 1872 statute had not been enacted with a discriminatory purpose. Plaintiffs, in the court's view, had not presented "specific," or direct, evidence of racial purpose. While plaintiffs had shown the "discriminatory propensities and practices of the 1872" legislature, they failed to show that the statute "was specifically designed to carry out the discriminatory intentions" of the legislature.[268] Apparently, nothing less than overtly racist statements from legislators could meet the court's exacting standard of proof. But as Carter pointed out, during the Reconstruction period, with the continuing fear of federal intervention,

> the fact that there is an absence of an explicit racial reference to me is exactly what I would have expected, and I would be

[267] Id., Deposition of Edward J. Larson, July 25, 1989, pp. 25, 27, 102.

[268] Id., 743 F. Supp. at 868-89.

> stunned as an historian if such an explicit purpose were stated in January of 1872.[269]

The opinion of the district court was soon overtaken by events. The general assembly, at the request of local officials, enacted a statute in 1990 abolishing the grand jury appointment system in Ben Hill County and adopting a seven member board of education elected from single member districts.[270] And at its 1991 session the legislature took the step that had been urged by Senator Culver Kidd five years earlier. It passed a statute to amend the state constitution in order to abolish the grand jury appointment system statewide and require all local boards of education, both county and city, to be elected by the voters residing in the applicable school districts.[271] The amendment also set December 31, 1993, as the date on which the terms of office of all appointed school board members would end. Georgia voters ratified the amendment in the 1992 general election.[272]

The passage of the local and statewide laws rendered the Ben Hill lawsuit moot. The district court, upon motion of the plaintiffs, "reluctantly" vacated its

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[269] Id., Deposition of Dan T. Carter, p. 36.

[270] Ga. Laws 1990, p. 4435.

[271] Ga. Laws 1991, p. 2032.

[272] Ga. Const. Art. VIII, Sec. 5, Para. 2.

opinion and dismissed the complaint, bringing the litigation and the racially exclusive era of grand jury appointments to a close.[273]

Georgia's Sole Commissioner Form of Government

Georgia is the only state which authorizes counties to use a sole commissioner form of government.[274] Under the sole commissioner system, all the legislative and executive powers of county government, including levying taxes, hiring and firing county employees, filling vacancies in office, supervising the county police, auditing county accounts, building roads and bridges, and controlling county property, etc., are combined in a single office holder elected from the county at-large.[275] The sole commissioner system is the ultimate form of majority-take-all elections. Whatever the theoretical, good government rationales for the system--that it is cost effective, efficient, and so on--it has operated, like so many institutions in the state, to exclude blacks from effective participation in the political and democratic process. There is no record of a black person ever being elected to office under a sole commissioner scheme.

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[273] Vereen v. Ben Hill County, Order of March 10, 1993, slip op. at 1.

[274] 1987 census of Governments, Vol.1, No. 2: Government Organization: Popularly Elected Officials [GC87(1)-2] (1990).

[275] Ga. Code Ann. § 36-5-22.1.

Carroll County, which used the sole commissioner system, was sued under Section 2 by the NAACP and private plaintiffs in 1984.[276] The district court dismissed the complaint but the court of appeals reversed. It found that numerous factors showing vote dilution had been established, including polarized voting and the lack of minority elected officials. Although the county was 17% black, the court found that "no black has ever been elected to any county office in Carroll County."[277] The court also found there was evidence tending to show the sole commissioner system had been enacted with a discriminatory purpose.

The county had adopted the sole commissioner system in 1951.[278] Prior to that time it had a three member commission elected at-large. One of the sponsors of the sole commissioner bill was Rep. Willis Smith of Carroll County. He had first introduced a sole commissioner bill in the general assembly in 1947, and had also been a sponsor the same year of a bill designed to maintain the white primary by allowing the Democratic Party to conduct elections entirely without state supervision. According to Willis, "Georgia is in trouble with the

[276] Carrollton Branch of NAACP v. Stallings, Civ. No. 84-122-6 (N.D. Ga.).

[277] Carrollton Branch of NAACP v. Stallings, 829 F.2d 1547, 1560 (11th Cir. 1987).

[278] Ga. Laws 1951, p. 3310.

Negroes unless this bill is passed. This is white man's country and we must keep it that way." The court of appeals concluded that the statement in 1947 "was evidence of an intent to discriminate against black voters in any voting legislation before the General Assembly during that session, and that a finder of fact might well infer that such intent continued until 1951 when the bill was re-introduced under the same sponsorship."[279] After the case was sent back to the district court for reconsideration, the county agreed to adopt a plan expanding the size of the county government, with six members elected from districts and a chair elected at-large.[280]

Following the decision in the Carroll County case, lawsuits were brought by the ACLU on behalf of black residents challenging the sole commissioner systems in Bleckley, Telfair, Pulaski, and Wheeler Counties.

Bleckley County's Sole Commissioner Form of Government

Holder v. Hall

NAACP of Cochran v. Bleckley County

[279] Carrollton Branch of NAACP, 829 F.2d at 1551-52.

[280] Id., Order of SeptemberSeptember 17, 1988..

The challenge to the sole commissioner form of government in Bleckley County was brought in 1985. The federal trial judge dismissed the complaint because he felt the plaintiffs had not carried their burden of proof, but he acknowledged that blacks, who made up 22% of the county's population of 10,767, had virtually no chance of winning under the existing system.[281] "I wouldn't run if I were black in [Bleckley] County," he said from the bench at the end of the trial. "You're going to put your hard earned time and shoe leather campaigning throughout this county . . . under these circumstances?"[282] The plaintiffs were in agreement. "It'd be a waste of money" for a black person to run for office in Bleckley County, said plaintiff David Walker. "If you know the trend and you know that you're going to lose, there's no sense in trying," added Rev. Wilson C. Roberson, another of the plaintiffs. A black person "hasn't got a chance."[283]

The court of appeals reversed, concluding that "the evidence conclusively establishes a pattern of racially polarized voting," and that "the totality of the circumstances found in Bleckley County clearly reveal a situation where the

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[281] Hall v. Holder, 757 F. Supp. 1560 (M.D. Ga. 1991)

[282] Hall v. Holder, 955 F.2d 1563, 1571 (11th Cir. 1992).

[283] Id., Record Volume 4, p. 332, Volume 3, pp. 104, 110.

electoral power of Bleckley County blacks has been abridged 'on account of race or color.'" The court found, among other things, that:

> *Bleckley County had enforced racial segregation in all aspects of local government
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> *Bleckley County had fought desegregation in all aspects of public life
>
> *Bleckley County had deprived blacks of the opportunity to participate in public life and government, even prohibiting blacks from registering to vote and from voting
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> *The only polling place for the entire county, which comprised 219 square miles, was in Cochran at the Jaycee Barn, owned and operated by the "all-white" Jaycees
>
> *Blacks are unable to sponsor candidates for Bleckley County's sole commissioner office because such candidacies are futile
>
> *A substantial number of Bleckley County's voters were highly susceptible to racist, segregationist appeals . . . [and] voted accordingly.[284]

The county appealed to the Supreme Court which brushed aside the overwhelming evidence of vote dilution and elevated formalism and theory over fact and experience in holding, 5-4, that the size of an elected body could not be challenged under Section 2. Three of the justices in the majority said that it was impossible to establish an objective benchmark or standard for increasing the size of an elected body. None of the counties which abolished their sole

commissioner systems, however, had any difficulty in establishing new sizes for their county governments. The other two justices who made up the majority said that the size of a governing body was not a voting "practice" within the meaning of Section 2.[285]

Two other jurisdiction were also sued in the Bleckley County litigation, Cochran, the county seat, over its use of at-large elections for its city council, and the county board of education, over its use of a malapportioned districting plan. The board of education agreed to implement a new plan and hold an election in a majority black district. The election was held in February 1986, and a black person was elected. The city's case was also settled on the basis of district seats. The first election under the plan was held in December 1986, and a black person was elected to the city council.

The ACLU also brought suit in 1988 against Bleckley County on behalf of black residents and the local NAACP of Cochran/Bleckley County, charging that discrimination in the selection and appointment of poll managers and poll workers in county elections violated the Constitution and Section 2.[286] In

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[284] 995 F.2d at 1566, 1572-74.

[285] Holder v. Hall, 512 U.S. 874, 885, 890, 892 (1994).

[286] NAACP Chapter of Cochran/Bleckley County v. Bleckley County, Civ. No. 88-32-2-MAC (M.D. Ga.)

elections from 1978 through 1986, defendants made 224 appointments to the position of poll manager for Bleckley County elections, yet none of the persons appointed was black, and no black person had ever been appointed to or served as a poll manager. During the same period, defendants made 509 appointments to the position of poll worker, of which only 29 (6%) were black persons, compared to the black population of the county, which was approximately 22%. Plaintiffs sought a declaratory judgment and injunctive relief, but the court declined to rule on any of the issues pending resolution of Hall v. Holder, which was not decided by the Supreme Court until 1994. However, even after the Supreme Court's decision in that case, the court did not rule on the issues before it in NAACP v. Bleckley County.

Telfair County's Sole Commissioner Form of Government

Clark v. Telfair County

The plaintiffs filed suit in the Telfair County case in 1987, prior to the decision of the Supreme Court in Holder v. Hall, contending that the sole commissioner system diluted black voting strength.[287] Although blacks were about one third of the county's population, no black person had ever been elected to the commission. The sole commissioner decided not to contest the allegations of the complaint and agreed to adopt a new form of government consisting of a board of commissioners elected from districts. Two white residents, however, who opposed such a remedy, moved to intervene in the law suit, claiming that the plaintiffs had instituted "[a] campaign to terrorize and intimidate the taxpayers of Telfair County." They raised some 21 defenses to the complaint, including that the suit was barred by the Eleventh Amendment, that "Blacks have not been discriminated against in Telfair County," plaintiffs lacked standing, and the action was "barred by the doctrines of sovereign governmental, judicial, official, and good faith immunity."[288] The district court denied intervention noting that the movants' petition "shows disturbing substantive

[287] Clark v. Telfair County, Civ. No. 287-25 (S.D. Ga.).

[288] Id., Proposed Answer of Intervenors Fred A Smith and Joe Tom Jeffries

defects. Essentially it consists of a litany of defenses which the movants believe should be asserted against the plaintiffs. I have examined these defenses. Most of them are ethereal at best, and spurious at worst."[289] The parties agreed that plaintiffs had established "a prima facie case" that the sole commissioner form of government violated Section 2, and the court subsequently issued an order in October 1988, implementing an agreed upon plan providing for a board of commissioners elected from five single member districts, one of which was majority black.[290]

Pulaski County's Sole Commissioner Form of Government

Sutton v. Anderson

The suit against Pulaski County was filed in 1989, but was stayed pending a final decision in the Bleckley County case. The complaint was dismissed after the Supreme Court ruled that Section 2 could not be used to challenge the size of an elected body.[291]

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[289] Id., Order of December 9, 1987.

[290] Id., Order of October 26, 1988.

[291] Sutton v. Anderson, Civ. No. 89-58-1 (M.D. Ga.).

Wheeler County's Sole Commissioner Form of Government

Howard v. Commissioner of Wheeler County

Wheeler County adopted its sole commissioner form of government in 1924 to replace a three member board of commissioners elected from single member districts. As of 1990, no African American had ever been elected to the office of sole commissioner or any other county office elected at-large. The only black office holder in the county was elected to the school board from a majority black district.

Plaintiffs filed suit in 1990, prior to the decision in Holder v. Hall, and contended the sole commissioner system was established with a racially discriminatory purpose and excluded blacks from effective participation in local politics in violation of Section 2. After discovery by plaintiffs, the parties agreed to enjoin the pending 1992 election and settle the lawsuit by adopting a three member commission with one majority black district. The plan was ordered into effect and at a special election in May 1993, the first African American commissioner in the history of the county was elected to office.[292]

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[292] Howard v. Commissioner of Wheeler County, Civ. No. 390-057 (S.D. Ga. January 13, 1993). A similar challenge was brought, and settled, in Webster County, Nealy v. Webster County, Civ. No. 88-203 (M.D. Ga. March 16, 1990), while the state legislature abolished sole commissioner systems in Cherokee County in 1989, Dade, Heard, and Franklin Counties in 1991, and Catoosa and Murray Counties in 1992. Ga. Laws 1989, p. 4295; Ga. Laws 1991, pp. 3893, 3976, 4681; Ga. Laws 1992, pp. 4501, 4649.

Less than a dozen counties in Georgia still use the sole commissioner form of government,[293] and in none of them has a black person ever been elected commissioner.

Georgia's Majority Vote Law

Brooks v. Miller

Prior to adoption of Georgia's majority vote requirement in 1964, elections to statewide offices were conducted under the infamous county unit system, a non-majoritarian scheme which was established by the general assembly in 1917 and gave control to the rural counties containing a minority of the population while diluting the voting strength of urban and black voters in the metropolitan areas of the state. County elections were local option, with most counties using a simple plurality system.

The county unit system was struck down by the Supreme Court in 1963 in Gray v. Sanders, which first used the phrase "one person, one vote."[294] A statewide majority vote bill was introduced in the house the same year. Its chief sponsor, Denmark Groover, was widely quoted in the press as saying that the

[293] Holder, 512 U.S. at 877.

[294] 372 U.S. 368, 381 (1963).

measure was needed to "restore the protection" that had been lost with the demise of the county unit system, and to thwart election control by blacks and other minorities.[295] Groover later appeared before a senate committee and warned that the federal government "intercedes to increase the registration of Negro voters," and that a majority vote rule would prevent the election by plurality vote of a candidate supported by a "bloc" vote group – meaning blacks.[296] The majority vote provision was passed in 1964 as part of a general revision of the election code, which also included a discriminatory literacy requirement for voter registration and a discriminatory "good character and understanding" test as an alternative to literacy.[297]

Leroy Johnson, the first black elected to the Georgia legislature since Reconstruction and a member of the state senate at the time, said that:

> many white members of the General Assembly favored adoption of a statewide majority vote requirement as a method of diluting minority voting strength. . . . The General Assembly would not have passed a statewide majority vote requirement, either as a house bill in 1963 or as part of the 1964 election code, unless the more conservative members

[295] McDonald (2003), p. 92.

[296] Id. at 94.

[297] Id. at 102.

> were convinced that the runoff system would help maintain white control over local and state government.[298]

The majority vote requirement had the discriminatory effect its proponents foresaw and intended. In one of the first elections held under the new system, Sam Williams, a black Savannah business man, won a plurality against four whites in the 1964 primary for sheriff of Chatham County, outdistancing his nearest opponent by some 400 votes. In the ensuing runoff, the white voters regrouped and defeated Williams two to one.[299] Aside from discouraging blacks from seeking office, especially statewide office and offices in majority white districts, the net loss to blacks from 1970-1995 caused by the majority vote requirement was 27 nominations or elections to office.[300]

In 1990, Tyrone Brooks, a veteran member of the Georgia House of Representatives and other black residents of the state, represented by the ACLU, filed suit challenging Georgia's statewide majority vote requirement.[301] The Brooks plaintiffs made three claims: the majority vote law was enacted with a discriminatory purpose; it discouraged blacks from running for office,

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[298] Brooks v. Harris, Civ. No. 90-CV-1001 (N.D. Ga.), Pl.Ex. 306, pp. 7-8.

[299] Savannah Morning News, September 24, 1964.

[300] Brooks v. Miller, 158 F.3d 1230, 1235 (11th Cir. 1998).

[301] Brooks v. Harris, 90-CV-1001 (N.D. Ga.).

particularly in majority white jurisdictions; and it resulted in discrimination in violation of Section 2 of the Voting Rights Act. The district court, however, ruled that the majority vote requirement did not violate the Constitution or the Voting Rights Act, and the court of appeals affirmed.[302] In ruling that the requirement had not been enacted with a discriminatory purpose, the court ignored the testimony of two historians who testified on behalf of the plaintiffs. Morgan Kousser, a professor at the California Institute of Technology, said that "[e]very factor that should be considered in a voting rights intent case points, in this instance, to the same conclusion [of purposeful discrimination], and every factor counts heavily against the alternative hypotheses."[303] Steve Lawson, a history professor at the University of North Carolina, reached the same conclusion, "that race played an integral part in determining the legislative outcome."[304]

The court of appeals further held that the discriminatory results standard of Section 2 could not be used to challenge a majority vote law because there was no "adequate remedy" for a violation. The court reasoned that a plurality system could result "in a candidate's wining with 1% of the vote," which "would

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[302] Id., 158 F.3d at 1236, 1241.

[303] Id., Pl. Ex. 102, pp. 27, 32.

[304] Id. Pl. Ex. 300, p. 60.

seriously undermine the legitimacy of the government."[305] Such a hypothesis is based more on fancy than on fact. There would have to be a minimum of 101 candidates in an election for any person to win with just 1% of the vote, and such elections simply don't exist in Georgia. Moreover, the Georgia legislature was to prove the court wrong; there was an "adequate" alternative to the majority vote requirement.

The state had defended the 1964 law by claiming that without a majority vote requirement "stalking horse" candidates could manipulate the electoral process by splitting the vote and allowing entrenched, corrupt incumbents who lacked majority support to stay in office. Roy Barnes, a member of the house who was later elected governor, said a majority vote requirement was "essential" and "there is nothing more American than to have a majority vote requirement."[306] But in 1994, the Democrat controlled legislature brushed aside the good government arguments it had advanced in support of the majority vote requirement and repealed the law in favor of a 45% plurality vote for general elections, except those for certain constitutional offices. Four years later, the

[305] Id., 158 F.3d at 1240.

[306] McDonald (2003), p. 208.

legislature abolished the majority vote requirement for state constitutional offices as well.

The catalyst for repeal was the defeat of Wyche Fowler, the white Democratic incumbent, by a Republican in the 1992 general election for the U.S. Senate. In a three-way contest, Fowler won a plurality of the votes but was defeated in the ensuing runoff. Thomas Chambless, a house Democrat, explained that it was the majority vote requirement itself - not the plurality rule as had previously been claimed - that allowed so-called stalking horse or fringe candidates to manipulate the electoral process. The people of Georgia were poorly served, he said, "by having a run off election . . . because of the existence of some fringe or very small party candidate such as occurred in 1992."[307]

If any real principle emerges from the state's adoption and subsequent rejection of a majority vote requirement, it is that the party or faction in power can generally be counted on to adopt rules for elections it thinks will promote its own interests, regardless of the discriminatory impact of such rules on minority voters. The Brooks litigation and its aftermath underscore the need for fair and effectively enforced voting rights laws.

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[307] Id., Pl. Ex. 320, p. 1115.

Challenging Restrictive Voter Registration Procedures

Voter Education Project v. Cleland

Georgia traditionally had extremely restrictive registration procedures. Citizens could only be registered to vote in county, state, and national elections by county registrars and deputy registrars. Registration could only be conducted by personal appearance, either at the main office of the board of registrars, or at additional places and times designated by the board of registrars. Additional registration places and hours of operation had to be advertised in a newspaper of general circulation in the county at least seven days prior to the first day for registration. State law placed nearly total discretion in the hands of local officials whether to appoint deputy registrars and permit voter registration at places other than the main voter registration office.

In September 1984, the ACLU sued state officials on behalf of the Voter Education Project, the Georgia State Chapter of Operation PUSH, the NAACP, a class of 1.2 million eligible yet unregistered voters in Georgia, and a class of 450,000 eligible but unregistered black voters in the state.[308] Several registrar boards had failed to appoint enough, or any, deputy registrars. Several counties had imposed dual registration requirements, which required each eligible citizen

[308] Voter Education Project v. Cleland, C84:1181A (N.D. Ga.).

to register with the county registrar and also with the municipality's registrar in order to vote in national, state, and county elections as well municipal elections. Furthermore, many of the county and city boards refused to act favorably on applications from civil rights groups, such as the NAACP, to appoint their members as deputy registrars. Other boards designated satellite registration locations that were inconvenient to black citizens and refused to permit registration at convenient locations such as churches, public housing facilities, and NAACP offices.

Plaintiffs contended state law was vague, gave local registrars uncontrolled discretion in the registration process, and resulted in proportionately fewer blacks than whites being registered to vote. Plaintiffs said the state had a duty to remedy the continuing effects of past discrimination and facilitate minority voter registration. Appropriate remedies included allowing deputized volunteers to register voters door to door, and permitting mail-in and election day registration.

The district court denied the plaintiffs' request for a preliminary injunction after the secretary of state issued emergency regulations requiring each county registrar to designate at least two additional registrars. The case was finally dismissed in January 1987, pursuant to a settlement agreement in which the

defendants agreed to expand voter registration opportunities throughout the state.

Charles H. Wesley Education Foundation, Inc. v. Cox

When the Voting Rights Act of 1965 was adopted, organizations could conduct voter registration drives, but only if their volunteers underwent training to become deputy registrars, or members of the county registrar's staff were available to work at the drives. Drives were also authorized to be held only on specific dates, usually for two or three days, and at fixed locations. Door to door registration drives were prohibited. In the early 1970s, some Georgia counties began designating "satellite" registration sites, which were usually banks or schools where an employee who had gone through training could accept registration applications.[309]

These restrictions changed dramatically with the adoption of the National Voter Registration Act of 1993 (NVRA). That act, with its requirement that states accept mail in registration and offer registration at motor vehicle offices and various state agencies, ended Georgia's rigid control of access to voter

[309] For a discussion of the restrictions placed on registration drives by groups such as the League of Women Voters and the NAACP, see NAACP v. State of Georgia, 494 F. Supp. 668 (N.D. Ga. 1980)(three-judge court), which enjoined under Section 5 a decision to terminate all registration drives by civic organizations.

registration. The NVRA specifically required state election officials to make mail in forms readily available to "private entities, with particular emphasis on making them available for organized voter registration programs."[310] Despite these provisions of the law, Georgia immediately took steps to limit voter registration drives.

The director of the elections division of the secretary of state's office instructed all chief registrars that persons filling out mail in registration applications had to mail or deliver the forms themselves. Organizations conducting registration drives were prohibited, according to the director, from returning the forms for the applicants, for example, by "bundling" them into one envelope or box and then delivering or mailing them to the secretary of state's or a registrar's office.[311] Citing a Georgia statute that said "a person may apply to register to vote by completing and mailing the form to the Secretary of State," the director concluded that "[t]here is no authority for someone else to return the form for a person."[312] The director also said the applications contained confidential information that could not be disclosed to those who were not

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[310] 42 U.S.C. § 1973gg-4(b).

[311] Memorandum from H. Jeff Lanier, Director, Election Division to "All Chief Registrars," May 12, 1995.

[312] O.C.G.A. § 21-2-223; Lanier Memorandum (1995) p. 2.

elections officials. Simple logic would dictate, however, that applicants should be free to mail their own applications, or give them to someone else to mail.

In 2004, the Charles H. Wesley Education Foundation, a predominantly black chapter of a social service fraternity, decided to conduct a voter registration drive. Its members explored the options under state law of undergoing training to become volunteer deputy registrars, which would have allowed them to handle applications and deliver them to the secretary of state. But after learning of the restrictions imposed by state law, including limiting the time and place of a registration drive and requiring advertising in the media, they elected to use the NVRA national registration forms and conduct a drive at a major shopping center. The volunteers retained the completed applications and mailed them in one package to the secretary of state's office. The secretary informed the fraternity's lawyer that it was rejecting the forms because no registrar or deputy registrar was at the drive. In the view of the state, the handling and mailing of the forms after they were filled out violated state law. The state said it was mailing a new form to each applicant, though the registration cutoff for a statewide primary was only three days away.

The state's position not only denied people the right to vote, but was nonsensical. If the fraternity members had mailed the applications one at a time

in separate envelopes, there would have been no indication the state's policy had been ignored.

The fraternity and several of the people who had filled out applications sued to enjoin the state's policy of rejecting applications submitted in bulk.[313] Plaintiffs relied on the NVRA, which provides that states "shall accept" mail in forms.

The court held that it did not matter how an application got delivered, only that it made it to the election officials. The court entered a preliminary injunction requiring that qualified voters who sought to apply through the registration drive be eligible to vote, and made the relief effective in time for the upcoming primary. The state processed the applications and those qualified were allowed to vote in the primary and during the pendency of the litigation. But the state appealed the granting of the preliminary injunction.

The ACLU filed an amicus brief in the court of appeals supporting the plaintiffs. It argued the state's policy violated both the specific language of the NVRA and Supreme Court decisions, which require that severe restrictions on the right to vote be justified by strong state interests. Here, the burden was severe - timely registration applications were rejected, and the state's interests in

[313] Charles H. Wesley Education Foundation, Inc. v. Cathy Cox, 324 F. Supp. 2d 1358 (N.D. Ga. 2004).

protecting the privacy of voters and against voter fraud were not advanced by its rejection policy. The reality was the policy was a radical limitation on the NVRA.

The court of appeals affirmed the grant of the preliminary injunction: "[t]he NVRA protects Plaintiffs' rights to conduct registration drives and submit voter registration forms by mail, and Defendants' denial of the sixty-four forms here was a clear violation of that interest."[314] It concluded:

> The associational and franchise-related rights asserted by the Plaintiffs were threatened with significant, irreparable harm, and the injunction's cautious protection of the Plaintiffs' franchise-related rights is without question in the public interest.[315]

State election officials have drafted interim regulations to implement the preliminary injunction, registration drives by private citizens are currently conducted, and applications accepted no matter the mode of delivery. But the state continues to contest the merits of the lawsuit in the district court.

Project VOTE! v. Ledbetter

Project VOTE!, a non-profit, non-partisan organization that conducts voter registration of the poor and unemployed, including recipients of public

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[314] Charles H. Wesley Education Foundation, Inc. v. Cathy Cox, 408 F.3d 1349, 1354 (11th Cir. 2005).

[315] Id. at 1355.

assistance, held registration drives at several food stamp distribution centers in Fulton County, Georgia, prior to the 1986 primary election. Just two years earlier, during the 1984 general election, 74% of eligible whites, but only 64% of eligible blacks were registered to vote in Georgia.

After registering more than 400 persons at a single Department of Family and Children Services (DFACS) office in Atlanta during a one week period before the primary elections, Project VOTE! sought permission to continue its activities elsewhere in Fulton County and other locations around the state prior to the general election. Although the DFACS managers uniformly had no objections, state officials informed Project VOTE! in August that it would no longer be permitted to conduct voter registration at DFACS offices.

The ACLU filed suit the following month on behalf of Project VOTE! alleging that because the new policy constituted a change in voting standards, practices or procedures, it required preclearance under Section 5.[316] The lawsuit also charged the state with violating the plaintiffs' First and Fourteenth Amendment rights, and asserted that the state's decision discriminated against blacks in violation of Section 2. Within a week of filing the lawsuit, the state agreed on September 12, 1986, to allow Project VOTE! to conduct non-partisan

[316] Project VOTE! v. Ledbetter, CV-C86-1946A (N.D. Ga.).

voter registration activities in the public waiting areas of DFACS offices as it had requested.

Georgia Judicial Elections

Brooks v. Georgia State Board of Elections

Georgia desegregated its juries in response to a series of Supreme Court decisions setting aside convictions on the grounds that blacks had been unconstitutionally excluded from grand and trial juries.[317] The state also desegregated its prisons and jails in the wake of Lee v. Washington, a case brought by the ACLU that resulted in a Supreme Court decision that racial segregation in penal facilities in Alabama was unconstitutional.[318] Despite these reforms, there was one instrumentality of justice that remained essentially segregated well into the 1980s: the state's judiciary. This was true for several reasons. Traditionally, none of the state's public or private law schools would admit blacks, and as a result there were very few black lawyers, most of whom practiced in the metropolitan Atlanta area. Elections were also held at-large in all the judicial circuits, with numbered post and majority vote requirements,

[317] E.g., Whitus v. Georgia, 385 U.S. 545 (1967).

[318] Lee v. Washington, 390 U.S. 333 (1968).

which allowed the white majority to control the outcome. In addition, three-quarters of the judges were first appointed to office by the governor and ran for reelection with the advantage of incumbency. Incumbent judges were generally unopposed and rarely defeated.

Georgia is divided into 45 judicial circuits, each containing between one and eight counties, and electing between one and 14 superior court judges. All of the circuits had a majority white voting age population, and as of 1988, only 6 of the 137 judges were black. From 1964 to 1988, the state created more than 77 new judgeships and five new judicial circuits, but it failed to submit any of the new voting practices for preclearance under Section 5 until June 1988.

The ACLU, representing black elected officials and community leaders from across the state, filed suit on July 13, 1988 (the Brooks case), challenging: (1) the at-large method of electing superior court judges, with majority vote and numbered post requirements, as diluting minority voting strength under Section 2; (2) the continuing failure of the state fully to comply with Section 5 in creating new superior court judgeships and circuits; and (3) the countywide method of electing judges of the state court.[319] Plaintiffs determined that under a single

[319]Brooks v. State Board of Elections, Civ. No. CV 288-146 (S.D. Ga.).

member district system of elections for the superior courts, a minimum of 25 majority black districts could be created.

The Attorney General notified the state in August 1988, that he did not object to 29 of the new judgeships and three of the five new circuits, which were primarily located in the mountain areas of the state in which there was no substantial black population. As to the remaining changes he requested additional information, including election returns, and the racial designation of registered voters. The state submitted some additional information, but refused to comply with the Attorney General's request, taking the position that the changes were not in fact subject to Section 5. Accordingly, the Attorney General notified the state in June 1989, that he objected to the addition of the 48 judgeships and the creation of two new circuits to which he had earlier requested information.[320] Despite the objection, the state continued to implement the objected-to changes.

Plaintiffs filed a motion to enjoin further enforcement of the disputed statutes, and requested the three-judge court to declare the unprecleared judgeships null and void. The district court, after briefing (joined in by the United States, as amicus curiae in support of plaintiffs) and oral argument, held

[320] James P. Turner, Assistant Attorney General, to Carol Atha Cosgrove, June 16, 1989.

that the changes affecting the election of judges were subject to Section 5.[321] It gave the state 30 days to submit the additional information to the Justice Department. If it did not do so, or if preclearance were not obtained, the order provided that the judgeships would cease to exist at the conclusion of the incumbents' terms of office.

The state provided the requested information to the Attorney General, who on April 25, 1990, entered an objection to the 48 unprecleared judgeships, as well as an additional 10 judgeships created in 1989 and 1990. He concluded that "polarized voting generally prevails in all of the superior court circuits now under review and there is a consistent lack of minority electoral success in at-large elections." The Attorney General further noted there was substantial evidence indicating the majority vote requirement was adopted by the state in 1964 with an "invidious purpose."[322]

The state appealed the order of the three-judge court, and the Supreme Court affirmed, thus establishing that the addition of elected judgeships was a covered change under Section 5 of the Voting Rights Act.[323] The state also filed

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[321] Brooks v. State Board of Elections, 775 F. Supp. 1470 (S.D. Ga. 1989).

[322] John R. Dunne, Assistant Attorney General, to Michael J. Bowers, April 25, 1990.

[323] Georgia State Board of Elections v. Brooks, 498 U.S. 916 (1990).

an action in the District Court for the District of Columbia seeking judicial preclearance of the changes that had been objected to by the Attorney General. The Brooks plaintiffs filed a motion for leave to intervene as parties defendant opposing preclearance, but the court granted them leave to participate only as amicus.

In October 1991, the Attorney General objected to another state law creating an additional state court judgeship in Athens-Clarke County because he was "unable to conclude that this election method was free of discriminatory purpose (with respect to the use of the majority vote requirement), and because the election system appeared to deny black voters an equal opportunity [to elect candidates of their choice]". He further noted that "local elections are characterized by racially polarized voting."[324]

As the Section 5 case was proceeding in the District of Columbia, Anthony Alaimo, a federal district court judge in Brunswick, offered to act as a mediator to try to work out a settlement agreement in the vote dilution case filed by the Brooks plaintiffs. He convened a series of negotiating sessions, which resulted in a proposed settlement in June 1992. The settlement was publicly hailed as an historic achievement by Governor Zell Miller, who had announced earlier that

[324] John R. Dunne, Assistant Attorney General, to Denny C. Galis, October 1, 1991.

resolving the litigation over the selection of judges was a priority of his administration.

Under the settlement, the state agreed to increase the number of African American superior court judges from the existing nine to not less than 25 by December 31, 1994, and an additional five new black superior or state court judges, bringing the total number of African American judges to a minimum of 26. The state would achieve those goals by filling judicial seats "frozen" under the existing court injunction, as well as by creating new "State Assignment Judges" who would serve throughout the state.

The black community would have substantial input in the selection of judges by having one of the plaintiffs and plaintiffs' counsel as sitting members of a Judicial Nominating Commission. The governor would appoint judges from the lists supplied by the commission.

All judicial elections would be held under a "retention" election system, thereby increasing the likelihood that the newly appointed black judges would be re-elected. In the event black judges lost their elections, the commission would nominate replacements.

The state would be permanently barred from discriminating on the basis of race in nominations or appointments and would remain subject to the jurisdiction of the court until such time as it achieved a "racially diverse judiciary

which is reasonably representative of the population of the state." Judge Alaimo would serve as arbitrator of disputes concerning enforcement of the agreement. In the event of backsliding by the state, plaintiffs would be able to renew their challenge to the system of judicial selection under the Voting Rights Act. The settlement was conditioned upon preclearance by the Department of Justice and/or judicial preclearance in the case in the District of Columbia.

A group of white legislators and citizens promptly filed an action in state court challenging the governor's authority to change, by way of a settlement, the method of electing judges. The superior court held that the governor had the power to enter into the settlement and dismissed the action, but the state supreme court on appeal ruled the action was not timely because the settlement agreement had not been finalized.[325] The Department of Justice gave approval to the settlement, and it was then submitted for approval to the district court in Savannah.

A fairness hearing was held in January 1994, at which the plaintiffs offered substantial evidence of racial bloc voting and past discrimination in education and admission to the bar. The court, however, rejected the settlement agreement. It held that in the absence of a violation of Section 2 of the Voting Rights Act, the

[325] Cheeks v. Miller, 262 Ga. 687 (1993).

court was without authority to accept a consent agreement changing the provisions of state law providing for the election of judges. The court also said the consent agreement was an unlawful "quota" system in violation of the Fourteenth Amendment.[326] Plaintiffs appealed, based on the assurances of the state defendants that they would continue to support the proposed settlement agreement. However, on appeal the state changed its position and argued that the case was now moot since some of the deadlines for implementing the agreement had passed, and that the district court did not abuse its discretion in rejecting the settlement. The court of appeals adopted the state's position and dismissed the appeal as moot in July 1995.[327]

After the rejection of the settlement agreement, a trial was held in the District of Columbia court, which in a 2-1 decision precleared the state's voting changes.[328] The majority held that the decision to add new judges was based upon case load and was therefore nondiscriminatory, and it refused to consider whether the method of electing the judges had a discriminatory effect. The Department of Justice refused to appeal, whereupon the Brooks plaintiffs

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[326] Brooks v. State Board of Elections, 848 F. Supp. 1548, 1574 (S.D.Ga. 1994).

[327] Brooks v. State Board of Elections, 59 F.3d 1114 (11th Cir. 1995).

[328] Georgia v. Reno, 881 F. Supp. 7 (D.D.C. 1995).

renewed their motion to intervene for purposes of appealing. The district court denied the motion, and the Supreme Court affirmed in December 1995.[329]

Plaintiffs' Section 2 vote dilution claim remained pending in the Brooks litigation, but the court of appeals had ruled in a series of cases that the method of electing judges could not be challenged under the statute.[330] Plaintiffs had little choice but to dismiss their Section 2 claim.

The litigation over the method of electing Georgia's judges spanned nearly seven years. The plaintiffs prevailed on their claim that state laws affecting the election of state judges were subject to preclearance under Section 5, but not their claim that at-large judicial elections diluted minority voting strength. The litigation, did, however, subject the method of electing judges to close scrutiny by the federal and state courts, the Department of Justice, state elected officials, and the general public. That scrutiny was no doubt instrumental in the subsequent appointment of blacks to the superior courts, as well as to the state court of appeals and supreme court.

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[329] Brooks v. Georgia, 516 U.S. 1021 (1995).

[330] E.g., SCLC of Alabama v. Sessions, 56 F.3d 1281, 1297 (11th Cir. 1995)(the state's interests in the at-large election of judges "outweigh whatever possible vote dilution may have been shown in this case").

Georgia Soil and Water Conservation Districts

Evans v. Bennett

In 1937, Georgia created a state commission on soil and water conservation as part of the national response to the Great Depression and the related soil erosion and crop failures which wiped out thousands of farms and left innumerable farmers and farm workers without work or homes. The Georgia commission was designed to work with the U.S. Department of Agriculture and other governmental agencies.

The state commission is an appointed body, but Georgia also created local conservation districts. There are now 40 such districts, each created as a special district at the request of landowners, with approval by referendum in which all electors in the covered area can vote. Each local district has two supervisors appointed by the state commission and at least three supervisors elected by plurality vote of the electors living in the local district. Statewide there are 195 supervisors elected in the 40 districts. The districts perform various functions concerning land use regulations, soil erosion, and research.

In 1984, the legislature enacted legislation, which was precleared under Section 5, exempting local supervisor elections from the state election code. The state commission subsequently issued election rules and instructions on holding

elections, but failed to submit these or any subsequent changes governing the elections for preclearance.

For a variety of reasons, elections for local supervisors were extremely low profile, with very little voter participation. The elections were not held at predetermined times, nor in conjunction with other elections. Terms expired depending on the time of year the district was created. Election dates were in part based on when terms were to expire and in part on when an incumbent qualified to run again. According to commission rules, when an incumbent's term was due to expire, he or she was given notice. The incumbent could get on the ballot by filing a petition signed by 25 registered voters. Once the incumbent filed a petition, the election date was set "about 6 weeks away." The rules were silent about how an election was to be scheduled when an incumbent did not seek re-election. Petitions by other candidates could be filed up to two weeks before the election. Notice to the public that a seat was to be filled by election, and notice of the election date, were given by a legal advertisement. But the elections received virtually no publicity, and were held in a single polling place, usually the county courthouse in each county covered by the district.

The combined effect of these election procedures was that participation was minuscule. Often less than 100 voters participated in an election, even in populous counties. A modest exception was the 2000 election in DeKalb County,

where an environmental group ran an e-mail campaign urging its members to support two candidates. Those two candidates got 1,538 and 1,523 votes, while the other three candidates received, 93, 58, and 38 votes.

In 2004, two plaintiffs, represented by the ACLU, filed suit against the state commission for failure to submit its voting procedures for preclearance under Section 5.[331] In support of their claim, plaintiffs analyzed the 2000 DeKalb County soil and water supervisor election. The analysis showed that the 1,613 voters who participated were only 0.6% of the 282,193 registered voters in the county, and though just over 50% of the registered voters listed their race as African American, only 9.3% of the voters in the election were African American.

Upon the filing of the lawsuit, the state soil and water commission cancelled all local district elections throughout Georgia pending compliance with Section 5. By agreement of the parties, the court closed the case administratively until the Section 5 process could be completed.

The state commission adopted revised election procedures, taking into account the suggestions and comments of plaintiffs. The procedures provide for future elections to be held in conjunction with regularly scheduled state and municipal elections, which will effectively provide more public notice of the

[331] Evans v. Bennett, No. 1:04-CV-2641-BBM (N.D. Ga.).

elections. The elections are to follow the state election code to the extent practicable, e.g., all precincts will normally be opened and absentee voting will be permitted. The requirement of nomination by petition signed by 25 voters was retained, which was favored by plaintiffs as an inexpensive requirement any serious candidate should be able to meet.

The state commission submitted the new election procedures to the Attorney General for preclearance on October 31, 2005. Plaintiffs supported the request for preclearance, which was granted on December 21, 2005.

Protecting Voter Privacy

Schwier v. Cox

The Privacy Act of 1974 makes it unlawful, with some exceptions, for "any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number."[332] The act protects individuals from disclosing their social security numbers (SSNs) when registering to vote, unless the state required such disclosure prior to passage of the act.

Deborah and Theodore Schwier learned about the Privacy Act as

[332] P.L. 93-579, Sec. 7(a)(1), 88 Stat. 1896.

Gwinnett County parents. The Gwinnett County school system required parents to disclose the SSNs numbers of their children when they enrolled them in the public schools. The requirement was dropped after parents asserted their rights under the Privacy Act.

When the Schwiers moved to Walton County in 1999 and tried to register to vote, they were told they had to disclose their SSNs. After they declined to do so, in reliance upon the Privacy Act, their applications were rejected.

Before the 2000 general election the ACLU filed suit for the Schwiers under the Privacy Act and the Civil Rights Act of 1964, which makes it illegal to deny anyone the right to register and vote for any act or omission not "material" in determining qualifications to vote.[333] The civil rights law had been enacted to prevent registration officials from denying blacks the right to vote for immaterial errors or omissions on their registration forms. The suit sought to require election officials to allow the Schwiers to register and vote without disclosing their SSNs.

On plaintiffs' motion for a preliminary injunction, the court ordered that the Schwiers be allowed to vote if they tendered their SSNs to election officials, and under seal to the court, but their SSNs were not to be permanently entered

[333] Schwier v. Cox, Civ. No. 1:00-CV-2820-JEC (N.D. Ga.).

into the election records and would be destroyed if they ultimately prevailed.

Much of the dispute in the litigation turned on whether Georgia's voter registration law qualified for the "grandfather" exemption in the Privacy Act and whether the state required disclosure of SSNs prior to January 1, 1975. As of that date, the state's voter registration form had a blank for the SSN followed by, "if known at the time of application." Plaintiffs' contended that disclosure of a SSN was not required, and that the state's registration system was not exempt from the Privacy Act. Additionally, when defendants surveyed the 159 counties in Georgia, they found only 24 interpreted SSN disclosure as mandatory.

The district court ruled for the state, holding that neither the Privacy Act nor the Civil Rights Act of 1964 provided private citizens the right to sue.[334] Plaintiffs' appealed, and the state argued that the Privacy Act's regulation of state elections was unconstitutional and exceeded Congressional authority. The United States intervened as of right to defend the constitutionality of the act, and also argued that Congress intended to allow private suits against states for failure to comply with the act.

The court of appeals reversed and remanded, holding that both the

[334] Id., Order of May 14, 2002.

Privacy Act and the Civil Rights Act provided a private right of action.[335] The court's opinion was significant because other courts had rejected private suits under both statutes.

On remand, the district court ruled in favor of the plaintiffs.[336] The court concluded that Georgia's voter registration system did not qualify under the Privacy Act's grandfather clause because the plain language of the state statute did not uniformly require disclosure of one's SSN for voter registration as of December 31, 1974. The court also held that this interpretation was bolstered by the evidence of how the statute was implemented. The court further held that the state, in denying persons the right to vote for failing to provide their SSNs, violated S the Civil Rights Act of 1964 because the disclosure of an applicant's SSN was not "material" in determining whether he or she was qualified under state law to vote. The state's appeal from this decision on the merits is currently pending.

[335] Schwier v. Cox, 340 F.3d 1284 (11th Cir. 2003).

[336] Id., Order of January 31, 2005.

Challenging Photo Identification Requirements for Voting

Common Cause v. Billups

Prior to 1998, voters in Georgia were not required to present any identification when voting in person at the polls. In 1997, the General Assembly adopted legislation requiring voters to present one of 17 forms of identification on election day. However, if a registered voter did not have any ID, s/he could vote simply by signing a statement under oath affirming that s/he was the person whose name was on the voters list.

In 2005, and despite the public statements of the secretary of state that there had been no evidence of in person voter fraud in Georgia during her nine years in office, the general assembly adopted Act 53, reducing the forms of voter ID from 17 to 6, and requiring all voters who vote in person after July 1, 2005, to present a government issued photo ID. Additionally, voters would no longer be allowed to vote by affirming their identity under oath. The general assembly also doubled the minimum fee for a photo ID from $10 to $20. The photo ID bill was adopted in a highly charged, racially polarized atmosphere. Only 1 of 43 African American legislators in the general assembly voted in favor of the bill.

Despite numerous comment letters from legal scholars, citizen advocacy groups, and civil rights organizations, including the NAACP Legal Defense and Educational Fund, the ACLU, and dozens of others, urging opposition to the

law, the Department of Justice precleared the photo ID bill on August 26, 2005. According to news reports, preclearance was granted over the objections of four of five Justice Department officials who, in an August 25 staff memo to their superiors, said the state had provided flawed and incomplete data, and they found significant evidence that Georgia's voting plan would be "retrogressive."[337] The staff memo also cited comments made by State Representative Susan Burmeister, one of the sponsors of Act 53, who disparaged black voters by saying "if there are fewer black voters because of this bill it will only be because there is less opportunity for fraud. [Burmeister] said that when black voters in her black precincts are not paid to vote, they do not go to the polls."[338]

Passage of Act 53 gave Georgia the most draconian voter identification requirements in the nation. A majority of 30 states do not require registered voters to present any form of identification as a condition for voting, while a minority of 20 states require voters to present some form of ID. Of these 20 states, only two (Georgia and Indiana, where a legal challenge is pending[339])

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[337] Dan Eggen, "Criticism of Voting Law Was Overruled. Justice Dept. Backed Georgia Measure Despite Fears of Discrimination," Washington Post, November 17, 2005.

[338] Section 5 Recommendation Memorandum, Act 53 (H.B. 244) (2005), August 25, 2005, p. 6.

[339] Indiana Democratic Party v. Rokita, 1:05-CV-0634-SEB-VSS (S.D. Ind.).

require a registered voter to present a photo ID as an absolute condition for voting at the polls.

On September 19, 2005, a variety of organizations, including the ACLU, as well as several private attorneys, filed suit in federal district court on behalf of African American voters, civil rights groups, and other advocacy organizations charging the law violated the state and federal constitutions, the 1965 Voting Rights Act, and the 1964 Civil Rights Act.340 The lawsuit asked the court to declare Act 53 "unconstitutional, null and void," and issue both a preliminary and permanent injunction against its use. Among other things, the lawsuit asserted the photo ID requirement:

- **Violates the Fourteenth Amendment** because it treats voters unequally. For example, voters who have a Georgia driver's license, a passport, or a government-issued photo ID are not required to pay for a photo ID. Neither are absentee voters who do not have driver's licenses, passports or other government issued photo ID (other than full-time voters). Other voters who are unequally burdened by the photo ID requirement include those who live in retirement or nursing homes and do not have driver's licenses and students without automobiles who have photo ID's issued by private colleges and universities but which are not valid for voting under the new law.
- **Violates the Twenty-Fourth Amendment** because it constitutes a poll tax on the right to vote.

340 Common Cause v. Billups, 4:05-CV-201 HLM (N.D. Ga.).

- **Violates Section 2 of the Voting Rights Act** because it results in the denial of voting rights to African American and Latino voters. Non-white citizens of Georgia, as a group, have lower personal and family incomes than white citizens of Georgia, and are less likely to have driver's licenses, passports or other government-issued photo IDs.

- **Violates the Georgia Constitution** because it creates an entirely new set of voting qualifications beyond those specified in the state constitution which declares that every person who has registered to vote and who is a citizen at least 18 years of age and not disenfranchised, and who meets minimum residency requirements as provided by law, "shall be entitled to vote."

- **Violates the 1964 Civil Rights Act** (specifically (42 U.S.C. § 1971(a)(2)(A) and (a)(2)(B)); because it applies different standards for voters who vote in person compared to those who vote by absentee ballot and disqualifies voters based solely on whether they have a government-issued photo ID, even if they are personally known to election officials, or their signatures match the one on their official voter registration card.

On October 18, 2005, the district court issued a preliminary injunction holding plaintiffs had a substantial likelihood of succeeding on several grounds, including claims that the photo ID law was a poll tax and violated the equal protection clause of the Constitution. In his decision, Judge Harold Murphy wrote:

> In reaching this conclusion, the Court observes that it has great respect for the Georgia legislature. The Court, however, simply has more respect for the Constitution. Because the Court finds that Plaintiffs have a substantial likelihood of succeeding on their claims that the Photo ID requirement unduly burdens the right to vote and

constitutes a poll tax the Court must enter a preliminary injunction against the Photo ID requirement.341

In support of plaintiffs' claim that the stated purpose of the photo ID requirement - to "combat fraud" - was a pretext to conceal the true purpose of the law, which was to suppress voting by the poor, the elderly, the infirm, African American, Latino, and other minority voters by making it more difficult to vote, the court found:

- The Secretary of State testified 'that her office has not received even one complaint of in-person voter fraud over the past eight years.'
- Before Act 53 was passed, the Secretary of State informed the legislature that '[a]t virtually every meeting of the State Elections Board during the past 10 years, we have dealt with cases involving fraud or election law violations in handling or voting absentee ballots.'
- The State imposes no Photo ID requirement or absolute identification requirement for registering to vote, and has removed the conditions for obtaining an absentee ballot imposed by the previous law. In short, [Act 53] opened the door wide to fraudulent voting via absentee ballots.342

The court also noted additional burdens imposed by the photo ID statute:

Photo IDs are issued at Department of Driver Service ("DDS") Centers, but there are only 58 in the entire State of Georgia, which means that in at least 101 of Georgia's 159 counties, voters must travel to another county to obtain a photo ID. And there is no DDS office in the City of Atlanta,

341 Id., Order of October 18, 2005, pp. 120-21.

342 Id., pp. 12, 95.

> Georgia's largest city. Further, '[m]ost of the DDS service centers are located in largely rural areas where mass transit is likely not available.'
>
> DDS offices often have long lines and three to four hour waits and 'Many voters who are elderly, disabled, or have certain physical or mental problems simply cannot navigate the lengthy wait successfully.'343

Plaintiffs had submitted the declarations of registered voters who did not have approved IDs, which described the difficulties they would face in obtaining a photo ID. The court reiterated these difficulties in its order granting the preliminary injunction, highlighting lack of funds; lack of transportation; physical and mental disabilities that make it difficult for voters to travel to DDS service centers, walk for long distances, and stand in lines; and difficulty obtaining and paying for required documents such as a certified copy of a birth certificate.344 The court also noted that it is impossible for some voters to obtain a photo ID (for which DDS requires an "original or a certified copy" of a birth certificate issued by a state agency) because to obtain a certified copy of a birth certificate, an applicant must provide "a photocopy of your valid photo ID, such as: driver's license, state issued ID card, or employer issued photo ID."345

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343 Id., pp. 22-3, 33-4, 86-7.

344 Id., p. 103.

345 Id., p. 28-29.

In issuing its preliminary injunction, the district court concluded:

> In particular, the Photo ID requirement makes the exercise of the fundamental right to vote extremely difficult for voters currently without acceptable forms of Photo ID for whom obtaining a Photo ID would be a hardship. Unfortunately, the Photo ID requirement is most likely to prevent Georgia's elderly, poor, and African-American voters from voting. For those citizens, the character and magnitude of their injury - the loss of their right to vote - is undeniably demoralizing and extreme, as those citizens are likely to have no other realistic or effective means of protecting their rights.346

Following issuance of the injunction, the state appealed to the Eleventh Circuit, which refused to stay the injunction.347

In an attempt to address the poll tax burden cited by the district court in its injunction, the Georgia legislature passed a new photo ID bill (SB 84) in January 2006, ostensibly providing for free photo identification cards. Despite its attempt to mitigate the burdens posed by the photo ID law, the legislature still neglected to address many of the issues raised in the original lawsuit, including the fact that poor, elderly and minority voters (and others) will incur significant financial costs to obtain these supposedly "free" IDs. The new law also did nothing to address the equal protection claims raised in the lawsuit, as absentee

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346 Id., p. 103.

347 Common Cause v. Billups, 05-15784-G, Eleventh Circuit Court of Appeals, October 27, 2005.

voters can still vote without showing any photo identification while a photo ID remains an absolute requirement for in person voting.

COUNTY AND MUNICIPAL LITIGATION IN GEORGIA

Following passage of the Voting Rights Act and its amendment in 1975, which resulted in increased black registration and political participation, a number of Georgia counties which used district elections switched to holding their elections at-large. The Supreme Court has noted the potential for discrimination inherent in at-large voting and why its adoption is subject to scrutiny under Section 5:

> Voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole. This type of change could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting.[348]

The deliberate change from district to at-large elections was but one of many purposeful strategies used by white officials to deprive black voters of the equal opportunity to participate in the political process at the county and local level. This section describes litigation and other actions taken by the ACLU in 70 of Georgia's 159 counties to challenge a wide range of discriminatory election

[348] Allen v. State Board of Elections, 393 U.S. 544, 569 (1969). For a discussion of the Georgia counties that abandoned their district systems in the wake of increased black political participation after passage of the Voting Rights Act, see McDonald (2003), pp. 131-2, 141-2.

practices and proceedings and enforce the Voting Rights Act and the Constitution since 1982.

In pursuing these efforts in Georgia, the ACLU filed or otherwise participated in 102 separate legal actions. This tally does not include other legal actions previously discussed such as ACLU efforts to challenge the sole commissioner form of government in particular counties, the grand jury method of school board appointments, or statewide litigation to end various discriminatory practices, including challenges to redistricting.

Baker County and the City of Newton

Kelson v. City of Newton

Located in the heart of Georgia's quail hunting plantation country, and 22 miles south of Albany, Newton is a small town of just 851 residents and the county seat of Baker County. Baker, which was known during the days of the Civil Rights Movement as "Bad Baker," was majority black, but prior to passage of the Voting Rights Act only 24 blacks were registered to vote, just 1.9% of the age eligible population. According to one local official, if anyone had suggested

that blacks should be allowed to vote, "why people here would have laughed in your face."[349]

Traditionally, the Newton City Council consisted of a mayor and four members elected at-large by plurality vote, with the highest vote getters being deemed the winners. In 1972, the city council added a numbered post requirement for council seats and also began implementing a majority vote requirement for council and mayoral elections. The requirement, which allows a white majority to control the outcome of elections, has been described by the Supreme Court as a device which can "significantly" decrease the electoral opportunities of a racial minority.[350] Indeed, in calling for the adoption of a majority vote requirement for statewide offices in 1963, one Georgia legislator advised his colleagues that it was needed precisely because it would "thwart election control by Negroes and other minorities."[351] More than 50 cities in Georgia adopted majority vote requirements after passage of the Voting Rights Act, and most, including Newton, ignored preclearance under Section 5.[352] The majority vote requirement, which was actually in conflict with the city charter,

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[349] Atlanta Constitution, July 30, 1963.

[350] City of Rome, Georgia v. United States, 446 U.S. 156, 183 (1980).

[351] Valdosta Daily Times, February 21, 1963 (quoting Rep. Denmark Groover of Bibb County).

and the numbered post requirement were plainly changes in voting but neither was submitted for preclearance under Section 5, despite repeated requests from the ACLU and the Department of Justice that the city do so.[353] According to the Georgia Secretary of State, blacks were approximately 41% of the population of Newton in 1990, and even though black candidates had repeatedly run for city office none had ever been elected.

Following the general election in November 1995, city officials abruptly stopped using the majority vote requirement and cancelled runoff elections in the middle of the election cycle. They continued, however, to enforce the unprecleared numbered post requirement. The racial impact of these selective decisions was apparent. One black candidate received the fourth highest number of votes cast in the election, but lost because he did not receive the most votes for a particular post. Had the numbered post requirement not been enforced, and since he was the fourth highest vote getter among nine candidates for four seats, he would have been the winner of one of the council seats. Another black candidate received the second highest number of votes for Post 1, and even though no candidate won a majority, he was denied the opportunity to

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[352] McDonald, (2003), pp. 135, 143-44.

[353] Laughlin McDonald to Mayor Bebe Johnson, December 28, 1995; Deval Patrick, Assistant Attorney General, to Mayor George Bush, May 31, 1996.

compete in a runoff election. Likewise, no candidate for mayor or Council Post 2 received a majority of votes cast, yet those seats went to the top vote-getters without a runoff.

In 1996, the ACLU filed a lawsuit in federal court on behalf of black voters in Newton to enforce Section 5.[354] Plaintiffs also contended that it was not proper to cancel the runoff after the election had been advertised, and candidates qualified, under numbered post and majority vote procedures. Making selective changes in mid-stream, particularly those which disadvantaged minority voters, was not the appropriate remedy, plaintiffs argued.

In 1997, the city adopted staggered terms of office for the council and submitted the change for preclearance. The Department of Justice refused to make a determination on the submission because the numbered post provision still had not been submitted. The Attorney General concluded, however, that the numbered post requirement "is not legally enforceable."[355]

Eventually, after the city changed lawyers three times, the fourth law firm convinced the city to enter into a consent agreement rescinding the numbered

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[354] Kelson v. City of Newton, GA. Civ. No. 1:96-CV-106-3-(WLS) (M.D. Ga.).

[355] Isabelle Katz Pinzler, Acting Assistant Attorney General, to Frank S. Twitty, Jr., September 5, 1997.

post and majority vote requirements.[356] The court adopted the consent order in April 1998, and an election was held in September 1998 for all council seats. The significant role of Section 5 in helping to ensure racially fair elections in Newton is apparent.

Baldwin County

NAACP v. the Mayor and Alderman of the City of Milledgeville

Milledgeville, with its stately antebellum mansions, was the state capital of Georgia from 1807 to 1868. George Wallace, a resident of Baldwin County, of which Milledgeville is the county seat, was one of the first blacks elected to the state senate during Reconstruction. He was immediately expelled from office by the white controlled legislature on the grounds that blacks were "ineligible" to hold office under the state constitution. The expulsion of Wallace and other blacks from the general assembly, as well as continuing racial violence across the state, prompted Congress once again to place Georgia under military supervision.[357]

[356] Kelson v. City of Newton, GA., Order of April 20, 1998.

[357] McDonald (2003), pp. 23-4.

Today, Milledgeville is more than 45% black. In 1982, black residents persuaded the city to sponsor legislation changing the method of electing the city council from at-large to six single member districts, three of which were majority black. The state senator from Baldwin County refused to support the legislation, and consequently the plan was not enacted during the 1983 legislative session.

In May 1983, black residents, represented by the ACLU, filed suit challenging the city's at-large system as racially discriminatory in violation of Section 2.[358] The parties entered into a consent decree in June 1983, implementing the agreed upon six single member district plan. The city held elections in September 1983, in three of the new districts and two black candidates were elected.

Boddy v. Hall

Baldwin County's five member board of education was traditionally appointed by the grand jury. In 1970, the Georgia legislature expanded the board to seven members, but continued their appointment by the grand jury. Two years later, the state changed the system again and enacted legislation requiring at-large elections by majority vote for the board of education. Similar

[358] NAACP of Baldwin County, Georgia v. Mayor and Alderman of the City of Milledgeville, Civ. No. 83-145-01-MAC (M.D. Ga.).

changes were made by other Georgia jurisdictions which abandoned their grand jury appointment systems and adopted at-large elections in the wake of increased black voter registration following passage of the Voting Rights Act. The at-large system would insure that whites in Baldwin County, who were 63% of the population, would control the outcome of elections. The 1970 and 1972 voting changes were subject to Section 5, but were never submitted for preclearance.

The county's five member board of commissioners was also elected at-large and by majority vote from numbered posts. This election system had been in effect since the 1950s, and made it extremely difficult for black residents to elect a candidate of their choice.

In November 1982, the ACLU filed suit in federal court on behalf of black residents and the local NAACP challenging at-large elections for the board of commissioners and board of education as racially discriminatory in violation of the Constitution and Sections 2 and 5.[359] Oscar Davis, a local resident explained, "[w]e've tried many, many times to get blacks elected and we've never been able

[359] Boddy v. Hall, Civ. No. 82-406-1-MAC, Compl. (M.D. Ga.).

to do it, even when most everyone turns out to vote. We finally made the decision that the only thing we could do was sue."[360]

After the plaintiffs filed suit, local officials finally submitted for preclearance the 10 year old change to at-large school board elections. In May 1983, the Attorney General requested additional information, and in September objected to the at-large component of the 1972 law, finding that "bloc voting along racial lines exists in Baldwin County," and "a system of elections such as that adopted for the election of the board of education tends to deny blacks an opportunity to participate fairly in the election process." The Attorney General further determined that "the additional features of numbered posts and majority runoffs plainly diminish the electoral impact of minority voters in jurisdictions where there is racial bloc voting."[361]

In October 1983, the board of education filed a declaratory judgment action in the District of Columbia seeking a ruling that the 1972 enactment was not racially discriminatory in either purpose or effect.[362] The ACLU filed a motion seeking to intervene on behalf of three black voters, which was granted.

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[360] Atlanta Constitution, June 8, 1984.

[361] William Bradford Reynolds, Asstistant Attorney General, to George M. Stembridge, Jr., Baldwin County Attorney, September 19, 1983.

[362] Baldwin County Sch. Dist. v. Smith, Civ. No. 83-3240 (D. D.C.).

However, in April 1984, the parties filed a joint motion to stay the proceedings pending the outcome of settlement negotiations.

In May 1984, the district court in Georgia signed a consent order between the parties finding that the board of education had failed to preclear the 1972 enactment. Pursuant to the order, the parties agreed upon a plan which provided for the election of the five member board of education from single member districts by majority vote to four year staggered terms. One of the districts was 64% black and another was 58% black. In the August 1984, elections a black candidate won in the 58% black district, and a black person was appointed to the board of education in the 64% black district pending the August 1986 elections.

In April 1983, the plaintiffs and the board of commissioners agreed upon a redistricting plan that provided for one single member district, which was 67% black, and a four seat district with a plurality vote requirement. The plaintiffs agreed to the plan because it initially appeared difficult to draw more than one majority black district. The county submitted the plan to the Attorney General who precleared it, but the district court refused to approve the consent decree.

In June 1984, the parties entered into a subsequent consent decree which provided that the board of commissioners would have five members elected by majority vote from three districts. District 1 (64.15% black) and District 2 (57.85%

black) each elected one member, while District 3 (21.25% black) elected three members from residency districts, with numbered posts. In August 1984, a black candidate was elected from District 1 and a black candidate from District 2 was elected after a run off.

Simmons v. Torrance

On September 4, 1984, a Democratic primary runoff election was held for the Baldwin County Board of Commissioners in District 2 (57.85% black) between Clarence H. Simmons, a black candidate, and Grady Torrance, the incumbent white commissioner. Torrance received 449 votes to Simmons's 412 votes, a 37 vote margin of victory.

On September 12, 1984, the ACLU represented Simmons in a challenge to the election on the grounds that persons who were qualified to vote in District 2 were either not allowed to vote, or incorrectly assigned to another voting district, while persons who were not qualified to vote in District 2 were allowed to cast their ballots in the district.[363] The court found that 40 persons had voted in the runoff who were not entitled to vote in District 2, and that election officials

[363] Simmons v. Torrance, Civ. No. 21,102 (Super. Ct. Bladwin Cty.)

improperly directed two people who were entitled to vote in District 2 to vote in another district. The court ruled that:

> Plaintiff has carried his burden of showing that a sufficient number of ballots were cast by electors not qualified to vote in voting district 2 and were in effect rejected, though cast by persons who were entitled to vote in voting district 2, 'to change or place in doubt the result' of the challenged runoff primary.[364]

A new run off was held on November 6, 1984, and Simmons won. He went on to win the general election as well.

Barrow County

In re City of Winder

Winder is approximately 50 miles due east of Atlanta and is the Barrow County seat. In 1987, the city's population was 6,705, of whom 17.8% were African American. In addition to its mayor, the Winder City Council had six members, all elected at-large, with four council members elected from residential districts.

In 1987, the ACLU initiated negotiations with the city on behalf of black voters seeking the adoption of single member districts. The city responded by agreeing to a plan with four districts, one of which was 65% black. The city's

[364] Id., Order of October 24, 1984.

plan also retained two at-large seats. Given the size and distribution of the minority population, it was only possible to create one majority black district; whether four, five, or six single member districts were used.

A single member district plan was subsequently adopted by the legislature and precleared by the Department of Justice. An African American was first elected to the council in 1991 from the majority black district.

Bartow County

Stephens v. Kennedy

Despite the fact that blacks constituted only 11.6% of the population in Bartow County, African Americans succeeded in winning a three-to-one majority on the Kingston City Council in the municipal elections held December 5, 1987. This was the very first time that blacks had won a majority. Two weeks later, and before the newly elected members took office, the council held a special meeting attended by the mayor and three incumbents at which they created a new, non-elected city office of "Administrator-Treasurer" and transferred to it the duties of the elected mayor and council. The group then appointed one of the defeated white incumbents to this position. Additional appointments were made for city attorney, city clerk, election superintendent, and other positions. The group also changed the regular meeting time of the city council so that it

conflicted with the work schedules of Jannie Stephens and John H. Hill, the two newly elected black council members.

As a result of these actions, the ACLU filed suit in June 1988 in federal court on behalf of Stephens, Hill, and other black voters, charging that the reallocation of authority from elected officials, a majority of whom were black, to an appointed official who was a defeated white incumbent, as well as other changes that had been enacted, violated the Constitution and Section 5. A three-judge court was appointed to hear the Section 5 claim and ruled on July 7, 1989, that the power of the city council had not been reallocated elsewhere and that changes in council meeting times were not covered by Section 5. The court based much of its ruling on findings that one of the three black city council members consistently voted with the remaining white incumbent, thereby creating a permanent split in the four-member council. "The parties all agree that the 'black majority' will not vote as a majority," said the court. "Even were this Court inclined to grant relief and enjoin implementation of the changes made, the constitution of this paralyzed council would remain unchanged… This Court cannot heal the rift in the council and declines to intervene into a political

impasse which the parties themselves have the power to resolve."[365] Rather than appeal the decision, the plaintiffs then settled the case.

Bibb County

Orrington v. Israel

The City of Macon, the county seat of Bibb County, annexed 196 acres of land in adjacent Jones County in 1962. The property was subsequently sold for development, which included the housing complex of Kingsview Village, all of whose residents, 348 in number, were black. There were 47 other residents of the annexed area, all of whom were white. The residents of the annexed areas voted in Macon municipal elections and received water and sewer services from Macon's Board of Water Commissioners.

In 1973, the Georgia General Assembly created the Macon-Bibb County Water and Sewerage Authority (WSA) to replace the Board of Water Commissioners. The 1973 act provided for five commissioners, three elected and two appointed, but only residents of Bibb County could serve on, or vote for members of, WSA. Thus, the residents of the annexed area in Jones County were

[365] Stephens v. Kennedy No. CV-4-88-124 (N.D. Ga.1988), Order, June 26, 1989, pp. 13, 16.

barred from participating in WSA elections even though they were residents of Macon, were subject to WSA's jurisdiction, and depended on its services.

In February 1984, the general assembly approved a plan to deannex the 196 acres in Jones County from the City of Macon. Although city officials publicly announced that residents would have an opportunity to voice their concerns about the proposed deannexation, the city never held a public hearing or referendum prior to approving the deannexation. The asserted justification for the deannexation was to remove a state legislator from the city's legislative delegation. The city further maintained that the legislation was not intended to dilute minority voting strength, and pointed out that two black legislators signed the deannexation measure. The city agreed to provide municipal services to the deannexed area through May 1984, and on June 5, 1984, residents of the affected areas were told that all city services would be terminated the next day, including the police department's participation in a Neighborhood Watch program.

Black residents of the deannexed area, represented by the ACLU, responded by filing a federal lawsuit against the city and WSA.[366] The plaintiffs argued that the defendants failed to preclear the 1984 deannexation as required by Section 5, and that the 1984 law violated the Constitution and Section 2.

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[366] Orrington v. Israel, Civ. No. 84-275-2 (M.D. Ga.).

At a conference with the court shortly after the suit was filed, the city agreed to submit the 1984 act for preclearance and to allow city residents in Jones County to vote for members of WSA pending the Attorney General's decision. The city also agreed to continue to provide residents with municipal services until the lawsuit was resolved.

Although the city submitted the deannexation plan to the Attorney General in 1984, it took almost three years for the city to provide the information requested by the Department of Justice. In April 1987, the Attorney General objected to the deannexation, finding that the city's alleged goal of removing a state legislator from the delegation "could have been accomplished through alternate and much less drastic means," and "that race may well have been not only a factor, but a principal factor, in the deannexation decision."[367]

Thanks to Section 5, city residents living in Jones County achieved the results they sought in bringing suit, and stipulated to the dismissal of their legal action.

[367] William Bradford Reynolds, Asstistant Attorney General, to Roy W. Griffins, Jr., Asstistant City Attorney, April 24, 1987.

Lucas v. Townsend

On December 17, 1987, the Board of Public Education and Orphanages for Bibb County, Georgia, placed a bond referendum on the March 8, 1988 presidential preference primary ballot. The election, popularly known as Super Tuesday, had high visibility. And because the Rev. Jesse Jackson's name was included on the ballot, significant African American voter turnout was expected. On January 4, 1988, the school board reversed itself and took the bond measure off the Super Tuesday ballot and called for a special election to be held Tuesday, May 31, 1988 – the day after the Memorial Day holiday.

The goal of the original bond measure was to generate funds to provide air conditioning in school buildings. In setting the May 31 date, the board combined the original bond issue with a second bond issue to build a new high school into one referendum question. The location of the proposed school, which would affect its racial makeup, was a matter of local controversy.

The ACLU represented five African American residents who objected to the switch in election dates. The plaintiffs favored the air conditioning measure but opposed the second bond issue, and believed the scheduling of the election and the combining of issues was done to manipulate the minority vote.

The ACLU wrote to the board setting out the concerns of plaintiffs and requested the ballot measures be separated and the referenda held on a regular

election ballot when a better turnout would be assured. The ACLU also pointed out that the special election date required preclearance under Section 5.

Nearly three months after its decision to call for the special election, the board submitted the change to the Attorney General for preclearance. On May 25, 1988, the Attorney General requested additional information including a "detailed explanation of the reason for choosing May 31, 1988 as the bond election date." The Attorney General also requested the board to respond to the allegations that "(i) the Super Tuesday date had been abandoned because the turnout of black voters was expected to be high on that date and (ii) that the two bond issues were consolidated to prevent black voters from voting separately on each of the proposed projects."[368]

Despite the absence of preclearance, the board proceeded with its plans to hold the special election. Plaintiffs filed suit seeking to stop the election for noncompliance with Section 5.[369] A hearing was held before a three-judge court, and on Friday night, May 27, 1988, the court denied the injunction. It held: "The Attorney General's regulation making all discretionary special elections subject

[368] Quoted in Lucas v. Townsend, 486 U.S. 1301, 1303 (1988).

[369] Lucas v. Townsend, 686 F. Supp. 902 (M.D.Ga. 1988)(three-judge court).

to Section Five's coverage is simply not supported by the language found in 42 U.S.C. § 1973c."[370]

Plaintiffs appealed and applied to Justice Anthony M. Kennedy, as Circuit Justice, for a stay. Justice Kennedy sought the views of the Solicitor General, Charles Fried, and the Solicitor supported the stay. On Memorial Day, May 31, 1988, Justice Kennedy entered his first stay as a Supreme Court Justice. He held the conclusion of the district court that special elections were not covered changes "is most problematic under our precedents," and found irreparable injury would likely result form the denial of relief:

> Permitting the election to go forward would place the burdens of inertia and litigation delay on those whom the statute was intended to protect, despite their obvious diligence in seeking an adjudication of their rights prior to the election. Even if the election is subsequently invalidated, the effect on both the applicants and respondents likely would be most disruptive. Further, although an injunction would doubtless place certain burdens on respondents, such burdens can fairly be ascribed to the respondents' own failure to seek preclearance sufficiently in advance of the date chosen for the election.[371]

Justice Kennedy enjoined the election approximately 16 hours before the polls opened.

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[370] Id., 686 F. Supp. at 905.

[371] Lucas v. Townsend, 486 U.S. at 1305.

The referendum was rescheduled for the November general election. The board received preclearance for the election date, but did not submit the form of the ballot question - the combining of bond issues - for preclearance. Plaintiffs sought another injunction under Section 5 arguing that the form of the question was required to be precleared. The court sought the views of the Attorney General, who filed a brief that the "discretionary decision to present the voters with a single vote on the entire project is not the kind of change subject to preclearance."[372] The district court adopted that view and denied relief. The bond issue was approved by 50.7% of the votes, a winning margin of 618 votes.

The complaint had also challenged the manipulation of the election date and combining the referenda as violating both Section 2 and the Fourteenth Amendment. Plaintiffs introduced substantial evidence of racially polarized voting in contests involving black and white candidates, which was acknowledged by the district court.[373] Plaintiffs' analysis of the referendum vote showed 66% of black voters opposed the bond issue while 57% of whites supported it. The evidence also showed that African Americans were a higher percentage of the turnout on the Super Tuesday primary than at the general

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[372] Brief for the United States as Amicus Curiae, p. 16, quoted in Lucas v. Townsend, 698 F. Supp. 909, 912 (M.D.Ga. 1988)(three-judge court).

[373] Lucas v. Townsend, 783 F. Supp. 605, 617 (M.D.Ga. 1992).

election. Plaintiffs' evidence showed defendants' election manipulation efforts did indeed affect the election outcome.

The district court ruled for defendants, holding that the finding of racially polarized voting in candidate races did not prove that white voters usually defeated the choice of black voters in referenda. Plaintiffs appealed and the court of appeals affirmed, concluding that the district court's opinion was not clearly erroneous.[374]

Bulloch County and the Town of Statesboro

Love v. Deal

Statesboro, Georgia, is immortalized in Blind Willie McTell's "Statesboro Blues." It is also the county seat of Bulloch County in southeastern Georgia. In 1979, black voters, represented by private counsel, filed suit against the county commission, county board of education, and city council charging that at-large elections for all three bodies violated Section 2 and the Constitution.[375] The law suit also charged that both the board of education, in 1980, and the city council, in 1966, had adopted at-large elections without obtaining Section 5 preclearance.

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[374] Lucas v. Townsend, 967 F.2d 549, 553 (11th Cir. 1992).

[375] Love v. Deal, No. CV 679-037 (S.D. Ga.).

The board of education promptly settled its portion of the case in May 1980, and agreed to create seven single member districts, with a district residency requirement.[376] Statesboro submitted its at-large system for Justice Department approval in December 1980, but the Attorney General objected, saying:

> blacks constitute about 40.7 percent of the population of the City of Statesboro. Although a black candidate has run for city council on a number of occasions since 1965 under the city's at-large method of election (with staggered terms and majority vote and numbered post requirements), no black has ever been elected. Analysis of election returns reveals that voting in the city generally follows racial lines. We also noted that this change to increase the terms of office was enacted immediately following the first black's bid for office in 1965 and during a period when, according to 1960 census data, blacks appear to have constituted a majority of the city's population.
>
> The increase in terms of office for the mayor and councilmembers, by decreasing the frequency of elections, along with the continued utilization of a system of voting which includes majority vote, numbered posts, and at-large election, enhances the disadvantage faced by blacks in seeking to elect representatives of their choice.[377]

Statesboro had received other Section 5 objections from the Department of Justice. In December 1979, the department objected to a proposed annexation by

[376] Id., Consent Decree, Order and Judgment, May 27, 1980.

[377] James P. Turner, Acting Assistant Attorney General, to Sam L. Brannen, February 2, 1981.

the city, noting that it had erroneously precleared a 1967 annexation earlier in the year:

> At the outset we note that, in spite of our letter of July 23, 1979, indicating no objection to the 1967 annexation, our present review and analysis reveal that our conclusion at that time not to object was wrong.
>
> Prior to the 1967 annexation the population of Statesboro consisted of 5,223 whites and 5,454 blacks (51%). Substantial evidence has been adduced that the predominantly black Whitesville community on the edge of the city limits voiced its desire to be included in the general expansion of the city boundaries in 1967. Nonetheless, the extended city limits were carefully drawn to fence out the Whitesville area.
>
> The instant annexation would further reduce the black proportion of the city. . . resulting in a cumulative dilution of 11.0% within five to fifteen years (10.4% currently).
>
> Our analysis reveals, therefore, that the present annexation is part of a series of racially selective annexations and also has a dilutive effect on black voting strength in the context of the city's at-large voting system. In addition, our review of information received from minority contacts and past election returns reveals that blacks have been excluded from meaningful access to the political process in Statesboro. No black has ever been elected to city office, although black candidates have run on several occasions. Furthermore, blacks have made unrebutted claims that the city has not been responsive to their needs, including their requests for enhanced voter registration opportunities.[378]

[378] Drew S. Days III, Assistant Attorney General, to George M. Johnston, December 10, 1979.

Although the Department of Justice could not reverse its July approval of those 1967 annexations, it objected to Statesboro's second annexation submission and advised the city that "the dilutive effects of the annexations in question could be removed by the adoption of an electoral system, such as single-member districts, which fairly recognizes the political potential of blacks in the city."

Despite this advice, Statesboro proceeded with another annexation in 1980, which drew a similar objection from the Department of Justice:

> We note that the land which is the subject of the annexation is currently uninhabited but is being annexed for the specific purpose of residential development. Your submission also indicates that the owner of the land desires to build multi-family apartment buildings on the land and intends to seek financial assistance from the Department of Housing and Urban Development under the Section 8 Program. If the HUD grant is obtained, a substantial number of black persons may reside in the new residential units. If the owner does not pursue his plan or if the grant is not obtained, the submission indicates that virtually all of the persons who will reside in the new residential units will be white.[379]

The department was careful to note that:

> Section 5 should not hinder the City's plans to develop low-cost subsidized housing to be occupied by both black and white citizens. The objection is being interposed because the City has failed to carry its burden of demonstrating that the development will, in fact, be completed as planned. In the event that the owner pursues his plan and constructs an

[379] Drew S. Days III, Assistant Attorney General, to George M. Johnston, General Counsel, August 15, 1980.

> integrated development, you may wish to seek reconsideration of this objection.

The department also reiterated that it would reconsider its objection if the city adopted an electoral system, such as single member districts, which fairly recognizes the political potential of blacks in the city. Statesboro, bowing to the inevitable, settled its portion of the vote dilution case in 1983, by agreeing to create three single member districts, plus a fourth district that would elect two members.[380]

Conditions in Bulloch County, not surprisingly, reflected those in Statesboro. Blacks were 36% of the population, but no black person had ever been elected to the county government. The county also agreed to settle its portion of the case in 1983, and adopted a plan for the commission containing two districts, one electing a single commissioner, and which was majority black, and the second electing two commissioners from numbered posts. A full-time, non-voting chairman (except as necessary to break a tie vote) was also elected at-large.[381]

In 1991, the county commission drew several plans to correct the malapportionment revealed by the 1990 census, and tendered them to the

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[380] Love v. Deal, Order and Judgment, April 7, 1983.

[381] Id., Consent Decree, Order and Judgment, May 26, 1983.

plaintiffs. The highest black voting age population of any district in the proposed configurations was 49% and plaintiffs rejected the plans, in part, because of the absence of a majority-minority district. Plaintiffs also wanted to increase the size of the commission by doubling the number of members elected from districts, while keeping the at-large chair.

Plaintiffs, with the assistance of the ACLU, produced a draft plan with a 50.9% black voting age population district to show that a majority-minority district could be drawn. They also produced plans containing a district with a black voting age population as high as 60.5%.[382] The county presented the 50.9% district plan to the court as the plan it preferred. Though plaintiffs preferred a higher minority voting age population, they believed the district would allow African American voters to elect a candidate of choice because the district included a college where the vast majority of students were white and most were not registered to vote in Bulloch County. In addition, African American candidates had consistently won in a similar district in prior elections.

After conducting a hearing, the court adopted the plan with the 50.9% African American voting age population district and also adopted plaintiffs'

[382] Love v. Deal, Transcript of April 16, 1992, p. 120.

proposal to double the number of members elected from each district.[383] Neither side appealed the adoption of the plan, although a protracted dispute ensued over attorneys' fees, which was resolved by the court of appeals.[384]

But for the oversight provided by the Voting Rights Act, there is little doubt that the rights of minority voters would have been significantly diluted in elections in Statesboro and Bulloch County.

Burke County and the City of Keysville

Sullivan v. DeLoach

Waynesboro, which had traditionally elected its mayor and council by plurality vote, adopted a new majority vote requirement in 1971. Significantly, the change was made after the 1970 extension of the Voting Rights Act and increased black voter registration.[385] The new voting law was submitted for preclearance pursuant to Section 5, and the Attorney General objected to it because he could not conclude that it "does not have the purpose or effect of

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[383] Love v. Deal, Order of April 23, 1992.

[384] Love v. Deal, 5 F.3d 1406 (11th Cir. 1993).

[385] As the Supreme Court noted in City of Rome, Georgia v. United States, 446 U.S. 156, 183-84 (1980), a majority vote requirement, which allows a numerical majority of whites to regroup around a candidate in a run off election and defeat a plurality winning minority candidate, can "significantly" decrease the electoral opportunities of a racial group.

abridging rights on account of race."[386] The city, however, ignored the objection and continued to impose a majority vote requirement until it was sued in 1976 by local black residents represented by the ACLU.[387] The plaintiffs challenged the continued use of the objected to majority voter requirement, as well as at-large elections for the city which they contended diluted minority voting strength.

This case was settled by a consent decree in 1977, which included a determination that the at-large method of elections "denies plaintiffs and their class equal access to the political system, in derogation of their rights" under the Constitution and Section 2. The decree also established a district method of elections consisting of three two-member wards with the mayor elected at-large, and a continuation of the majority vote requirement.[388]

Although the agreed upon plan was a "legislative" plan subject to Section 5, it was not submitted for preclearance until 1988, when it was included in a request to preclear several annexations. The Attorney General requested additional information in February 1989, but it was not provided by the city until five years later, in March 1994. The Attorney General precleared the district

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[386] David L. Norman, Assistant Attorney General, to Jerry Daniel, January 7, 1972.

[387] Sullivan v. DeLoach, No. CV176-238 (S.D. Ga.).

[388] Id., Order of September 22, 1977. The discriminatory effect of a majority voter requirement is neutralized in a fairly drawn district system of elections, while the retention of the majority vote

plan, except for the adoption of the majority vote requirement for mayor, concluding that:

> Our review of elections involving city voters indicates a pattern of racially polarized voting in Waynesboro that has hampered the ability of black voters to elect their candidates of choice to at-large elected offices. Moreover, it appears that political participation among black voters is depressed, attributable largely to a history of racial discrimination such as that found in the City of Waynesboro, which continues to be reflected in the disparate socio-economic conditions between the city's black and white residents.[389]

Despite the action by the Attorney General, city officials took no public position whether they would comply with the objection. Given the pendency of a mayoral election in November 1995, the plaintiffs requested a conference with the court, which was held in October. At the suggestion of the court the parties met and agreed that a plurality vote of at least 37% should be used in the mayoral election. This figure was arrived at based on the fact that no black candidate for mayor had ever received more than 36% of the vote. The agreement was incorporated into a proposed supplemental consent order and

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requirement for mayor was part of the compromise that resulted in the consent agreement.

[389] Deval L. Patrick, Assistant Attorney General, to Gary A. Glover, May 23, 1994.

was submitted to the Attorney General, who precleared it.[390] It was then tendered to the court for approval.

The day before the election, however, which pitted three whites against a lone black for mayor, the city unilaterally withdrew its consent to the supplemental settlement agreement and announced that it would hold the election for mayor using a majority vote requirement, insuring that the black candidate could not win with a simple plurality. The council's vote was strictly along racial lines, with the white members voting to abrogate their prior agreement.[391]

At the ensuing election, the black candidate, William Patterson, led the ticket with 37.1% of the vote. The city then scheduled a runoff election for November 21, 1995, between Patterson and the next highest white vote getter. The plaintiffs filed a motion to enjoin the election, but it was not heard by the court and the runoff went forward. The Department of Justice, moreover, although it was invited to do so by the plaintiffs, took no action to enforce its

[390] Elizabeth Johnson to Gary A. Glover, November 3, 1995.

[391] The Augusta Chronicle, "Council rejects election plan," November 7, 1995.

objection to the majority vote requirement. Predictably, white voters regrouped around the white candidate in the runoff and Patterson was defeated.[392]

In December 1995, the district court, noting that the runoff election had been held, dismissed the plaintiffs' motion for an injunction as moot.[393] The plaintiffs could have proceeded with the litigation on the merits, but weary of litigation and racial contention, they elected not to do so. Patterson, the defeated black candidate, said that he was willing to give the new mayor "the benefit of the doubt," but "the way the election was run, I don't know if he'll be fair."[394]

Bynes v. Board of Commissioners of Burke County

In amending the Voting Rights Act in 1982, one of the cases Congress relied upon was Lodge v. Buxton,[395] a successful challenge to at-large elections for the county commission of Burke County, Georgia. Opponents of the amendment argued the case was proof that successful challenges under Section 2 could be brought under the existing discriminatory "intent" standard. Congress, however, noting that the trial court had found "[t]he vestiges of racism

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[392] The Augusta Chronicle, "Mayor says race relations stable," February 10, 1996.

[393] Sullivan v. DeLoach, Order of December 29, 1995.

[394] The Augusta Chronicle, "Mayor says race relations stable," February. 10, 1996.

encompass the totality of life in Burke County," concluded that Lodge v. Buxton was "an extreme situation" and provided "little support for exclusive reliance on the intent test."[396]

On July 1, 1982, two days after President Ronald Reagan signed the 1982 amendments of the Voting Rights Act into law, saying "the right to vote is the crown jewel of American liberties, and we will not see its luster diminished," the Supreme Court affirmed the decision from Burke County.[397] The Court also approved the remedy ordered by the trial court, the implementation of a single member district plan proposed by the plaintiffs. Elections were held under the new plan in November 1982, and two blacks, Herman Lodge and Woodrow Harvey, were elected to the county commission, the first in the county's history.

A decade later, the 1992 census showed that the commission districts, as well as those for the county board of education which used the same plan, were malapportioned in violation of the one person, one vote standard. Although the total deviation among districts was 37%, the state legislature failed to adopt a constitutional plan during its 1992 session, and as a result the county was

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[395] 639 F.2d 1358 (5th Cir. 1981).

[396] S. Rep. No. 97-417, 97th Cong., 2d Sess. 38-39 (1982).

[397] Rogers v. Lodge, 458 U.S. 613 (1982).

proceeding to hold the upcoming elections under the invalid plan. Black residents of Burke County, represented by the ACLU, filed suit requesting the federal court to enjoin further use of the unconstitutional plan and implement a plan that complied with one person, one vote, as well as Sections 2 and 5 of the Voting Rights Act.[398]

The parties were able to agree on a remedial plan which complied with the Constitution and the Voting Rights Act. The plan was submitted to the Department of Justice, approved under Section 5,[399] and implemented by the court at the 1992 elections. There is little doubt that Section 5 played a determinative role in insuring that a fair election plan was implemented in a county in which, as found by a federal court, "[t]he vestiges of racism encompass the totality of life."

Gresham v. Harris

The Town of Keysville was chartered in 1890, and for many years was a bustling agricultural center. But in 1933, the year the country was sinking deeper into the Great Depression, the town held its last elections for the mayor and

[398] Bynes v. Board of Commissioners of Burke County, Georgia, No. CV 192-085 (S.D. Ga.).

[399] Steven H. Rosenbaum, U.S. Department of Justice, to Laughlin McDonald, April 24, 1992.

council. After that, for reasons no one can fully explain, the municipal life of the town died altogether.

Fifty years later there were only 300 people still living in Keysville, 80% of whom were black. Since there was no municipal government, there was no central water system. A few families had wells. Sewerage was primitive or non-existent. Most of the streets were unpaved, unmarked, and unlighted.

Keysville reached a turning point in 1985 when a mobile home in the black community went up in flames. Neighbors called the nearest fire station - some 25 miles away in Waynesboro - but it did not respond. Nollie Mae Morris, a local black resident, said "that's when we realized that Keysville ought to have fire protection and some of the other public services that people elsewhere take for granted."[400]

The black community, organized under the banner of the Keysville Concerned Citizens, took on the task of revitalizing municipal government. But they were met with fierce resistance from local whites. In the event elections were held it would be likely that some or most of the elected officials would be black. From the white perspective, that was an outcome to be avoided at all costs.

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[400] "The Revival of Keysville," Civil Liberties, (Fall 1987).

Local whites claimed that blacks were irresponsible and incapable of governing, and that they were motivated by a desire for power and revenge against whites. The owner of a local nursing home in Keysville said that "black people in this town can't even keep bread in their homes, much less keep up any obligations to the city." Another white resident said that blacks were "racists" and that their attempt to restore local government was "reverse discrimination. They're trying to do to us what they say we did to them back in the 60s."[401] Whites also feared that if the town were revitalized a majority black government would tax them to pay for services which whites already had.

Emma Gresham, a retired school teacher and a leading force in Concerned Citizens, tried to reassure the white community that it had nothing to fear from new elections. "We have no anger in our hearts towards our white brothers and sisters," she told a gathering at a local church. "All we want is a government elected by the people, black and white, that can help bring this town back to life and do something about the water and the sewerage and the other problems. If we all come together, we can make it work."[402] As for the charge that blacks were looking for power, Gresham says they were simply looking for "a better life.

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[401] Id.; Atlanta Constitution, October 19, 1988; True Citizen, March 1, 1989.

[402] The Dallas Morning News, January 29, 1989.

I had never even thought about what we were doing in terms of trying to get power."[403] Aside from white resistance, the proponents of municipal government faced other obstacles. Based on existing, and conflicting, deeds and plats the exact location of the town boundaries was unsettled. State law also provided that municipal elections must be conducted by elected officials appointed by the local governing body. Since there was no governing body in Keysville to make appointments, there was no way for an election to be held in conformity with state law. In seeking a way out of this dilemma, and upon the advice of an assistant state attorney general, blacks organized a town meeting to which all residents were invited. The meeting voted to hold an election and appointed two elections superintendents, one black and one white. January 6, 1986, was set as the date for the election.[404]

Candidates duly qualified for mayor and the five council positions; all were black and all were unopposed. Since there was no need to hold an election, the county probate judge administered the oath of office to the black candidates. On the same day, however, several whites filed a suit in state court arguing that the election had not been held in accordance with state law and that the

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[403] Time, "The Burden of Power," Time, August 7, 1989.

[404] Gresham v. Harris, 695 F. Supp. 1179, 695 (N.D. Ga. 1988).

boundaries of the town were unknown. The state court agreed and granted an injunction prohibiting the blacks from taking office and from conducting any more elections without strict compliance with state law.[405]

Concerned Citizens took another tack. They asked their representative in the legislature to introduce legislation activating the town. Whites, for their part, asked the representative to get the legislature to draw the boundaries to exclude them from the town limits. But the legislator refused to get involved in the controversy and took no action.

Concerned Citizens turned next to Governor Joe Frank Harris and asked him to fill the vacant mayor and council positions, as he is authorized to do by the state constitution. Harris refused, claiming that the town boundaries were too uncertain to allow him to make appointments. He suggested that the legislature enact a law requiring county officials to conduct special elections to fill vacancies in municipal offices.

The legislature, under the urging of the legislative black caucus, passed such a law in 1987 and authorized the board of registrars for the county to prepare a list of voters for the election.[406] After being advised by the attorney

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[405] Id.

[406] Ga. Laws 1987, p. 178.

general that the new statute was mandatory, Burke County officials prepared a map designating the town's boundaries, and issued a call for an election in Keysville to be held on January 4, 1988. The county attorney acknowledged that setting the town boundaries had been "a problem," but said "we now believe that the boundaries have been reasonably determined, and the election can go forward."[407]

The new election procedures were precleared by the Department of Justice, but, before an election could be held, the white plaintiffs again went to state court and got another injunction against the pending election. According to the state court, the boundaries of Keysville "were improperly determined" and were still essentially unknowable. And although the state court order plainly embodied a change in voting--the canceling of an election - the court nevertheless concluded that the change was not subject to preclearance under Section 5.[408]

Emma Gresham and other members of Concerned Citizens, with the assistance of the ACLU and Christic Institute South, filed a suit of their own in federal court arguing that the state court order canceling the election could not be implemented absent Section 5 preclearance. The court granted an immediate

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[407] Poole v. Gresham, No. 89-1564, Motion to Affirm, p. 7.

[408] Poole v. Lodge, Civ. No. 85-V-414 (Sup. Ct. Burke Cty., December 31, 1987).

hearing and on December 31, 1987, issued an injunction allowing the January election to go forward.[409] "Either Keysville never existed," the judge said, "or you do the best you can."[410]

White opposition, however, remained unabated. On the day of the election several whites filed an action with the county board of registrars challenging the eligibility of 41 voters on the grounds that the boundaries of the town had not been determined and the residency of the voters could not be established. The board of registrars dismissed the challenge, and there was no appeal.[411]

There were two slates of candidates in the election, one supported by Concerned Citizens and the other by those who opposed the restoration of municipal government. Candidates on the two slates got almost the identical number of votes, indicating that the voting was sharply polarized. Emma Gresham was elected mayor, outdistancing her white opponent by ten votes. Blacks were elected to four of the council positions, while James Poole, who had

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[409] Gresham v. Harris, 695 F. Supp. at 1181.

[410] Atlanta Journal and Constitution, November 23, 1989.

[411] In Re: Contest of Election Results of the Keysville Municipal Elections Held January 4, 1988, Civ. No. 88-V-21 (Sup. Ct. Burke Cty., May 23, 1988).

been endorsed by Concerned Citizens in an effort to include whites in the new government, was elected to the fifth council seat.

After the election, whites challenged the results in state court alleging once again that the boundaries of the town were indeterminable and that it was impossible to ascertain who was a qualified voter or candidate. The contest was denied and the state court affirmed the results of the election based on the map and voters list prepared by the county registrar.[412] Shortly thereafter, the federal court issued a permanent injunction that the state court order "changed a previously precleared practice and therefore should also have been precleared."[413]

Whites in Keysville, however, pressed on with their opposition to municipal government. "We're in it for the duration," vowed their lawyer.[414] The white plaintiffs appealed the decision of the federal court to the U.S. Supreme Court and tried to block the enforcement of various ordinances and

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[412] Id.

[413] Gresham v. Harris, 695 F. Supp. at 1184.

[414] Dallas Morning News, January 29, 1989.

annexations enacted by the newly formed government by filing suits in state court. The city responded by removing the cases to federal court.[415]

On May 29, 1990, the Supreme Court affirmed the lower court decision, and on September 21, 1990, the federal court dismissed the state court ordinance and annexation challenges. With entry of these court orders, the dispute over municipal boundaries in Keysville was finally, irrevocably, over. And under the leadership of Emma Gresham and the town council, Keysville blossomed.

The town started a junior city council program for young people, and instituted programs to fight illiteracy and teen pregnancy. A small library was begun in the temporary town hall. The county built a fire station just outside of town, street lights were installed for the first time, and a new post office was established. Streets have been paved. There is a new city hall, a clinic, and a handsome playground and recreation center. And rising above it all is a gleaming new water tower, dedicated in 1993 and a symbol of the town's triumph over the dead hand of the past and the closed fist of more recent times.[416]

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[415] Keysville Convalescent and Nursing Center, Inc. v. City of Keysville, Georgia, Civ. No. 188-184 (S.D. Ga.); Poole v. City of Keysville, Georgia, Civ. No. 188-183 (S.D.Ga.).

[416] Atlanta Constitution, October 19, 1988; ACLU, "Reaffirmation or Requiem for the Voting Rights Act?" (May 1995); The Dallas Morning News, January 29, 1989. The closed fist metaphor is that of Judge John Minor Wisdom. See United States v. Jefferson County Board of Education, 372

The changes that came to Keysville were nothing short of remarkable and owed much to the spirit of local residents who persevered against the odds and refused to succumb to the racial fears and distrust that had for so long gripped the white community. The changes also had a lot to do with the increased influence of the Georgia legislative black caucus which shepherded through state legislation requiring officials to conduct town elections. And they had a lot to do with the Voting Rights Act, and those who helped to enforce it, which prohibited whites from blocking the efforts of blacks to participate in the governance of the community in which they lived.

Butts County and the City of Jackson

Brown v. Brown

Brown v. Bailey

Jackson, the home of Georgia's death row, is the county seat of Butts County. According to the 1980 census, 43.5% of Jackson's 4,133 residents were black. In 1981, the ACLU filed suit in federal court on behalf of black citizens of

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F.2d 836, 854 (5th Cir. 1966).

Jackson challenging the failure to preclear annexations from 1966-1975 as well as a majority vote requirement imposed by the Jackson Democratic Committee.[417]

The city, which elected its mayor and five member council at-large, had followed a policy since 1965 of annexing areas with white population, which maintained the city's white majority. For example, in 1970, the city annexed of the town of Pepperton, which brought in 234 whites and only 35 African Americans. Overall, between 1960 and 1970, 64% of the 853 persons annexed into the city were white.

As a result of court orders, the city democratic committee disbanded, which had the consequence of ending the majority vote requirement in city elections. The defendants also agreed to submit all their annexations to the Attorney General for preclearance.

In 1981, the Department of Justice refused to preclear two annexations submitted by the city on the grounds that other land had been annexed since 1970, that had not been submitted under Section 5.[418] In April 1982, the city finally submitted to the Department of Justice 42 annexations since 1964 that had never been precleared. The ACLU asked the Attorney General to object on a

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[417] Brown v. Brown. No. CV-81-198-MAC (S.D. Ga.).

[418] James P. Turner, Acting Assistant Attorney General, to Alfred D. Fears, City Attorney, Jackson, Georgia, January 12, 1981.

number of grounds, including that the submissions understated the number of whites annexed into the city, and the city had established a pattern and practice of annexations to maintain the white majority."[419] The Attorney General requested additional information on two separate occasions, indicating that the annexations were problematical, but on May 20, 1983, and despite their racial impact, the Attorney General precleared the submissions.

The ACLU filed suit in 1984 on behalf of black voters challenging at-large elections for the Jackson City Council as violating the Constitution and Section 2. The lawsuit also challenged at-large elections for the three member Butts County Board of Commissioners on similar grounds.[420] Blacks had run for city and county office but had always lost. One black candidate made it to a run off for the county commission in 1982, but was defeated in the ensuing election.

In 1986, the city agreed to a plan for the city council consisting of five single member districts, two of which were majority black. The plan was implemented in the May 1986 election, and two blacks won seats on the city council.

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[419] Neil Bradley, ACLU Southern Regional Office, to William Bradford Reynolds, Assistant Attorney General, June 10, 1982.

[420] Brown v. Bailey, No. CV-84-223-MAC (M.D. Ga.).

The plaintiffs also reached an agreement with the county, expanding the commission from three to five members, with all members elected by districts. Although blacks were approximately one third of the county's population, because of the dispersion of the minority population, only one of the districts was majority black. A special election was held in April 1985, and two black candidates were elected, one from the majority black district and another from a district with a substantial black minority.

The county board of education, whose members were appointed by the grand jury, subsequently adopted the districts used by the county commission. The board's plan was submitted under Section 5 and was precleared.

Duffey v. Butts County Board of Commissioners

In 1992, the new census showed the districts for the Butts County Board of Commissioners and Board of Education were malapportioned with a total deviation of nearly 25%. The general assembly enacted new districting plans containing only one majority black district, but they were not precleared by the April deadline and fell victim to the "poison pill" provision.

The ACLU then filed suit on behalf of black residents on June 2, 1992, seeking an injunction against further use of the malapportioned plans.[421] Plaintiffs sought, and obtained, a preliminary injunction finding that the election districts were "constitutionally malapportioned."[422]

One year later, on June 10, 1993, the parties entered into a consent decree that retained five single member districts for both boards, reapportioned the districts with minimal deviation, and established two majority black districts, instead of the single majority black district that had been contained in the state legislative plan. The agreement was precleared by the Justice Department in August and on October 1, 1993, the district court ordered the new plan into effect.

Calhoun County

Calhoun County Branch of the NAACP v. Calhoun County

Calhoun County, located in southwest Georgia, was named in honor of U.S. Senator John C. Calhoun of South Carolina. Calhoun, architect of the doctrine of state nullification, was twice elected vice-president of the United

[421] Duffey v. Butts County Board of Commissioners, Civ. No. 92-233-3-MAC (M.D. Ga.).

[422] Id., Order, June 11, 1992.

States but famously resigned the post in 1832, and returned to the U.S. Senate where he championed the cause of states' rights in debates with Daniel Webster.

Calhoun County was majority black and prior to passage of the Voting Rights Act elected its county government from single member districts. As of 1962, only 145 blacks were registered to vote in the county, just 6% of the voting age population. But in 1967, after increased black registration under the act, and faced with the prospect that one or more of its single member districts would have a majority of black registered voters, the county switched to at-large elections.[423] And in doing so, it ignored the preclearance provisions of Section 5.

In 1979, black voters, represented by the ACLU, sued the board of commissioners to enjoin its use of at-large elections for failure to comply with Section 5. The plaintiffs also sued the board of education, whose members were elected from districts, alleging the districts were malapportioned.[424] On January 30, 1980, a three-judge court ruled that the change to at-large voting had never been submitted for preclearance, and enjoined its further use. Later that year a consent order was entered creating five single member districts, two of which

[423] Georgia Laws 1967, p. 3068.

[424] Jones v. Cowart, Civ. No. 79-79-ALB (M.D. Ga.).

were majority black, for both the county commission and the school board, with the school board having two additional members elected at-large.

Following release of the 1990 census, black voters, represented by the ACLU, again sued the county charging that its voting districts were malapportioned in violation of one person, one vote.[425] On July 13, the district court entered an order enjoining the upcoming primary election for the board of education under the malapportioned plan. The parties then agreed upon a new plan that complied with the equal population standard and maintained two of the districts as majority black. The court entered a consent order directing defendants to submit the plan to the Department of Justice for preclearance.[426] The plan was submitted and precleared, and elections were held in 1992 under the plan for both the board of education and the county commission.

Camden County and the Cities of Kingsland and St. Mary's

Haywood v. Edenfield

Camden County has a long and documented history of racial discrimination against African Americans. In 1978, the Treasury Department

[425] Calhoun County Branch of the NAACP v. Calhoun County, Georgia, Civ. No., 92-96-ALB/AMER(DF) (M.D. Ga.).

[426] Id., Order of August 26, 1992.

conducted an investigation and found that the county was discriminating against minorities in employment. The county's workforce did not reflect its black population, and minorities were relegated to jobs as laborers in the road department.[427] The Department of Health, Education, and Welfare also concluded that the county had fired two black school teachers in retaliation for filing allegations of discrimination, discriminated against blacks in awarding professional non-teaching positions at the county high school, and overwhelming assigned black students to lower, racially identifiable classes and tracks.[428]

In 1980, the City of Kingsland, one of the principal municipalities in Camden County, had a population of 4,166, of whom 33.55% were black. Prior to 1976, local laws required that the mayor and four member council be elected biennially to two year terms by plurality vote. In 1975, Kenneth E. Smith, a black candidate, came within 17 votes of winning a plurality and being elected to the council. It was the first time a black candidate had received a substantial number of votes in a city election.

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[427] Bernadine Denning, Director, Office of Revenue Sharing, to E.B. Herrin, Jr., Chairman, Camden County Board of Commissioners, January 30, 1978.

[428] W. H. Thomas, Dir., Office for Civil Rights (Region IV), to David Rainer, Superintendent, Camden County Schools, September 1, 1977.

The next year, the city adopted numbered posts and staggered terms, and implemented a majority vote requirement for city elections. The majority vote requirement was formally adopted by the city in 1977, but neither it nor the 1976 changes were submitted for preclearance under Section 5.

The city did, however, seek preclearance in 1978 of another voting change, the relocation of a polling place from city hall to a meeting hall owned by two private, all white organizations, a local Woman's Club and the American Legion. The Attorney General objected to the change, noting that the meeting hall was in an inconvenient location for minority residents, there were no black poll workers or managers at the site, and "members of the black community believe that the use of the meeting hall as a polling place will deter black participation in elections, and that other possible sites are available."[429] After the objection, the city moved the polling place back to city hall.

Black candidates, as could be expected, fared poorly under the city's majority vote requirement. In the 1978 election, a black candidate won a plurality of the votes for one of the council seat, but was defeated in the ensuing run off.

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[429] Drew S. Days III, Asstistant Attorney General, to the Hon. David M. Procter, Judge of Probate Court for Camden County, August 4, 1978.

In November 1981, black residents, represented by the ACLU, filed suit against the city to compel submission of the 1976 and 1977 voting changes under Section 5.[430] The city agreed to stop using its majority vote requirement, and submitted the remaining changes to the Justice Department. The district court stayed the case and postponed the December 1982 elections pending the Attorney General's decision.

In its submission, the city argued the changes were necessary to ensure continuity in office and to avoid all council positions being held by persons new to office. However, the city never submitted any evidence to the Attorney General to support these claims. The city's alleged reasons for the changes were even more questionable given that, in the 1975 election, two council members and the mayor were reelected, and the only opposition against the mayor was from an incumbent council member. There was also evidence that the city violated the state's voter registration laws. In the December 1977 election, there were 785 registered voters, and only those voters were eligible to vote in a run off. Despite that, 800 registered voters were certified as eligible to vote in the run off.

[430] Haywood v. Edenfield, Civ. No. 281-142 (S.D. Ga.).

On January 3, 1983, the Attorney General precleared the use of staggered terms, but objected to the numbered post provision. He noted that "implementation of numbered positions, in the context of racial bloc voting that seems to exist in Kingsland, would effectively nullify the advantage to the minority community of single shot voting and, thus, diminish their opportunity to elect a candidate of their choice." He also took note of the city's decision to return to plurality voting and emphasized that use of a majority vote requirement "is not legally enforceable." [431]

Plaintiffs requested the court to order a special election for the mayor and four city council positions, arguing that all incumbents were elected under illegal voting procedures. The court declined to cut the incumbents' terms short and instead ordered that only two council positions be filled by special election because those terms would have expired in December 1982, anyway.[432] The court also required that ballot forms, instructions, and candidate qualification procedures explicitly inform all registered voters that there was no anti-single shot law, and that incumbency should not be noted on official forms to avoid giving a benefit to those elected under an illegal system.

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[431] William Bradford Reynolds, Asstistant Attorney General, to John J. Ossick, Jr., Kingsland City Attorney, Kingsland, January 3, 1983.

[432] Haywood v. Edenfield, Order of March 7, 1983.

Foreman v. Douglas

Prior to 1967, St. Mary's, another municipality in Camden County, had six council members elected by plurality vote to staggered two year terms. A mayor was elected by plurality vote to a one year term. In 1967, the city adopted numbered posts and a majority vote requirement for council members, and a majority vote requirement for the mayor. The city reenacted the changes in 1981, which was an election year, but did not submit either the 1967 or 1981 enactments for preclearance under Section 5.

In 1980, St. Mary's had a population of 5,208 people, of whom 18.47% were black. In the 1982 election, Gerald Roberts, a black former council member who had been elected four times, received 45% of the vote in a four candidate race for mayor. Although he received a plurality and would have won under the pre-1967 voting system, he was forced into a run off and was defeated. Furthermore, when Roberts vacated his council seat to run for mayor, no black person even qualified for the vacant seat, underscoring the deterrent effect of the majority vote requirement on black candidacies.

In November 1981, black residents, represented by the ACLU, filed a lawsuit against St. Mary's, seeking to enjoin use of the majority vote and

numbered post requirements absent preclearance under Section 5.[433] The city submitted the changes, and the district court stayed the case pending the Attorney General's decision. The city maintained that even if the changes were rejected, its election scheme would still require a majority vote because the language in the city's charter addressing elections was silent on the majority versus plurality issue. The ACLU submitted comments urging an objection, and pointed out that the Georgia Supreme Court had interpreted language similar to that in the city's charter to require a plurality vote.[434] The ACLU further highlighted the city's failure to provide important data regarding the racial breakdowns of voter registration lists between 1971 and 1980, which indicated that minority registration was depressed. The continued use of numbered posts and a majority vote requirement, the ACLU argued, would have a negative racial impact.

Nevertheless, the Attorney General precleared the changes without explanation in September 1982.[435] Given the Attorney General's approval, the

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[433] Foreman v. Douglas, Civ. No. 281-143 (S.D. Ga.).

[434] Neil Bradley, Associate Director, ACLU Voting Rights Project, to William Bradford Reynolds, Assistant Attorney General, May 28, 1982.

[435] William Bradford Reynolds, Assistant Attorney General, to Stephen L. Berry, Esq., September 14, 1982.

district court ordered municipal elections to be held on December 7, 1982, bringing the litigation to a close.

Baker v. Gay

In February 1984, black residents, represented by the ACLU, challenged Camden County's use of at-large elections for the board of commissioners and the board of education. Under the county's system, members of both boards were elected at-large by majority vote for two year terms. The plaintiffs argued that the county's at-large election system diluted black voting strength in violation of the Constitution and the Voting Rights Act. The parties reached a tentative agreement the day before trial, and entered a consent order resolving the case in October 1985.[436] The agreement provided that both boards would be elected from five single member districts, two of which were majority black.[437] In the August 1986, primary elections, one black candidate won a board of education seat, and two black candidates won commission seats. Another black candidate, the first named plaintiff, lost a third commission seat by three votes.

[436] Baker v. Gay, Civ. No. 284-37, Order (S.D. Ga.).

[437] Id., Order of October 7, 1985.

In April 1991, the county sought to change elections for the board of commissioners by reducing the five single member districts to four, with a chairman elected at-large.[438] The county also wanted board members to serve four year staggered terms instead of two year terms.[439] However, there is no record showing that the Attorney General ever approved these changes. In 1992, the county attempted to get the legislature to enact In 1992, the county attempted to get the legislature to enact a redistricting plan that did not contain any majority black districts, but the county abandoned its efforts after the black community raised objections. Then, in 1993, the county proposed a new redistricting plan with one majority black district at 50.55%. The general assembly passed the redistricting plan with the help of Rep. Charlie Smith of St. Mary's, even though the black community had no say in the drawing of the lines and, for the most part, were completely shut out of the reapportionment process. The county submitted the 1993 plan for preclearance and the last correspondence from the Attorney General shows that the county had not

[438] J. Grover Henderson, Attorney for Camden County, to Richard Thornburg, U.S. Attorney General, April 3, 1991.

[439] Id.

provided sufficient information for the Justice Department to render a decision.[440]

Today, the board of commissioners is composed of five members elected from single member districts to four year staggered terms. As of 2006, although the county populations is 20.1% African American, none of the commission districts are majority black. The county board of education has five members, one of whom is African American.

Carroll County

Wyatt v. Carroll County Board of Commissioners

The 1990 census showed that the six member board of commissioners of Carroll County was malapportioned, with a total deviation of 45.7%. The legislature had enacted a remedial plan but did not submit it for preclearance until shortly before the April 27, 1992, deadline. The plan was not acted on by the Department of Justice, and died as a result of the legislative poison pill.

The black population of Carroll County was approximately 15%, and under the plan based on the 1980 census only one of the districts was majority (51.41%) black. Under the plan enacted by the legislature based on the 1990

[440] James P. Turner, Assistant Attorney General, to J. Grover Henderson, Attorney for Camden County, May 24, 1993.

census, however, none of the districts were majority black, and the percentage of blacks in the previously majority black district was reduced to 47.3%.

The ACLU filed suit on May 1, 1992, on behalf of black voters in Carroll County, alleging that the 1980 plan was malapportioned, and that the 1990 plan was retrogressive because it eliminated the sole majority black commission district under the pre-existing plan.[441] On June 10, 1992, the court enjoined the regularly scheduled primary election for the board of commissioners, and ruled that "it is undisputed, that the current districting system . . . is malapportioned in violation of the Fourteenth Amendment's one person-one vote guarantee."

Defendants then proposed a remedial plan in which one district was majority black based on total population, but contained a black voting age population of just 47.8%. Plaintiffs proposed an alternative plan with a 51.8% black district, which included students living on the campus of West Georgia College, many of whom were either non-residents, and thus not entitled to vote, or unlikely to vote in elections held during the summer. Taking the student population into account gave plaintiffs' proposed district an effective black voting age population. The court, however, rejected plaintiffs' plan and ordered

[441] Wyatt v. Carroll County Board of Commissioners, Civ. No. 3:92-CV-61-GET (N.D. Ga.).

the defendants to submit their plan to the Attorney General for preclearance.[442] On behalf of the NAACP and other black voters, the ACLU urged an objection to the county's plan on the grounds that it was retrogressive compared to the benchmark 1980 plan.[443] Despite the defect in the county's plan, the Justice Department precleared it on August 24, 1992.

Charlton County

Smith v. Carter

About a third of Charlton County is taken up by the Okefenokee Swamp, Seminole for "Land of Quaking Earth," which served in the 19th century as a sanctuary for members of the Seminole Indian Tribe, as well as escaped slaves. Even though blacks were almost a third of the county's population, prior to 1985 no black person had ever been elected to the county commission or school board. On August 29, 1985, the ACLU filed suit on behalf of five black voters of Charlton County against the county commission and school board alleging that at-large elections for both bodies diluted the voting strength of black voters in

[442] Id., Order of June 18, 1992

[443] Mary Wyckoff to Steven H. Rosenbaum, Department of Justice, June 24, 1992.

violation of Section 2 and the Constitution.[444] The lawsuit also alleged that the county had an egregious record of failing to comply with Section 5.

Prior to 1974, the board of commissioners consisted of three members elected at-large from residential districts. In 1974, the general assembly passed legislation that increased the board to five members, established numbered posts and staggered terms, and eliminated residential districts. Although these were changes in voting, the county implemented them at the elections in 1974 and 1976 without complying with Section 5. When the changes were finally submitted in 1977, the Attorney General precleared the increase in the size of the board but objected to the numbered posts and staggered terms:

> Our analysis reveals that blacks have not been elected to the Board of Commissioners of Charlton County under the elective system established by Act No. 1222 . . . and that voting along racial lines is present in Charlton County.[445]

The county asked for reconsideration, but it was denied:

> We have carefully considered the information you have provided, but find that it fails to provide a basis for our withdrawing the objections that were interposed. In particular, we have reanalyzed voting patterns in the county

[444] Smith v. Carter, Civ. No. 585-088 (S.D. Ga.).

[445] Drew S. Days III, Assistant Attorney General, to Honorable J.S. Haddock, Jr., Judge, Probate Court, Charlton County, June 21, 1977.

> and find that our original conclusion, that racial bloc voting exists, is still warranted.[446]

Despite the objection of the Department of Justice, the county refused to comply and conducted elections in 1978, 1980, 1982, and 1984 using the objected to numbered posts and staggered terms requirements.

In 1982, the Department of the Treasury notified the chairman of the county commission that a discrimination complaint had been filed against the county. After an investigation, the department found that "blacks are substantially underrepresented" in the county workforce with only 1 out of 29 permanent employees being African American. The department concluded that

> the County's recruitment policies and practices, coupled with the limited `active' period for applications, discriminates against blacks by limiting their knowledge of, and opportunity to apply for positions in the County's work force. The County's practice of hiring friends or relatives of incumbent employees, given the predominantly white composition of the County's work force, limits the opportunities for blacks to be considered once they apply.

The county denied the department's findings but signed a five-year compliance agreement. A follow-up investigation in 1983 found that "blacks still remain underrepresented within the County's work force . . . [and] are

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[446] Drew S. Days III, Assistant Attorney General, to Honorable J.S. Haddock, Jr., Judge, Probate Court, Charlton County, August 29, 1977.

predominantly concentrated in the service/maintenance positions."[447] A 1985 letter from the Treasury Department cited the County's "slow progress in fulfilling the hiring objectives of the Compliance Agreement," and noted only four of the County's 35 full-time permanent employees were black.[448]

The county school board also had a record of failing to comply with federal law. Although the Supreme Court outlawed segregation in 1957, the Charlton County schools remained segregated until 1970, with 90.2% of the county's black students in all-black schools. Two of the county's three schools were all-white. The county also maintained separate bus routes, and assigned children to buses based on race. In 1970, in response to a federal court order, the county board of education, along with 81 other local school systems in the state, finally adopted a plan to desegregate its public schools.[449]

Charlton County adopted at-large elections for its school boards in 1975 after the 1970 extension of the Voting Rights Act to replace a pre-existing system

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[447] Treadwell O. Phillips, Manager, Civil Rights Division, Office of Revenue Sharing, U.S. Department of the Treasury to Jessie A. Crews, Jr., Chairman, Charlton County Board of Commissioners, November 14, 1983.

[448] Treadwell O. Phillips, Manager, Civil Rights Division, Office of Revenue Sharing, U.S. Department of the Treasury to William Charter, Chairman, Charlton County Board of Commissioners, February 15, 1985.

[449] United States v. State of Georgia, No. CIV-12972 (N.D. Ga, 1969).

of grand jury appointments.[450] The legislation also provided for numbered posts, staggered terms, and a majority vote requirement. The Attorney General objected to the changes in 1977 on the grounds that "fairly drawn single member districts would give blacks a more realistic opportunity to elect a candidate of their choice."[451] The District Court for the District of Columbia, however, in an unpublished opinion, subsequently precleared the changes.[452]

The 1985 voting rights lawsuit against the board of commissioners and the board of education was resolved by consent decree in December 1985, with the defendants admitting their failure to comply with Section 5. A remedial plan was agreed upon and adopted in 1986, creating five single member districts for both the board of education and board of commissioners.[453] Elections were held that year and black candidates won a seat on each board.

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[450] Act No. 360 (1975).

[451] Drew S. Days III, Assistant Attorney General, to J. S. Haddock, Jr. June 21, 1977.

[452] Treadwell O. Phillips, Manager, Civil Rights Division, Office of Revenue Sharing, U.S. Department of the Treasury to William Charter, Chairman, Charlton County Board of Commissioners, February 15, 1985.

[453] Smith v. Carter, Order of March 31, 1986.

Clay County

Frank Davenport v. Clay County Board of Commissioners

Clay County, which is majority black, is one of the poorest counties in Georgia, with more than 30% of the population living below the poverty level. Located in the southwest corner of the state, on the Georgia-Alabama line, the county traditionally elected its five member board of commissioners from single member districts. No black candidates had ever been elected to the commission.

After passage of the Voting Rights Act, and the prospect that one or more of its election districts might contain a majority of registered black voters, the county abandoned its district system in favor of at-large voting in 1967. This change allowed whites to continue to control the election of all members of the board of commissioners. Although the switch to at-large elections was a change in voting, the county failed to submit it for preclearance under Section 5.

In 1980, members of the local NAACP, represented by the ACLU, filed suit challenging the county's at-large election system and the failure to comply with Section 5.[454] The three-judge court found a Section 5 violation, which resulted in a return to the single member district system.[455]

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[454] Davenport v. Isler, No. 80-42-COL (M.D. Ga.).

[455] Id., Order of June 23, 1980.

The 1990 census showed that the county commission districts were malapportioned with a total deviation of 39.1 %. The general assembly enacted a remedial plan in 1992, which called for new districts of substantially equal population, three of which contained majority black voting age populations.

However, because the 1992 reapportionment legislation was not precleared by the April 27, 1992, deadline, it was rendered void by a poison pill provision. Since the county was without a constitutional districting plan, the ACLU filed suit on July 10, 1992, seeking a remedial plan for the upcoming elections.[456]

Primary and general elections, however, were held in 1992 under the malapportioned plan and all five districts elected county commissioners for four year terms. When the general assembly reconvened for its 1993 session, it enacted redistricting legislation that provided for districts identical to those in the 1992 legislation, only this time the reapportionment bill contained no poison pill provision.

In 1993, the general assembly enacted legislation changing the method of selecting the Clay County school board members from grand jury appointment to election from the same five single member districts used by the county

[456] Davenport v. Clay County Board of Commmissioners Civ. No., 92-98-COL (JRE) (M.D. Ga.).

commission. [457] However, the legislation also included a requirement that school board candidates must possess a high school diploma or its equivalent.[458] The change was submitted for preclearance but was objected to by the Department of Justice:

> In Clay County, only 37% of black persons age 25 and older possess a high school diploma or its equivalent, compared to 69% of white persons age 25 and over, according to the 1990 census. State law generally does not appear to require or endorse the proposed educational qualification and the existing system of grand jury appointments to the school board has no such requirement. Indeed, we understand that none of the three black incumbents on the school board would meet this requirement. In these circumstances, requiring that persons who wish to run for the school board demonstrate that they have a high school diploma or a GED equivalent would appear to have a disparate impact on the ability of black voters in Clay County to elect their preferred candidates.[459]

In a consent decree adopted on June 2, 1993, defendants admitted that the board of commissioner districts were "malapportioned in violation of the one person-one vote requirement of the Fourteenth Amendment," and agreed to hold special elections in 1994, and to submit the newly enacted redistricting plan

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[457] This change came about as the result the adoption by Georgia voters of a Constitutional amendment in 1992, mandating that school districts which utilized appointive systems change to district election systems. See, Ga. Laws 1991, p. 2032; Ga. Const. Art. VIII, Sec. 5, Para. 2.

[458] Georgia Laws, 1993, Act 8.

[459] James P. Turner, Assistant Attorney General, to William H. Mills, October 12, 1993.

for Section 5 preclearance. Plaintiffs agreed to "assist in the preclearance process," and preclearance was granted[460]

Following adoption of the consent decree, the defendants sought attorneys' fees as the prevailing party. Plaintiffs were clearly the prevailing party because they secured the adoption of constitutionally apportioned commission districts, three of which were majority black, as well as the cutting short of the terms of commissioners from four to two years. The court, however, ordered fees awarded to neither party, ruling that, "[a]s incongruous as it may seem, it is the Court's view that in the situation above described there are two prevailing parties in this case."[461]

Clayton & Fulton Counties and the City of College Park

In re the City of College Park

College Park, named for the finishing school and military academy that once anchored the community, is just south of Atlanta and abuts Hartsfield-Jackson International Airport. In 1977, the city had a seven member city council, consisting of a mayor elected at-large and six council

[460] Davenport v. Clay County, Order of June 2, 1993, p. 4.

[461] Id.

members elected from single member districts. The population at the time was 26,835, and approximately 30% black. This was a significant increase from the 15.4% minority population recorded by the 1970 census.

In October 1977, the city submitted a redistricting plan, as well as some 32 proposed annexations, for preclearance under Section 5. The Department of Justice objected to the redistricting plan, as well as 17 of the 32 annexations, noting that:

> Voting in municipal elections appears to follow racial lines. Under the districting plan adopted by the City there will be a black majority in one of the six wards; Ward 2 will be 77 percent black in total population. Thus if voting is along racial lines blacks under this plan will have the opportunity to elect no more than one of the six council members elected from single member districts, although they constitute almost one-third of the City's population. In addition, our analysis reveals that this plan has a total deviation from equal district population of plus or minus 15.8 percentage points, and that it is possible to draw a plan creating two districts with substantial black majorities that has a significantly smaller total deviation.
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> With respect to the annexations. . . Our analysis reveals that of the City's population of 26,835, approximately 8,748 reside in the annexed areas under consideration; of these, according to the best estimates we have received, approximately 98 percent are white. As a result, the City without the annexed areas would have a population of 18,117 [*sic*] and would be approximately 43 percent black. Thus the annexations have resulted in a dilution of the black population from 43 percent to approximately 30 percent.

> Based on this analysis and that presented above with respect to the redistricting, we must conclude that the annexations significantly dilute the City's black population and that College Park's electoral system does not minimize the dilutive effect of these annexations.[462]

By 1983, the black population of College Park had increased to 48.3%, but the 1980 census also showed the six city council districts were malapportioned. The city adopted a redistricting plan and submitted it to the Department of Justice for preclearance, but the Attorney General objected because the plan fragmented the concentrations of black population and created only one majority black district and five safe, majority white districts (not including the at-large mayoral seat) for the incumbents. Were the city apportioned in a racially fair manner, at least two of the six districts would have been majority black.

> In spite of the enormous increase in minority population, the city appears to have made a conscious effort to maintain effective minority voting strength at the level established in 1976. In doing so, the proposed plan increases the fragmentation of the minority community in a manner that adversely affects minorities by packing black population into one district (District No. 2 at 90 percent black) and dividing the rest of the black population concentration between four other districts. Nor does there appear to be any legitimate reason for the strangely irregular lines that meander throughout census Block No. 319, a highly concentrated

[462] Drew S. Days III, Assistant Attorney General, to George E. Glaze, City Attorney, City of College Park, December 9, 1977.

> black community. Such fragmentation and irregularity of shape in the context of the voting patterns that exist in the city and the fact that the city seems not to have welcomed but, rather, to have avoided input from the black community in the reapportionment process, are all probative of racial purpose.[463]

The ACLU, at the request of black residents of College Park, met with members of the city council and was able to secure a redistricting plan that fairly represented minority voters. The new plan contained two majority black districts, was submitted to the Attorney General, and was precleared in February 1985.

Allen v. Reeves

On election day 2003, African American postal worker Tracey Wyatt challenged a white incumbent, Ken Allen, for a city council seat representing College Park's Third Ward. In the ward's south precinct, poll officials instructed voters to deposit their ballots in the ballot box without removing the number stubs attached to each one, a process which violated Georgia election law. A poll watcher objected, but was rebuffed until the late afternoon, when College Park Mayor Jack Longino intervened by contacting the city's supervisor of elections.

[463] William Bradford Reynolds, Assistant Attorney General, to George E. Glaze, Esq., December 12, 1983.

The elections supervisor then instructed the Third Ward poll manager to tell remaining voters to remove the number stubs from their ballots before casting their votes. The Third Ward's ballots, secured in their boxes, were then transported to the College Park City Hall.

Unsure of what to do with the irregular ballots, the city sought advice from the Fulton County superior court judge on call to manage election disputes, who conducted an informal hearing. The Third Ward's ballot boxes were then opened with witnesses present and the 70 ballots with number stubs still attached were segregated from the rest. The presiding judge then detached the stubs from their ballots and invited poll officials to count the completed votes with witnesses present. All told, 80 votes had been cast in the Third Ward's south precinct: 71 for Tracey Wyatt, and nine for Ken Allen. Across the entire ward, Wyatt prevailed by a margin of 181 to 140.

Allen then filed an election challenge in the Fulton County Superior Court to discount the 70 ballots which had been cast with number stubs attached, and to award him the city council seat.[464] Wyatt, represented by the ACLU, argued that granting Allen's challenge would violate the Fourteenth and Fifteenth Amendments and Article 2 of the Georgia constitution. A victory for Allen,

[464] Allen v. Reeves, Civ. No. 2003-CV-77825 (Fulton Cty. Sup. Ct.).

moreover, would encourage fraud by poll officials, and unjustly penalize voters for mistakes made by election officials.

Wyatt further argued that granting Allen's petition would violate Section 2 of the Voting Rights Act because statistics showed that even if every white voter in the Third Ward went to the polls and voted for Wyatt without removing the number stub, 74% of the discounted ballots would have come from minority voters. By discounting the 70 ballots that had originally been incorrectly cast, the court would be changing the results of an election in which a majority black ward had chosen a black candidate. When reauthorizing the Voting Rights Act in 1982, the U.S. Senate had warned against allowing an isolated incident of misinformation or breakdown in polling procedures to dilute the vote in minority communities.

Following a hearing, the Superior Court dismissed Allen's challenge and upheld the election results. Employing what it described as a "legal fiction," it held that the challenged ballots had not been actually cast until the election judge separated the ballots from their number stubs. Thus, all the ballots were properly cast and counted, and no violation of state law had occurred. A week after the court issued its order, Tracey Wyatt was sworn in as a member of the College Park City Council.

Coffee County and City of Douglas

NAACP v. Moore

Presley v. Coffee County Board of Commissioners

Coffee County, with a population of nearly 22,000, a quarter of whom are black, is located in the rural wire grass region of south central Georgia. In 1968, the county abandoned grand jury appointments of school board members in favor of at-large elections. Two years later, after the legislature authorized a referendum on several school board issues, residents ratified the 1968 change to school board elections, voted to reduce the number of board members from seven to five, and changed the position of county school superintendent from an appointed to an elected position. The 1968 and 1970 changes were all subject to Section 5, but the county failed to seek preclearance. The county had also adopted at-large elections for its five member county commission in 1960, prior to passage of the Voting Rights Act.

In 1977, the ACLU filed suit on behalf of black voters challenging at-large elections for the county board of commissioners, the board of education, and the city commission of Douglas, the county seat, as diluting minority voting strength in violation of Section 2 and the Constitution.[465] The plaintiffs also sought to

[465] NAACP Branch of Coffee County v. Moore, Civ. No. 577-25 (S.D. Ga.).

require the board of education to comply with Section 5. The parties subsequently entered into consent agreements in 1978, acknowledging that at-large elections for each jurisdiction "denied plaintiffs and their class equal access to the political system, in derogation for their rights [under the constitution and the Voting Rights Act]." Five single member districts were established for the commission and school board, but using different district lines. One district for each body was majority black. The plan for the City of Douglas contained three two member districts, one of which was majority black.

Based on the 1980 census, the three bodies were malapportioned. However, despite repeated negotiations, the parties to the 1977 litigation were unable to reach an agreement on remedial plans, and as a consequence the malapportioned plans were used throughout the decade.

In 1992, the general assembly enacted identical redistricting plans for the board of commissioners and board of education. The plans were not precleared by the deadline set by the legislature, and accordingly died of a poison pill provision.

In September 1992, black voters, who were 25.4% of the county population, and nearly half the population in Douglas, again filed suit challenging the malapportionment of the commission, the board of education,

and the city council as violating Section 2, and the Constitution.[466] Defendants did not contest plaintiffs' assertion that the existing plans were malapportioned, acknowledging that the election plan for the board of commissioners contained a deviation of 39.2%, the plan for the board of education 21.72%, and the plan for Douglas 34.9%.[467]

Because the July 21, 1992, primary elections had already been held for the board of commissioners and the board of education under the malapportioned plans, plaintiffs moved to enjoin the general election or require special elections under a properly apportioned and precleared plan. On October 29, 1992, the district court refused to enjoin the pending November elections, but indicated it would require a special election once proper plans had been enacted and precleared. The county submitted the 1992 legislative plan and it was precleared by the Department of Justice on January 19, 1993. Plaintiffs contended, however, that the plan violated Section 2 because it packed black voters in one district and fragmented them in other districts.

Prior to trial on the Section 2 vote dilution claim, the parties reached an agreement on redistricting plans for the commission and board of education

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[466] Presley v. Coffee County Board of Commissioners, Civ. No. 592-124 (S.D. Ga.). The 1977 case, NAACP v. Moore, was consolidated with the Presley case on October 28, 1992.

[467] Id., Plaintiffs' Opposition to Defendants' Motion to Adopt Reapportionment Plan, p. 2.

which created one district with a 65.72% black voting age population (BVAP), and a second district with a 27.22% BVAP. The court signed the consent decree revising the legislative plans on March 16, 1994, and the plans were precleared.[468]

Following the 1990 census, the City of Douglas adopted a plan which packed black voters into a single district, but it was unable to get the plan precleared. Subsequently, on October 7, 1993, the parties to the 1992 malapportionment litigation submitted a consent order to the court enjoining the upcoming elections. The city sought to expand the six member city commission by one member, but the court declined to accept that change. After a trial date was set, the city agreed to a plan containing six districts, three of which were majority African American.

As is evident from these events, Section 5 proved to be an important tool in helping to dismantle election districts in Coffee County that unfairly diluted the political influence of minority voters.

[468] Deval Patrick, Assistant Attorney General, to Keith H. Solomon and Sidney Cottingham, April 22, 1994.

Colquitt County and the City of Moultrie

Cross v. Baxter

When Congress amended and extended the Voting Rights Act in 1982, one of the cases it relied upon was Cross v. Baxter,[469] a challenge to at-large elections in Moultrie, Georgia - the Colquitt County seat - brought by black residents represented by the ACLU. Despite evidence of discrimination and lack of equal access to the political process, the district court dismissed the complaint. The court of appeals, citing evidence of vote dilution that had been ignored or discounted by the district court, reversed and remanded.[470] The district court, however, once again dismissed the complaint.

A second appeal was taken, but this time the court of appeals affirmed. It held that plaintiffs had not shown that town officials were "unresponsive to the particularized needs of the Black residents."[471] Plaintiffs petitioned the Supreme Court for review, and based on the intervening amendment of Section 2, the Court vacated the decision and sent the case back to the district court for yet another trial under the new "results" standard.[472] The Senate report

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[469] Civ. No. 76-20 (M.D. Ga.).

[470] Cross v. Baxter, 604 F.2d 875 (11th Cir. 1979).

[471] Cross v. Baxter, 639 F.2d 1383 (11th Cir. 1981).

[472] Cross v. Baxter, 460 U.S. 1065 (1983).

accompanying the 1982 amendments expressly provided that proof of unresponsiveness of elected officials was not a prerequisite for a Section 2 violation. The report further noted that the case from Moultrie "was rejected, even though the evidence showed pervasive discrimination in the political process."[473]

On remand, and in light of the amendments of the Voting Rights Act, the City of Moultrie capitulated and agreed to the adoption of district elections. But the price it exacted from the plaintiffs was a plan that packed nearly every black city resident (91%) into a two member district. Rather than prolong the litigation before a district court judge who had twice dismissed their complaint, plaintiffs agreed to the settlement, which clearly reflected the deep and continuing racial polarization in the city.[474] Elections were held under the new plan in May 1985, and two black candidates were elected to office.

[473] 1982 U.S.C.C.A.N. 39.

[474] Cross v. Baxter, Order of July 24, 1984.

Cook County

Jones v. Cook County

Located along Interstate 75, halfway between Macon, Georgia, and Jacksonville, Florida, Cook County had a population of 13,456 in 1990. The county's history of voting discrimination against its 30% African American population included the adoption, in 1967, of at-large elections to minimize black influence in elections. In 1982, the Attorney General objected to annexations by the county seat of Adel because of their potential to dilute black voting strength:

> Our analysis shows that, assuming the data presented by the City to be accurate, the annexations in question would seem to result in an overall dilution in the black voting strength of between 2.5 and 3 percent, a significant reduction in view of the apparent existence of racial bloc voting in the City.[475]

The Attorney General withdrew his objection in 1983, following a change in the method of elections in Adel.

A vote dilution lawsuit filed by local residents in 1984 was settled by the adoption of five single member districts for both the Cook County board of commissioners and board of education.[476] One of the districts for each body was majority black.

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[475] William Bradford Reynolds, Assistant Attorney General, to Howard E. McClain, June 29, 1982.

[476] Cook County Voter Education Project v. Walker, Civ. No. 84-044-VAL (M.D. Ga.), Order of July 11, 1985.

Based on the 1990 census, the districts were malapportioned, with a total deviation of 25.23%. The ACLU filed suit in 1994 on behalf of black voters challenging the malapportioned districts for both the commission and the board of education as violating Section 2, Section 5, and the Constitution.[477] In a hearing on December 19, 1995, county officials agreed that "the relevant voting districts in Cook County are malapportioned in violation of the equal protection clause of the fourteenth amendment to the United States Constitution."[478] A consent decree allowed sitting commission members to retain their seats but implemented a new plan, correcting the malapportionment for the 1996 elections. Based on 1990 census figures, the new plan maintained the existing majority black district at 65.45% and created a second district with a 52.02% black population.

Crawford County

Thomas v. Crawford County

In 2002, the ACLU filed suit on behalf of voters in Crawford County alleging that election districts for the board of commissioners and board of

[477] Jones v. Cook County Board of Commissioners, 7:94-cv-73-(WLS),(M.D. Ga. filed June 3, 1994).

[478] Jones v. Cook County Board of Commissioners, Civ. No. 7:94-cv-73 (WLS), Order, December 19, 1995.

education were malapportioned.[479] Both boards consisted of five members elected from five identical single member districts, two of which were majority black.[480] A sixth member was appointed to the board of education by its members. The total deviation among the districts was 73.63%, and plainly unconstitutional under one person, one vote.

Failed efforts by the legislature and local officials to cure the malapportionment had a convoluted history. After the 2000 census was released, the board of commissioners adopted an ordinance reducing the number of single member districts for the board from five to four, with the chairman elected at-large. The Georgia General Assembly enacted a plan based on the ordinance, and it was submitted to the Department of Justice for preclearance under Section 5.

The board of commissioners, alleging that it was unaware that the new plan reduced the number of districts, later rescinded the ordinance and asked the Department of Justice to deny preclearance to the proposed four district plan. The department issued a letter on April 29, 2002, stating that it would take no action on the submission in light of the letter from Crawford County officials

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[479] Thomas v. Crawford County, Georgia, 5:02 CV 222 (M.D.Ga.).

[480] The county adopted single member districts as a result of Section 2 litigation brought in 1984. Raines v. Hutto, 84-321 (M.D.Ga.).

stating that they no longer wished to implement the submitted plan. The general assembly also passed legislation reducing the number of single member districts for the board of education from five to four, but Governor Roy Barnes vetoed the bill on May 22, 2002.

Plaintiffs brought suit when it became apparent that the 2002 elections would be held under the malapportioned plan. They sought, and were granted, summary judgment and a preliminary injunction preventing elections from taking place under the unconstitutional plan. The court then held a remedial hearing to fashion a court ordered remedy. Plaintiffs argued for the maintenance of the two majority black districts. The court reviewed plans from the plaintiffs and the county, and adopted a court ordered plan consisting of five single member districts, two of which were majority black.

Coweta County

Rush v. Norman

Coweta County, west of Atlanta, is named for the tribe headed by Chief William McIntosh of the Coweta Tribe of the Creek Indian Nation, "the half-Scot, half-Creek" who relinquished lands to the federal government in the 1825 Treaty of Indian Springs. McIntosh was later slain by an irate group of fellow Creeks at his home on the Chattahoochee River.

In October 1983, the ACLU wrote a letter on behalf of the local NAACP branch to the members of the general assembly from Coweta County advising them that at-large elections for the county commission, the board of education, and the board of aldermen of Newnan, the county seat, were likely in violation of the Voting Rights Act. In response, a five district plan was adopted for the county commission, one of which was majority black. A plan was also adopted for the board of education containing five single member districts, one of which was majority black, and two at-large seats.

The City of Newnan also enacted a new election plan. It increased the membership on the board of aldermen from four to six, and provided for four members elected from single member districts, one of which was majority black, and two members elected at-large. Blacks, who constituted 45% of the population of Newnan, opposed the plan because it did not fairly reflect minority voting strength. The plan was submitted to the Attorney General for preclearance, who objected to it in August 1984:

> Our review of the information available to us indicates that racially polarized voting exists in the City of Newnan and that no black ever has been elected to the city council, even though six blacks have been candidates for council positions since 1970. Our analysis reveals that the submitted plan provides for one district in which black voters would appear to have a realistic opportunity to elect a representative of their choice.
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> In evaluating the purpose underlying the proposed changes we note at the outset the submission's statement that the proposed changes were initiated in response to a letter from representatives

> of the minority community seeking a meeting to discuss possible changes in the existing at-large method of election. Our information, however, is that the city has made no effort to solicit input or suggestions from the members of the minority community who sought the change. Nor has the city adequately justified the method chosen.
>
> In that regard, our analysis shows that a plan with compact districts which recognize communities of interests likely would provide two districts in which minority voters could elect representatives of their choice. In fact, we understand that the city considered alternatives which would have had exactly that result but rejected all of them in favor of a plan that unnecessarily divides the city's minority residential areas into three districts, thereby affording minorities an effective majority in only one district. In a locality with a history of racial bloc voting, such as seems to exist in the City of Newnan, such fragmentation of minority residential areas has the effect of diluting the black voting strength.[481]

Because of the objection, the method of elections for the city reverted back to the preexisting at-large system.

In September 1984, the ACLU filed suit on behalf of black residents of Newnan challenging at-large elections for the board of aldermen. They also moved to enjoin the October 30, 1984, city elections.[482]

The parties subsequently agreed upon a plan providing for four aldermen elected from single member districts, two of which were majority black. In addition, the number of aldermanic positions was increased from four to six, with the two additional members elected from two voting districts consisting of

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[481] William Bradford Reynolds, Assistant Attorney General, to A. Mitchell Powell, Jr., August 31, 1984.

[482] Rush v. Norman, Civ. No. C84-150N (N.D. Ga.).

the combination of the two majority white and the two majority black districts. The agreement also provided for a special election to be held on March 19, 1985, at which a black alderman was elected from one of the single member majority black districts. Today, the mayor pro tem is a black female who was elected from one of the majority black districts. Thus, Section 5 has played an obvious and critical role in ensuring racially fair elections for the City of Newnan.

Crisp County

Dent v. Culpepper

Based on the 1980 census, Cordele, the county seat of Crisp County, had a population of 10,914 people, a majority (53.37%) of whom were black. The city had a commission-manager form of government with five commissioners elected at-large by majority vote. Only 32.6% of black residents were registered to vote and voting was racially polarized. Prior to 1964, no black person had even run for city commission. In 1974, a black candidate won a plurality of votes but lost in a run off to a white candidate. As late as 1986, only one black person, A. J. Rivers, had ever won a seat on the city commission, and he had run unopposed.

In October 1986, black residents, represented by the ACLU, filed suit against the city challenging its at-large elections as diluting minority voting

strength in violation of the Constitution and Section 2.[483] The following year, plaintiffs filed a motion for a preliminary injunction to enjoin the pending commission elections. A hearing, which lasted three days, was held on the motion during which plaintiffs put up an abundance of evidence of past and continuing discrimination in the city and the county: no black person had ever been elected probate judge, sheriff, clerk of court, or to the Democratic Executive Committee in the county; no black person was elected to the six member Crisp County Board of Education until the late 1970's; no blacks were elected to the county commission until the creation of a majority black district in 1984; between 1976 and 1986, the county appointed 237 persons as poll managers for county elections, none of whom were black; from 1950 to 1986, the city commission appointed 94 poll managers for city elections, none of whom were black; no black person from the county had ever been elected to the Georgia House of Representatives or Senate from a district which was, in whole or in part, within the city limits; African Americans in the city and county historically had been discriminated against in the areas of education, housing, and public accommodations; there were no public high schools for blacks in the county until 1956, and it was not until the 1970-71 school year that the city was forced by

[483] Dent v. Culpepper, Civ. No. 86-173-ALB-AMER (M.D. Ga.).

federal court order to desegregate the public schools; 55% of the city's white residents graduated from high school while only 26% of black residents had high school diplomas; the city maintained racially segregated cemeteries; housing projects remained segregated until the mid-1970's; the county courthouse, polling places, public parks, and other public accommodations were segregated; the local NAACP chapter had no white members; the city had two American Legion posts, one white and the other black; the Lions and Rotary clubs were all white; demonstrators picketing a restaurant in Cordele that refused to serve blacks were attacked by whites on two separate occasions in July 1965; the per capita income for white city residents was $7,122, but only $2,362 for blacks; a majority of the city's black residents lived below the national poverty level while only 9% of white residents lived below that level; and according to plaintiffs' expert, Dr. Peyton McCrary, Cordele adopted a majority vote requirement in 1964 with the specific purpose of diluting the voting strength of black voters. Additionally, Crisp County, which had single member districts for county commission elections, adopted at-large elections shortly before the Voting Rights Act was passed.[484]

[484] McDonald (2003), p. 131.

Despite the evidence of a Section 2 violation, the court denied the plaintiffs motion for a preliminary injunction. It held "[e]ven assuming that the Plaintiffs will eventually be entitled to the relief they seek . . . the court refuses to 'act in haste' under the present circumstances."[485] The following year, and after two years of litigation, the parties entered into a consent decree which established four single member districts for the city commission, with a fifth member, the chair, elected at-large.[486] Two of the districts were majority black. The plan was implemented at the December 1988 election.

Dekalb County

In re the City of Decatur

The City of Decatur, which is six miles east of Atlanta's central business district, is the Dekalb County seat and the second largest city in the Atlanta metropolitan area. The city has operated under a commission-manager form of government since 1920, and in the early 1980's the governing body consisted of a mayor and four commissioners elected at-large. Although 41.7% of Decatur's 18,404 residents were black, no African American had ever been elected to city government.

In the fall of 1983, black residents of Decatur, with the assistance of the ACLU, prepared and presented a reapportionment plan to the city utilizing single member districts. In the event voluntary redistricting was not successful, the ACLU planned to bring suit on behalf of black voters. The redistricting plan was rejected by the mayor and city commissioners, but the members of the local legislative delegation were more

[485] Dent v. Culpepper, Order of November 23, 1987.

[486] Id., Order of September 21, 1988.

receptive to municipal reapportionment. Public hearings were held by the legislators in November 1983, at which several proposed plans were presented by various community groups.

The local delegation settled on a plan providing for two, two member commission districts with the mayor elected at-large. One of the two seat districts was majority black. The plan was enacted by the general assembly at the close of the 1983 legislative session, and elections were held in 1984. For the first time in the city's history, an African American was elected to city office.

Maher v. Avondale Estates

Located just two miles east of the City of Decatur, the DeKalb County seat, the town of Avondale Estates has long been a predominantly white enclave in an area that became mostly non-white. The 1970 census reported that only two of the city's 1,735 residents were black. Ten years later there were 26 blacks out of 2,589 residents.

One of the mechanisms employed to exclude black homeowners was a municipal ordinance, adopted in 1967, that prohibited the display of yard signs and thus limited information about real estate available for purchase. This technique was common in predominantly white neighborhoods that sought to avoid residential integration, but it was seldom imposed by law.

Although patently unconstitutional,[487] the ordinance remained unchallenged until the summer of 1998 when two days before a primary election, Avondale Estates residents Tanya Greene and Sean Maher placed a campaign sign on their front lawn in support of a candidate for superior court judge. Like Ms. Greene, the candidate was an African American who had devoted much of his professional career to representing indigent persons facing the death penalty. The sign was removed by the city clerk on her lunch break the next day.

Avondale Estates resident Laurie Hunt made a yard sign criticizing the city for not discharging the city manager for making racial comments on the job. The city manager, who was also the police chief, was accused of saying "[t]he police officer's uniform patch would look better if it had a nigger on the patch with a noose around his neck."[488] The city hired the former county district attorney to investigate the accusation. He concluded that he could not determine the exact phraseology and context of the comment, but that "the words 'nigger' and 'noose' were said."[489] The city council fined the police chief $5,000.00, but did not discharge him. When the city manager/police chief saw Ms. Hunt's sign, he "stopped at the police department" and asked an officer to

[487] Linmark Assoc. Inc. v. Township of Willingboro, 431 U.S. 85 (1977)(ban on residential "for sale" signs unconstitutional); Ladue v. Gilleo, 512 U.S. 43 (1994)(total ban on political signs unconstitutional).

[488] Investigative Report of Allegation of Racial Discrimination, Prepared for the Mayor and The Board of Commissioners, City of Avondale Estates, Georgia, August 15, 1998, p. 3.

[489] Id., p. 28.

"just stop and ask the people to remove the sign."[490] Eventually, three squad cars arrived and Ms. Hunt was issued a citation with a potential $100 fine.

According to the city, these citizens had violated the ordinance that banned all yard signs. However, not only was the ordinance unconstitutional, it was selectively enforced.

In 1998, several city residents, joined by a real estate agent and represented by the ACLU, filed suit against the city alleging that the ordinance was unconstitutional.[491] In discovery, plaintiffs learned that no version of the sign ban had been in place before the effective date of Section 5, and that the 1967 ordinance and subsequent amendments had never been submitted for preclearance under Section 5. The regulations for implementing Section 5 include as an example of covered changes "any change affecting the right or ability of persons to participate in political campaigns" enforced by a covered jurisdiction.[492] The complaint was amended to include a Section 5 violation.

After suit was filed the city adopted a moratorium on enforcing the ordinance, and after plaintiffs filed for summary judgment the ban was repealed insofar as it applied to political and "for sale" yard signs. For the general election in 2000, residents could display political signs - without fear of police interference - for the first time in three decades.

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[490] Maher v. Avondale Estates, Ga., No. 1:00-CV-1847 (N.D.Ga. July 20, 2000), Plaintiffs' [First] Motion for Summary Judgment, Exhibit 11, p. 21, filed October 20, 2000.

[491] Maher v. Avondale Estates, Ga., No. 1:98-CV-2584 (N.D.Ga. September 4, 1998); refiled and assigned No. 1:00-CV-1847 (N.D.Ga. July 20, 2000).

[492] 28 C.F.R. § 51.13(k).

Though the main problem - the total ban on political yard signs - was resolved in plaintiffs' favor, the city amended its ordinance six times during the litigation continuing to create other issues regarding size, setback regulations, and unequal treatment based on content. When the district court eventually issued an order on the remaining issues, it concluded that Section 5 did not cover political signs.[493]

Plaintiffs' motion for reconsideration was denied on February 9, 2006.

Dodge County

Brown v. McGriff

Eastman, the seat of Dodge County, is a rural town of 5,440 residents, of whom 37.4% are black. In 1987, black residents, represented by the ACLU, challenged the at-large method of electing the five member city council as diluting minority voting strength in violation of the Constitution and Section 2.[494] The city agreed to settle the litigation, and the parties entered into a consent decree providing for elections from single member districts.[495]

[493] Maher v. Avondale Estates, Ga., Order of March 31, 2005, pp. 74-79.

[494] Brown v. McGriff, Civ. No. 387-019 (S.D. Ga.).

[495] Id., Order of August 1, 1988.

Dooly County

McKenzie v. Giles

The three member board of commissioners and five member board of education of Dooly County were traditionally elected from single member districts. As with many other Georgia counties, following enactment of the Voting Rights Act in 1965, Dooly County abolished its district systems in favor of at-large voting in 1967, and it ignored the preclearance provisions of Section 5.

Black voters of Dooly County, represented by the ACLU, filed suit against the board of commissioners in 1979, and later amended their complaint to include the board of education, alleging that the at-large systems for both boards had been implemented in violation of Section 5, and diluted black voting strength in violation of Section 2.[496] Although blacks were 50.7% of the population of the county according to the 1970 census, prior to the filing of the lawsuit no black person had ever been elected or appointed to either board.

After the lawsuit was filed, the county submitted the 1967 voting changes for preclearance, but preclearance was denied by the Department of Justice, which said:

> Our analysis indicates that a fairly-drawn single-member district system would probably contain at least one district with a population majority of blacks. Analysis of precinct returns demonstrates that voting in Dooly County generally follows racial lines, at least to the extent of rendering very improbable the election of a black candidate for County Commission in the context of at-large elections.[497]

[496] McKenzie v. Giles, No. CIV-79-43 (M.D. Ga.).

[497] Drew Days III, Assistant Attorney General, to John C. Pridgeon, Esq., July 31, 1980.

After the election, the parties entered into consent decrees providing for single member district voting plans for future elections of the board of commissioners and the board of education.[498]

In 1981, the general assembly adopted legislation to implement the settlement decree, and it was precleared by the Attorney General. However, at the time the voting districts were drawn, the 1980 census was not available and data from the 1970 census was used. The 1980 census showed that the districts were severely malapportioned, with a total deviation for the board of commissioners of 25.96%, and 51.45% for the board of education. Black residents of the county asked members of the local legislative delegation to seek enactment of a new redistricting plan, but they took no action.

McKenzie v. Dooly County

In June 1986, black voters, again represented by the ACLU, filed suit in federal court challenging the county's voting districts as violating the Constitution and Section 2.[499] Blacks were a minority of the voting age population in each of the three county commission districts, thereby giving whites the ability to control the outcome of elections in all three districts. The commission district with the largest black population was also overpopulated with a deviation of 15.9%. The situation in the five districts for the board of education was similar. Only one district had a majority black voting age population, and it was overpopulated by 33.3%.

[498] McKenzie v. Giles, Order of July 5, 1980.

[499] McKenzie v. Dooly County, Georgia, No. CIV-86-95 (M.D. Ga.).

In August 1986, the court enjoined further elections under the malapportioned plans and ordered the development of new plans, finding that, "[i]n this case defendants have not put forth any legitimate considerations for the population disparities. Counsel for the defendants has quite candidly admitted that the population figures as presented by plaintiffs show that the voting districts are malapportioned."[500] The case was settled the following month with the creation of a five district plan for both boards which included two majority black districts, with black populations of 69.01% and 60.09%. A special election was held in November 1986, and blacks were elected to both the county commission and board of education.

Granville v. Dooly County

Dooly County's redistricting problems continued into the 1990s. The new census showed the districts for the board of commissioners and board of education were malapportioned with a total deviation of 34.8%. The general assembly enacted a remedial plan, but it was not precleared by April 27, 1992, and was killed by a poison pill provision. In October 1992, the ACLU again filed suit challenging the existing plan, and the parties quickly agreed to a settlement. The new plan corrected the malapportionment and increased the number of majority black districts from two to three.[501] The settlement also set aside the July 1992, primary, halted the November 3, 1992, general election, and called for a special election to be held in December under the

[500] Id., Order of August 8, 1986, pp. 3-4.

[501] Granville v. Dooly County, No. CIV 92-378-1(M.D. Ga.).

new plan. The parties further agreed that the defendants would ensure that the new plan would be enacted by the general assembly in 1993.

Shaw v. The State

The activities of the ACLU in Dooly County also led the organization to defend the rights of black citizens in other arenas. In 1981, Tom Shaw, a Dooly County voter and plaintiff in previous ACLU litigation, was indicted for aggravated assault, robbery by force, and simple battery upon a Dooly County deputy sheriff. At his first trial, he was represented by private counsel, and a mistrial was declared when the jury could not reach a verdict. At the time of his retrial, his private attorney was out of the state and not available. Over Shaw's objection he was tried without his attorney and without the presence of one witness who had given exculpatory testimony at the first trial. The retrial resulted in a guilty verdict, and Shaw, who had no prior felony convictions, was sentenced to 30 years imprisonment.

The ACLU began representing Shaw at this point because it felt he was being retaliated against for his voting rights activities. After extensive hearings, the superior court judge denied Shaw's motion for a new trial, and an appeal was taken to the Georgia Court of Appeals.[502] In September 1982, that court affirmed. The ACLU then petitioned the Georgia Supreme Court, and it agreed to review the case. Oral argument

[502] Shaw v. The State, 163 Ga. App. 615 (1982).

was held in January 1983, and in June the Court reversed the convictions and sentences.[503]

Shaw was tried for a third time in August 1983, and found guilty. (The ACLU did not represent him at the retrial). He was sentenced to serve 15 years, instead of the 30 years imposed after the second trial, but that sentence was reduced to 12 years by the State Sentence Review Board.

Dougherty County and the City of Albany

Mathis v. Whittington

Whittington v. Mathis

Wright v. City of Albany

Albany, the county seat of Dougherty County, sits on the banks of the Flint River in southwest Georgia. During the 1960s it was a caldron of civil rights activity. Over a two year period hundreds of men, women, and children who participated in a series of massive civil rights demonstrations, known as the Albany Movement, were arrested and jailed. Four homes where voter registration organizers were staying were riddled with bullets in the summer of 1962. Days later, someone fired three shotgun blasts into the home where Charles Sherrod, a leader of the movement, was sleeping.[504]

More than a decade later, local blacks sued the city over its use of at-large elections, which they contended diluted black voting strength. In an opinion written in

[503] Shaw v. The State, 251 Ga. 109 (1983).

[504] For an account of the Albany Movement, see John Lewis, Walking with the Wind: A Memoir of the Movement (New York: Simon and Schuster, 1998), 186, 191.

1977, striking down the at-large system, the court made detailed findings showing that the city remained significantly polarized on racial lines. The city functioned "in every respect . . . as a racially segregated community." Schools, voting, the library, the city auditorium, tennis courts, swimming pools, public housing, juries, municipal employment, taxicabs, theaters, and city buses were segregated. The Democratic Party was "in the hands of an all-white committee." The black community "has just never had the opportunity or been permitted to enter into the political process of electing city commissioners." The challenged system, the court found, was "winner take all" and was unconstitutional.[505] The at-large elections were replaced with a mayor-commission form of government, consisting of six wards and a mayor elected at-large. The new system provided blacks for the first time an opportunity to elect candidates of their choice to the city government. But vestiges of the old racial divisions remained.

In August 1984, three candidates from Ward 2 vied for a seat on the Albany Board of Commissioners. The white incumbent, Joe Whittington, and a black challenger, Henry Mathis, got the most votes, but neither received a majority required for election. A run off was held in September, during the course of which Mathis learned that poll workers at one of the majority black precincts were denying people the right to vote if they had not voted in the August primary. Under state law, to vote in a run off a voter must have been eligible to vote in the preceding election, but there is no requirement that the voter actually voted in the prior election.

[505] Paige v. Gray, 437 F. Supp. 137, 153-58 (M.D. Ga. 1977).

Mathis complained to the election superintendent that eligible voters were being turned away, and the practice was stopped. Between 14-18 voters had been improperly denied the right to vote, and Mathis and election officials contacted most of them and they voted later in the day. But four electors were never located and thus never voted. As fate would have it, Mathis lost the run off by two votes (900 to 902). Had the four voters who were improperly turned away been allowed to vote, the outcome could have been different.

Mathis, represented by the ACLU, filed an election challenge with the board of commissioners. The board denied the challenge by a vote of 3 to 2, and did so strictly along racial lines. The three white commissioners who voted in the majority were of the view that the voters who were turned away had "forfeited" their votes by not filing a complaint on their own behalf with the election superintendent. Mathis appealed to the Superior Court, and after a hearing it granted the challenge and ordered a new election.[506] The incumbent appealed and the Georgia Supreme Court affirmed on January 3, 1985.[507]

A new run off election was held in February, but as often happens to successful challengers, Mathis was defeated. Mathis later ran again for the city council, and was elected.

As black participation in governmental affairs increased, so did white flight from the city. In 1980, blacks were 47.6% of the population, but by 2000, the black population

[506] Mathis v. Whittington, Civ. No. 84-M-515 (Dougherty Sup. Ct.).

[507] Whittington v. Mathis, 324 S.E.2d 727 (Ga. 1985).

had increased to 64.7%. Following the 2000 census, the city adopted a new redistricting plan for the mayor and commission to replace its admittedly malapportioned existing plan, but it was rejected by the Department of Justice under Section 5. The Department of Justice noted that while the black population had steadily increased in Ward 4 over the past two decades, subsequent redistrictings had decreased the black population "in order to forestall the creation of a majority black district." The department's letter of objection concluded that it was "implicit" that "the proposed plan was designed with the purpose to limit and retrogress the increased black voting strength in Ward 4, as well as in the city as a whole."[508]

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

Black residents of the city, represented by the ACLU, brought suit to enjoin further use of the malapportioned plan, and requested the court to supervise the development and implementation of a remedial plan that complied with one person,

[508] J. Michael Wiggins, Acting Assistant Attorney General, to Al Grieshaber, Jr., City Attorney, September 23, 2002.

one vote and the Voting Rights Act.[509] In a series of subsequent orders, the court granted the plaintiffs' motion for summary judgment, enjoined the pending elections, adopted a remedial plan prepared by the state reapportionment office, and directed that a special election for the mayor and city commission by held in February 2004. The court emphasized that "[i]n drawing or adopting redistricting plans, the Court must also comply with Sections 2 and 5 of the Voting Rights Act." Under the court ordered plan, blacks were 50% of the population of Ward 4, and a substantial majority in four of the other wards.[510] But for Section 5, elections would have gone forward under a plan in which purposeful discrimination was "implicit," and which could only have been challenged in time consuming vote dilution litigation in which the minority plaintiffs would have borne the burden of proof and expense.

Knighton v. Dougherty County

Wright v. Dougherty County

Because of a racial divide in the county's legislative delegation, the Dougherty County Commission and Board of Education were also unable to redistrict following the 2000 census. While cities in Georgia have the power under state law to redistrict themselves, redistricting at the county level can only be done by the general assembly. As a matter of long standing courtesy, the legislature will not enact a redistricting plan for a county that does not have the unanimous approval of the county's legislative

[509] Wright v. City of Albany, Georgia, 306 F. Supp. 2d 1228 (M.D. Ga. 2003).

[510] Id. at 1235, 1238 , and Order of December 30, 2003.

delegation. Dougherty County's legislative delegation, divided strictly along racial lines, could not agree on new plan for the county commission and board of education, and as a result the county proceeded to hold elections in 2002 under a plan that contained a total deviation of 29.8%, and was in clear violation of the one person, one vote principle.

The dispute within the county's legislative delegation centered, predictably, on the number of majority black districts a new plan would have. Both the county commission and the board of education consisted of seven members, six of whom were elected from identical single member districts and the seventh member at-large. The county had asked the delegation to approve, and the legislature to enact, a plan that contained three majority white districts, despite the fact that whites were a minority (39%) of the population of the county. After the two black members of the delegation, both of whom lived in Albany, refused to approve the proposed plan, minority residents of the county, represented by the ACLU, filed suit to enjoin continued use of the existing malapportioned plan and to require court supervision of a properly apportioned plan that complied with Sections 2 and 5.[511] The lead plaintiff, Rev. Lawrence Knighton, when asked to assess the current state of race relations in Dougherty County, soberly replied "it's Sodom and Gomorrah."

The district court allowed the 2002 elections to go forward under the malapportioned plan, and gave the legislature yet another opportunity to enact a

[511] Knighton v. Dougherty County, Georgia, Civ. No. 1:02-CV-130-2 (WLS) (M.D. Ga.). An earlier suit had been filed by black plaintiffs seeking similar relief but had been dismissed on the dubious theory that the plaintiffs, while they lived in overpopulous districts, did not live in the most overpopulous district and

constitutional plan. When it again failed to do so, the court granted the plaintiffs' motion for summary judgment, enjoined further use of the challenged plan, and adopted a court ordered plan, similar to one proposed by plaintiffs, in which "four out of the six districts are clearly majority African-American." In implementing its plan, the court again emphasized its obligation to "comply with Sections 2 and 5 of the Voting Rights Act."[512] Thus, the Voting Rights Act was applied to insure that black voters in the county had an equal opportunity to elect candidates of their choice to the county commission and board of education.

Douglas County

Simpson v. Douglasville

The City of Douglasville enacted a number of annexations over the years, but failed to submit them for Section 5 review. Minority plaintiffs, represented by the ACLU, sued the city in 1996, seeking compliance with the preclearance requirement.[513]

Prior to filing the lawsuit, the ACLU consulted with the city attorney and was able to reach an agreement on the need for preclearance. Plaintiffs were thus able to file simultaneously with the complaint a proposed consent judgment reflecting the agreement of the parties. The consent order, which was approved by the district court on June 28, 1996, enjoined the city from further implementation of the unprecleared

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thus lacked standing. See Wright v. Dougherty County, Georgia, 358 F.3d 1352 (11th Cir. 2004).

[512] Knighton, Order of April 23, 2004, pp. 6, 9.

[513] Simpson v. Douglasville, No. 1:96-cv-01174 (N.D.Ga.).

annexations and required them to be submitted to the Attorney General within 75 days. The city complied with the decree, however, in part because of the large number of annexations it was not until November 23, 1998 – over two years from the date the lawsuit was filed - that the city gathered and submitted all the information needed for the Department of Justice to make a decision.

The Douglasville City Council consisted of seven members, five elected from single member districts and two at-large. As was predictable, the annexations caused severe malapportionment of the districts. Approximately 1,985 persons were added to the city, which resulted in a total deviation of 128%.

Plaintiffs filed an amended complaint seeking to correct the malapportionment and to ensure that any remedial plan did not dilute the voting strength of African Americans. The city agreed to a modification of the election structure which would continue to protect minority voting strength. The modified plan had three members elected from single member districts and four members elected by numbered posts from two double member districts. The plan was submitted for preclearance, and the Department of Justice approved it on June 11, 1999. The parties submitted a joint consent decree providing for the new plan to be implemented in November 1999, which was approved by the court.

Though it took more than three years, African Americans were able to secure compliance with Section 5, cure unconstitutional malapportionment, and convince local officials to modify their method of elections to prevent minority vote dilution.

Evans County

Concerned Citizens for Better Government for Evans County v. Deloach

Woody v. Evans County Board of Commissioners

Evans County is located in southeast Georgia, and based on the 1980 census had a population of 8,428, of whom 34.72% were black. The county was named for Confederate General Clement A. Evans who surrendered under General Robert E. Lee after leading the last charge of the Army of Virginia at Appomattox.

In August 1983, black voters, represented by the ACLU, filed suit to challenge the at-large method of electing the county's five member board of commissioners as diluting minority voting strength in violation of the Constitution and Section 2.[514] The litigation also challenged at-large elections in Claxton (pop. 2,694), the county seat, and the town of Hagan (pop. 880). The lawsuit against the county was settled in January the following year with the creation of five single member districts for the county commission, one of which was majority black.[515] That district subsequently elected a black candidate to the county commission.

The claims against the two towns were resolved several months later when the city of Hagan agreed to elect its five member council from two districts, one with three members and designated posts, and the other with two members and designated posts.

[514] Concerned Citizens for Better Government for Evans County v. DeLoach, Civ., No. 483-343 (S.D. Ga.).

[515] Id., Order of January 13, 1984.

The city of Claxton agreed to increase the size of its council to seven members, with two elected from one district and five elected from a second district.[516]

The 1990 census showed that the districts for the commission and board of education were malapportioned with a total deviation of 33.7%. And although 34% of the county's population of 8,724 was black, the black population was packed in the single majority black district at the level of 87.9%. The general assembly enacted a new districting plan for the county commission and board of education based on the 1990 census, but the plan retained the single, packed majority black district, containing approximately 85% black population. This configuration essentially gave 80% of the electoral power to whites who comprised less than 65% of the total county population.[517] The legislation also contained a "poison pill" provision, and when the plan was not precleared by April 27, 1992, it was automatically repealed.

In 1992, the ACLU filed suit on behalf of black voters challenging the malapportioned plan under the Constitution and Section 2.[518] And on June 29 the district court enjoined "holding further elections under the existing malapportioned" plan for both bodies.[519]

The defendants then proposed a new redistricting plan increasing the number of county commission districts from five to six with two majority black districts. This plan

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[516] Concerned Citizens for Better Government for Evans County v. DeLoach, Order of April 18, 1984 (City of Hagan); Order of July 27, 1984 (City of Claxton).

[517] Mary Wyckoff, ACLU, to Steven H. Rosenbaum, Department of Justice, January 29, 1993, fn. 4, pp. 6-7.

[518] Woody v. Evans County Board of Commissioners, Civ. No. 692-073 (S.D. Ga.1992).

[519] Id., Order of April 7, 1994, p. 2.

was opposed by plaintiffs who contended that because increasing the number of commission districts was not done to create a second majority black district but, rather, to dilute black voting strength. Plaintiffs also argued that by increasing the number of districts, defendants were seeking to maintain four majority white districts and protect white incumbents. They also pointed out that the 72% and 70% black majority districts created by defendants' plan "essentially amount to packed districts."[520] In contrast, plaintiffs proposed a plan that maintained the five county commission districts, but created two majority black districts with 64% and 65.8% black population, respectively. The defendants' plan effectively reduced minority voting strength from 40% of district members (two seats out of five) to 33% (two seats out of six).

For the board of education, which had an additional member – the chair - elected from the county at-large, defendants' proposal to expand the number of districts from five to six further diluted minority voting strength by reducing minority voter opportunity from 33% (two members on a six member board) to 28.6% (two members on a seven member board).

Defendants adopted their plan regardless of the concerns expressed by plaintiffs and submitted it to the Attorney General, who precleared it on December 13, 1993, despite evidence of racially discriminatory intent. The district court subsequently ordered the six member plan into effect, with the chair of the board of commissioners elected by majority vote of the members, and the chair of the board of education - a seventh member elected at-large and voting only in the event of a tie.

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[520] Mary Wyckoff, ACLU, to Steven H. Rosenbaum, U.S. Department of Justice, January 29, 1993, p. 8.

The plan was implemented at the next regularly scheduled elections that year.[521]

Floyd County and the City of Rome

Askew v. City of Rome

Located in north Georgia, the City of Rome has a population of 30,000 and is 30% African American. For the first 10 years Section 5 was in effect, Rome simply ignored the preclearance requirements. During that period, Rome implemented majority vote, staggered terms, and numbered post requirements for its nine member city commission and seven member school board. When the city finally submitted an annexation for preclearance in 1974, an investigation by the Attorney General revealed the unprecleared election structures and a total of 60 unprecleared annexations. When the annexations were submitted without including the election structure changes, the Attorney General declined to preclear them "[b]ecause these electoral changes are indispensable to an evaluation of the voting effects of the annexations."[522] When everything was finally submitted, the Attorney General objected to the structural changes and 13 of the 60 annexations.[523]

The city then sought preclearance by filing suit in the District Court for the District of Columbia. The city also challenged the constitutionality of Section 5 and, alternatively, sought to be removed from the list of Section 5 covered jurisdictions by

[521] Id., Order of April 7, 1994.

[522] J. Stanley Pottinger, Assistant Attorney General, to Robert M. Brinson, August 1, 1975.

[523] J. Stanley Pottinger, Assistant Attorney General, to Robert M. Brinson, October 20, 1975.

"bailing out" from coverage. The district court denied bail out as well as preclearance to the structural changes, and the Supreme Court affirmed. It held the changes, "when combined with the presence of racial bloc voting and Rome's majority white population and at-large electoral system, would dilute Negro voting strength."[524] The Court rejected the city's challenge to the constitutionality of Section 5, finding that it was an appropriate exercise of congressional authority to enforce the non-discrimination provisions of the Constitution.

In 1987, the city against sought to implement staggered terms for school board members, but was stopped from doing so by yet another objection of the Attorney General. The Attorney General concluded the change would be retrogressive because "black candidates have had limited success in seeking seats on both the city school board and the city board of commissioners. This appears to be based in part on a prevailing pattern of racial bloc voting in city elections."[525]

In 1993, three African American residents of Rome and two organizations, represented by the ACLU, challenged Rome's method of electing its city commission and school board under Section 2 and the Fourteenth Amendment.[526] At the time suit was filed, Rome had a nine member city commission elected at-large from three residency wards. All three seats in each ward were up for election at the same time, and the three top vote getters were elected. The school board had seven members, all

[524]City of Rome v. United States, 446 U.S. 156, 183 (1980).

[525] William Bradford Reynolds, Assistant Attorney General, to Robert Brinson, August 11, 1987.

[526] Askew v. City of Rome, No. 4:93-cv-28-HLM (N.D. Ga.).

elected at-large and all elected at the same time with the top seven vote getters being elected. As of 1996, only one African American had ever been elected to the city commission. Only two African Americans had ever been elected to the school board, and only one served at any given time. Only one African American had ever been elected to either board without having first been appointed.

The city filed a counterclaim that Section 2 of the Voting Rights Act was unconstitutional, which was denied by the district court. The court also denied Rome's motion to compel disclosure of the membership lists of the plaintiff NAACP, finding that such discovery would violate the members' First Amendment right of association.

In 1970, a black man ran for the school board and received the highest number of votes in the general election but was defeated in a run off held under the unprecleared majority vote requirement. The district court found "[m]ore voters turned out for the run off than turned out for the initial election," and they did so in order to "defeat the first serious black candidacy in Rome's history." The court also found Rome remained "a largely segregated society," and "racism does affect a portion of the electorate when the voters are unfamiliar with a candidate of the opposite race."[527] Nonetheless, the court dismissed the complaint because blacks

[527] Askew v. City of Rome, 127 F.3d 1355, 1377, 1383 (11th Cir. 1997).

had been able to elect preferred white candidates under the challenged system. The plaintiffs appealed, but the decision was affirmed.[528]

Fulton County

Lewis v. City of Atlanta

In November 1982, the Atlanta City Council passed a resolution authorizing a referendum whether there should be a freeze on the production and development of nuclear weapons, and whether money should be transferred from the defense budget to jobs and human services programs. A group of local businessmen, together with the Southeastern Legal Foundation, filed suit in state court charging that the referendum was ultra vires, in that the city charter authorized referenda only upon presentation of a petition signed by city voters. The state court enjoined the referendum on the ultra vires theory.[529]

John Lewis and Mary Davis, two members of the city council, and two other black registered voters, all of whom were represented by the ACLU, filed suit in federal court alleging that since the prior practice of the council had been to authorize the placing of questions on the ballot, the state court order was a change in

[528] Id. at 1355.

[529] Southeastern Legal Foundation, Inc. v. City of Atlanta, Civ. No. C-92179 (Sup. Ct. Fulton Cty).

voting that could not be implemented without Section 5 preclearance.[530] A single-judge, concluding that there was "some reasonable possibility of plaintiffs' success on the merits of their motion," granted a temporary restraining order requiring the ballots to be printed with the "nuclear freeze-jobs for peace" question included.[531] The full three-judge court, however, denied a request for a preliminary injunction on November 17, 1982, but without resolving any of the Voting Rights Act issues. The election went forward without the nuclear freeze question on the ballot. In the meantime, the city council amended its charter to clarify the authority of the council to conduct referenda. The amendment to the charter rendered moot the question of the validity of the state court order, and the district court, upon plaintiffs' motion, dismissed the complaint on mootness grounds on September 28, 1983.

Glynn County

Brunswick-Glynn County Charter Commission v. United States

Glynn County is located in southeast coastal Georgia and includes the industrial city of Brunswick, the county seat, as well as St. Simon's Island, an affluent, predominantly white resort. Brunswick is majority black, and since the mid-1970's, two of its five council members have been African American.

[530] Lewis v. City of Atlanta, Civ. No. 82-2464A (N.D. Ga.).

[531] Id., Order of November 16, 1982.

In 1982, the state legislature, at the request of local officials, and over the objections of the Brunswick black community, adopted legislation consolidating the governments of Brunswick and Glynn County. The county submitted the legislation for preclearance and the local branch of the NAACP, represented by the ACLU, argued that consolidation would have a racially discriminatory effect because it would dilute the voting strength of black voters in Brunswick. They also said consolidation was being undertaken with a racially discriminatory purpose in violation of the Constitution and Section 2.

Although blacks were a majority of the population of Brunswick, they were a minority of the population in Glynn County. Under the proposed plan, six members of the consolidated government's board of commissioners would be elected from single member districts and one at-large. Blacks were a majority of the voting age population in only one of the districts. In addition, consolidation was to be approved by a countywide referendum, rather than by separate votes in the city and the remainder of the county. In July 1982, the Attorney General objected to the consolidation legislation finding that:

> the majority-black population of the City of Brunswick will be submerged in the majority-white population of Glynn County, resulting in diminished opportunities for blacks to elect representatives of their choice to govern their affairs. Whereas at present blacks have been successful in electing candidates of their choice to the city commission . . . they will not be in a position to exert such influence in the consolidated government

> in the context of racial bloc voting that appears to exist in Glynn County.[532]

The Attorney General also objected to the single referendum provision, noting that it was a change from procedures previously followed in the county, and that it would have "the effect of diminishing the political voice of blacks, who constitute a majority in the City of Brunswick, but not whites, who compose a majority of Glynn County."

In 1983, the Georgia General Assembly took another stab at consolidation. It enacted legislation providing for the consolidated government to be elected from three multi-member districts, one of which was 65.9% black. But again, the referendum on the proposed new government was to be held on a countywide basis. The Attorney General precleared the proposed new plan as "fairly" recognizing minority voting strength, but again objected to the proposed referendum, noting that it did not recognize "the black community's electoral voice . . . on a par with that of the white community's . . . [resulting] in a dilution of black voting strength."[533]

In 1986, the county charter commission filed a declaratory judgment action in the District Court for the District of Columbia seeking a ruling that its single

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[532] William Bradford Reynolds, Assistant Attorney General, to Terry K. Floyd, Glynn County Attorney, August 16, 1982.

[533] William. Bradford Reynolds, Assistant Attorney General, to Terry K. Floyd, Glynn County Attorney, February 21, 1984.

referendum proposal did not violate Section 5.[534] Local black residents of Glynn County, represented by the ACLU, sought to intervene to oppose preclearance. The district court dismissed the complaint in July 1986, on the grounds that the charter commission, as opposed to the local governing bodies or election officials, lacked standing to bring a suit for preclearance. Rather than refile their complaint, the county conducted a referendum, but consolidation was defeated. The county then filed a state court challenge to the election, but the state court dismissed the suit in May 1987.

Lyde v. Glynn County Board of Elections

The Glynn County Board of Education was composed of ten members, with two members elected from each of five two member districts. Blacks are 25% of the county population, and were a majority in one of the two member districts, which had elected two African Americans.

At a referendum held in November 2002, voters approved a change in the size and method of election of the board of education. Although the referendum was a change in voting, the county did not submit it for preclearance. In 2003, the general assembly enacted legislation implementing the referendum.[535] The bill was

[534] Brunswick-Glynn County Charter Commission v. United States, Civ. No. 86-0309 (D. D.C.).

[535] Ga. Laws 2003, p. 3697.

signed by the governor on May 30, 2003, but the county did not submit it for preclearance until ten months later. On its face, the change was retrogressive as the new system used the same district lines as the preexisting plan, but reduced to one the number of board members elected from each district. Two other board members were elected at-large. Given the reality of polarized voting, African American voters would be able to elect their candidate of choice to only one of seven seats under the proposed new system, rather than two of ten seats as under the preexisting plan.

In support of preclearance, the county argued the new plan was the same as that used by the county commission and that blacks had been elected county wide as coroner and state court judge.[536] The county failed to note that no African Americans had been elected to the at-large seats on the county commission, or were likely to be elected to the at-large seats on the school board. The county also argued that the change was not retrogressive because the ability to elect "one (1) member out of seven (7) would be proportional based on registered voters," an argument that failed to take into account the fact that black voter registration was depressed, with blacks constituting only 18% of registered voters.

On June 18, 2004, the Attorney General precleared the legislation authorizing the referendum, but requested additional information regarding the statute adopting the new plan. Plaintiffs, African American citizens and registered voters of

[536] Submission letters of March 18, 2004, and June 4, 2004.

Glynn County, represented by the ACLU, filed suit on July 16, 2004, seeking to enjoin the upcoming elections for failure to comply with Section 5.[537]

The court conducted a hearing on plaintiffs' motion for temporary restraining order on July 19, 2004. Despite clear precedent that unprecleared voting changes are void and unenforceable,[538] the court did not issue a ruling and voting under the new plan began on July 20th. However, the court entered an order at 10:34 a.m. on the 20th enjoining the election because election officials had posted a sign at one of the polling places erroneously stating that the election had been enjoined.[539]

Nonetheless, on July 28, 2004, the Attorney General precleared the new election plan. Plaintiffs and defendants entered into an agreed order rescheduling the primary election for the board of education for August 24, 2004. The at-large seats were won, predictably, by two white males.

In this instance, the failure of Section 5 to block implementation of a plainly retrogressive voting change must be laid at the door step of the Department of Justice, and not the statutory scheme itself.

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[537] Lyde v. Glynn County, Civ. No. 204-091 (S.D. Ga.).

[538] E.g., Lucas v. Townsend, 486 U.S. 1301, 1305 (1986).

[539] Lyde v. Glynn County Board of Elections, Order of July 20, 2004.

Greene County

Bacon v. Higdon

Greene County was majority black, but prior to passage of the Voting Rights Act blacks were excluded from the political process. Following the abolition of the all white primary, the local paper warned in 1946 that if blacks voted in any appreciable numbers, "some hooded and secret order such as the Ku Klux Klan will ride again, and all power acquired by the ballot will be lost by terrorism." The paper reasoned, "[i]f California has the rights to have a law keeping a Japanese from owning property it seems to us that Georgia can have a white primary."[540]

Traditionally, three members of the county board of commissioners were elected from single member districts, with a fourth member, the chair, elected at-large. Commission members were also required to be property owners. On the eve of passage of the Voting Rights Act, with its promise of increased black registration, the county changed the method of electing the commission to insure that whites, who were a majority of the county's voting age population, as well as registered voters, could continue to control the outcome of all elections. This was done by increasing the size of the commission to five members, all elected at-large and by majority vote, and by retaining the requirement that commissioners be freeholders.

[540] Harris County Journal, June 28, 1946 (reprinted from Greensboro Herald Journal).

The board of education, whose five members were appointed by the grand jury, also in 1964 adopted at-large elections with a majority vote requirement. The change was approved in a county wide referendum, and the first elections under the new system were held in December 1964. The new election procedures were different from those in effect for the board of education on November 1, 1964, and were thus subject to preclearance under Section 5. The board, however, ignored Section 5 and proceeded to hold illegal at-large elections over the next 21 years, disregarding requests from the Department of Justice in 1978, 1979, and 1984 that the new procedures be submitted for Section 5 review. The at-large method of elections for the board of education was reenacted by the state legislature in 1985, but again no effort was made to comply with Section 5.

Prior to 1970, no black person had ever been elected to, or appointed to serve on, the board of commissioners or board of education. After that, blacks served in token numbers only.

In March 1985, black residents of Greene County, represented by the ACLU, challenged at-large elections for the board of commissioners and the board of education as having been adopted, and as being maintained, purposefully to discriminate against blacks in violation of the Constitution, and as diluting minority

voting strength in violation of Section 2.[541] The plaintiffs also contended that the method of elections for the board of education was in violation of Section 5.

Three months later, in June 1985, the parties entered into a consent decree enjoining at-large elections for the board of education pending Section 5 review. The parties also agreed to submit a final decree to the court reapportioning both the board of commissioners and the board of education into four single member districts with the chair elected at-large. Two of the districts were majority black.

In January 1986, the district court issued an amended consent order and decree adopting the new voting plan for the two governing bodies.[542] At the ensuing election held in August 1986, one black person was elected to the board of commissioners and two blacks were elected to the board of education.

Hall County

Bryant v. Miller

The Georgia General Assembly has the duty under state law to reapportion county governing bodies and school boards every 10 years based on the recent census. Despite that, the legislature failed to redistrict 16 counties - Butts, Carroll, Clay, Dougherty, Evans, Hall, Lee, Liberty, Mitchell, Monroe, Morgan, Newton,

[541] Bacon v. Higdon, Civ. No. 85-40-ATH (M.D. Ga.).

[542] Id., Consent Order and Decree of January 10, 1986.

Screven, Sumter, Tattnall, and Terrell - after the 1990 census. The deviations in the 16 counties ranged from 18% (Terrell) to 73% (Lee). No plans were enacted for three of the counties. Plans were enacted for the remaining 13, but the enabling statutes all contained a "poison pill" provision that if the plan were not precleared under Section 5 by April 27, 1992, the beginning date of qualifying for county commission and school board elections, it would become "null and void." None of the 13 plans were precleared by that date, and the malapportioned plans remained in effect as a result.

Prior to the 1992 elections, and in an effort to secure a comprehensive and orderly remedy, the ACLU filed suit in federal court in Atlanta on behalf of residents of the 16 counties asking the court to supervise the required redistricting in conformity with one person, one vote and Sections 2 and 5 of the Voting Rights Act.[543] The court, however, declined to exercise broad jurisdiction and, citing "improper joinder of claims," dismissed all the cases except the one against Hall County.[544] The ACLU pursued the case against Hall County and filed new, separate actions against the other counties to secure constitutionally apportioned plans.

Hall County is located in Northeast Georgia, historically an area of small farms and few African Americans. The county commission consists of five

[543] Bryant v. Miller, Civ. No. 1 92-CV-1042 (N.D. Ga.).

[544] Id., Order of May 13, 1992.

members, four elected from districts and one at-large. The total deviation among the districts was 44.2%. Blacks were 8.6% of the population, and when combined with Hispanics were 13.6% of the population, still too small to constitute a majority in a single member district.

Local efforts to reapportion the county commission in the late 1980s and early 1990s, as well as efforts to establish single member districts for city council elections in Gainesville, the county seat, were conducted against the backdrop of considerable activity by the Ku Klux Klan. Headquartered in nearby Oakwood, the Georgia chapter of the Invisible Empire Knights of the Ku Klux Klan was particularly active in Gainesville, holding frequent marches and rallies, including one unsuccessful attempt to secure a parade permit to march along a three mile route through the heart of Gainesville's small African American community. These developments were cited by State Representative Wycliffe Orr in a letter to county and city officials, following a 1991 public meeting concerning local government redistricting. "Our area has been harmed, and greatly misrepresented to the state, nation and world, by the substantial national attention given to Ku Klux Klan activities in our community," Orr wrote.[545]

The reapportionment plan enacted for Hall County by the Georgia general assembly, and which was killed by the poison pill, contained districts of

[545] Representative E. Wyckliffe Orr to Hall County Board of Commissioners, et. al, December 20, 1991.

substantially equal population, including a district with a combined black and Hispanic population of 39%. The district court ruled, predictably, that the existing plan for the county was "unconstitutionally malapportioned," and that new districts had to be drawn.[546]

Rather than accept the unprecleared legislative plan, plaintiffs asked the court on May 20 to adopt an alternative plan which contained a slightly higher minority population of approximately 42%, and with a lower deviation of just .43%.[547] Were the court to adopt the legislative plan, plaintiffs further argued, the plan would have to be precleared under Section 5 because it reflected the "policy choices of the elected representatives of the people." The court disagreed and ordered the 1992 legislative plan into effect for the 1992 primary and general elections.[548]

Plaintiffs appealed the district court's adoption of the unprecleared legislative plan to the Eleventh Circuit on the grounds that a local federal court did not have the authority to implement an unprecleared legislative plan.[549] In the 1992 election, Frances Meadows, the black chairwoman of the Hall County Voting Rights Task Force, a private citizens' group, ran a close second in a four-candidate race in the

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[546] Bryant v. Miller, Order of May 22, 1992, n. 3, p. 4.

[547] Mary Wyckoff, ACLU, to Hon. Orinda Evans, May 11, 1992, p. 2. See, also, Bryant v. Miller, Stipulations for Hall County, May 20, 1992.

[548] Bryant v. Miller, Order of May 22, 1992.

[549] Bryant v. Miller, Civ. No. 92-8533 (11th Cir.).

July primary for the county commission in the newly created 39% minority district. Meadows then went on to beat the white, four term incumbent commissioner in the August runoff.[550] With no Republican opposition in November, Meadows won the general election, becoming the first African American to win county office in Hall County. In light of the success of a minority candidate, and the inability to draw a true majority minority district, plaintiffs dismissed their pending appeal on December 23, 1992.

Harris County

Brown v. Reames

In 1975, five black voters of Harris County, Georgia, represented by the ACLU, challenged the at-large method of electing the county board of commissioners.[551] Black were 45% of the population, but no black person had ever been elected to the commission, or any other county office.

Historically, blacks had been excluded from the electoral process in Harris County until the 1930s, when President Franklin Roosevelt established the Little White House at Warm Springs, and thus a federal presence in the county. Some blacks voted as a result, but according to one black resident, prior to the next two

[550] Editorial, "County government begins to reflect our diversity," Gainesville (Georgia) Times, August 14, 1992.

[551] Brown v. Reames, Civ. No. 75-80 (M.D. Ga.).

elections, and in an effort to intimidate blacks from voting, whites "dug some graves there by the courthouse, some short graves, and burned some crosses at the crossroads."[552] After that, and prior to passage of the Voting Rights Act, most blacks in the county simply did not vote. As of 1963, only 263 blacks were registered to vote, 8.5% of the eligible population. By contrast, more than 100% of the eligible white population was registered.

Elections in the county were run by whites, and no black person ever served as a poll worker until 1971. At the 1974 election, only one black person was appointed to serve as a poll worker. No blacks served in the 1975 election. At the time the law suit was filed in 1975, no black person had ever been an officer or member of the executive committee of the Democratic Party, which controlled the political process, and the chair of the county party said that he didn't intend to take any action to increase black participation in party affairs. "I'm going to mind my own business," he said," and I want everybody else to do that too."[553]

Racial bloc voting was a fact of political life in Harris County. When the Department of Justice objected in 1972 to a proposed numbered post requirement for county commission elections, it noted "a pattern of racial bloc voting" which would "diminish significantly the possibilities of a member of a racial minority being

[552] Id., Trans. 115, 118.

[553] Id., Trans. 285-86.

elected to the county commission."[554] Three years later, the department objected to at-large elections for the board of education because "minority candidates have not been able to become elected to any county-wide office in Harris County," and an at-large system "has the discriminatory effect of diluting the ability of minority candidates to participate as members of the Board of Education."[555]

In 1974, J. B. Stoner, an avowed white supremacist who promised that his election "will take the fear of black savages out of White people, and put it back into the blacks, where it belongs," finished third out of a field of ten candidates in one precinct and fourth in two others.

Despite the extensive evidence of discrimination and its continuing effects, the district court dismissed the complaint filed by the ACLU because, in its view, the county's election laws "did not have as their purpose a dilution of the minority vote," and:

> the Constitution does not require that elections must be somehow so arranged that black voters be assured that they can elect some candidate of their choice and that an at-large system of election is not to be regarded as unconstitutional merely because a minority of voters cannot elect a candidate from among themselves.[556]

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[554] David L. Norman to Roy Moultrie, December 5, 1972.

[555] J. Stanley Pottinger, Assistant Attorney General, to Ken Askew, August 18, 1975.

[556] Brown v. Reames, Order of December 16, 1977.

The plaintiffs appealed, and the appellate court vacated the trial court's opinion and sent the case back for further consideration in light of the intervening decision of the Supreme Court in City of Mobile v. Bolden requiring proof of purposeful discrimination in Section 2 cases.[557]

After the remand, plaintiffs attempted to negotiate a settlement, but defendants remained adamant in retaining the at-large system. Before the case was reconsidered by the district court, Congress amended Section 2 in 1982, dispensing with any requirement of proving racial purpose to establish a violation of the statute. The Harris County defendants, apparently concluding that their at-large system could not be defended under the new discriminatory results standard, agreed to adopt single member districts. A plan was agreed upon by the parties, enacted by the Georgia General Assembly, and precleared by the Attorney General on April 16, 1984. The first elections under the new plan were held in 1985.

Houston County and the Cities of Perry and Warner Robins

In re the City of Perry

Perry is the seat of Houston County, home of Warner Robins Air Force Base, acclaimed as "Georgia's largest industrial complex." In 1963, just prior to the passage of the Voting Rights Act, Perry adopted at-large elections for its six member council, with

[557] Brown v. Reames, 618 F.2d 782 (5th Cir. 1980). See City of Mobile v. Bolden, 446 U.S. 55 (1980).

a mayor elected at-large.

In 1973, the city sought preclearance for two voting changes: a 1970 change imposing a plurality requirement for municipal elections, and a 1973 change imposing a majority vote requirement for municipal elections. The Department of Justice precleared the 1970 change to plurality voting, but objected to the 1973 change, saying:

> Our analysis has demonstrated that where, as in the City of Perry, there is significant participation in the political process by the black community, a majority requirement has the practical effect of decreasing the potential for minority voters to elect candidates of their choice. Furthermore, the imposition of a majority requirement on a pre-existing designated post system as exists in the City of Perry, similarly reduces the potential voting strength of minority groups.
>
> In addition, recent court decisions dealing with issues of this nature, indicate that the combination of numbered posts and majority vote requirements might have the effect of abridging minority voting rights.[558]

Beginning in 1978, black candidates had run in at least four city council races, but despite comprising 35.20% of the population of Perry, no black candidate for mayor or city council had ever been elected. In October 1983, the ACLU, on behalf of the local NAACP, wrote the county's legislative delegation that at-large elections for the city council were likely in violation of Section 2 and requested them to consider changing to a district system. Following negotiations with the legislative delegation, city council members, and the NAACP, legislation was enacted in 1984 dividing Perry into three

[558] J. Stanley Pottinger, Assistant Attorney General, to Lawrence C. Walker, Jr., August 14, 1973 (internal citations omitted).

two-member districts, one of which was majority black.

The plan was submitted for preclearance, and the city advised the Attorney General that blacks had participated in the districting process:

> The white participants initially suggested a combination plan whereby some of the councilmembers would be elected at large and some from districts. The black participants did not favor this and this plan as proposed by the white participants was abandoned.[559]

The Department of Justice precleared the city's plan. Today, two blacks serve on the city council, both of whom were elected from the majority black district. The other members of the council are white.

Green and Concerned Citizens of Warner Robins and Houston County v. Mayor and Council of City of Warner Robins

By 1990, the population of Warner Robins, another city in Houston County, had grown to 42,672. Blacks were 25% of the population and 18% of registered voters. The city council discussed moving to single member districts in 1991, but failed to enact a new plan.

In August 1992, the ACLU filed suit on behalf of black voters, including members of the Concerned Citizens of Warner Robins and Houston County,

[559] Lawrence Walker, Jr. to Mr. Gerald W. Jones, Chief, Voting Section, U.S. Department of Justice, May 30, 1984.

challenging Warner Robins's at-large elections.[560] According to an analysis of elections by plaintiffs' expert, Allan J. Lichtman, professor of political science at American University, blacks voted cohesively at the average rate of 82%, and whites at the average rate of 89%. The lawsuit sought to enjoin the upcoming November elections, and establish single member districts.

After the case was filed, the parties met to negotiate a new plan. Though few council members defended the at-large plan, the parties disagreed over the configuration of the single member districts. The city was anxious to have a new plan in place for the November elections, however, and negotiated a plan acceptable to black voters, with five districts, including one with a majority black population greater than 65%. A sixth council seat was to be elected at-large.

The judge, however, refused to adopt the new plan on the grounds that the state legislature, which by law had the authority to change the method of city elections, had not yet had an opportunity to consider a remedy. On August 26, 1992, the judge enjoined the November city council election and stayed the litigation until the conclusion of the 1993 general assembly session. As a matter of law, the judge could have approved the plan, subject to Section 5 preclearance, but chose not to.

When the general assembly convened in 1993, the city submitted two plans, the negotiated 5-1 plan, and a second plan with four single member districts, one of which

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[560] Green and Concerned Citizens of Warner Robins and Houston County v. Mayor and Council of City of Warner Robins, Georgia, Civ. No. 92-331-2-MAC (WDO) (M.D. Ga.).

was majority black, plus two at-large seats (the 4-2-1 plan). The plaintiffs opposed the second plan because the additional at-large seat would contribute to minority vote dilution. The legislature enacted the city's preferred plan.

The plan was submitted to the Department of Justice for preclearance, and the Houston County NAACP wrote a letter urging an objection, saying it was "inherently unfair to the minority community, and will dilute its voting strength at city level."[561] The plan was precleared by the Department of Justice on August 23, 1993, and a special election was held in October 1993.

Jasper County and the City of Monticello

In re Jasper County and the City of Monticello

Not all changes in voting procedures were the result of litigation. The threat, or implied threat, of litigation has sometimes been sufficient to prompt jurisdictions to adopt racially fair election plans. Jasper County, and the county seat of Monticello, were two such jurisdictions.

Jasper County was created in 1807 from a part of Baldwin County and was named for Sergeant William Jasper, a Revolutionary War hero who died trying to retrieve a flag during the siege of Savannah. Monticello was named for Thomas Jefferson's home in Virginia, mainly due to the large number of

[561] Rev. C. E. Edgerton, President, Houston County Branch of the NAACP, to the U.S. Department of Justice, March 2, 1993.

Virginians who moved to the area. Monticello emerged as a center of commerce and industry between 1885 and 1930. To accommodate mill and agricultural workers, the town established a segregated African American neighborhood on the south side close to one of the mills. The neighborhood was named Washington Park in honor of Booker T. Washington, and still survives today

Based on the 1980 census, 40.31% of Jasper County's residents, and 54% of Monticello's residents, were black. Despite this large black population, no black candidate had ever won a county commission election, and only one black person had ever been elected to the city council. Not surprisingly, both of the governing bodies were elected at-large. In October 1983, the ACLU wrote the representatives of the general assembly from Jasper County on behalf of the Jasper County Branch of the Southern Christian Leadership Conference (SCLC) that at-large elections for the city council and the county commission were in probable violation of Section 2 and requesting them to introduce legislation implementing districting plans. Local officials responded favorably to the request. Representative Culver Kidd said:

> I agree that changes need to be made in this area, as well as possibly the method for choosing the board of education. Personally, I feel that having the board of education appointed by the Grand Jury is obsolete and should have been stopped a long time ago.[562]

[562] Culver Kidd to Christopher Coates, November 17, 1983.

In December 1983, the Monticello City Council requested the local delegation to introduce a bill providing for two, two member voting districts, with one of the districts being majority black. The fifth member would continue to be elected at-large. The local delegation introduced the bill during the 1984 session of the legislature, and it was enacted. Today, the mayor pro tem and two city council members are African American.

The response by the county commission was also favorable. Legislation was enacted in 1984 which expanded the size of the commission from three to five members, all elected from single member districts. Two of the districts were majority black.

Jefferson County

Tomlin v. Jefferson County, Georgia Board of Commissioners

In 1860, Jefferson County, located just south of Augusta in east Georgia, had a population of 4,133 whites and 6,045 slaves. By 1980, the county was still majority (55%) black, but no black person since Reconstruction had served on the three member county commission.

In response to increasing black political activity in the 1970s, three towns in Jefferson County - Louisville, the county seat, Wadley, and Wrens - adopted majority vote and numbered post requirements for the election of their city councils. The Department of Justice objected to the changes in Louisville and Wadley in 1974.

"There is increasing interest in the political process by the black community," the Attorney General noted in objecting to Louisville's submission, and "a majority and designated post requirement have the practical effect of eliminating the potential for minority voters to elect candidates of choice."[563] In objecting to Wadley's submission, the Attorney General wrote:

> under Wadley's current system of at-large plurality elections, minority race voters have the potential to elect a candidate of their choice. In fact, as you know, two minority candidates have won election to the City Council in recent years. This minority voting strength potential is lost, however, if candidates must restrict their candidacies to a single, specific post, and must receive more than half of the votes cast.[564]

Wrens did not submit its changes for preclearance until 1986, and they also drew an objection from the Attorney General:

> We note that although there have been several attempts by black candidates to gain a position on the city council, there has been only one black city commissioner elected since these changes were implemented [in 1970], and that commissioner has been largely unopposed in his elections. . . . [It] appears in substantial part to be the result of a general pattern of racially polarized voting occurring in the context of Wrens' at-large election system; a condition which, since 1970, has made it even more difficult for black candidates to elect candidates of the choice by requiring that candidates run for numbered positions and receive a majority of the vote to be elected. . . . such a

[563] J. Stanley Pottinger, Assistant Attorney General, to James C. Abbot, Attorney for Louisville, June 4, 1974.

[564] J. Stanley Pottinger, Assistant Attorney General, to Sidney R. Shepherd, October 30, 1974.

> requirement, in the circumstances as they exist in Wrens, would appear to have the proscribed retrogressive effect.[565]

The ACLU first filed a suit on behalf of black voters challenging Jefferson County's at-large system in April 1980,[566] but voluntarily dismissed the complaint after the Supreme Court's decision that year in City of Mobile v. Bolden,[567] which required proof of intentional discrimination to establish a violation of Section 2.[568] After Congress amended the Voting Rights Act in 1982 to restore a results standard for Section 2 claims, plaintiffs initiated discussions with county officials about changing the at-large method of elections for county commission. The parties were able to agree on a new plan expanding the commission from three to five members, with four members elected from single member districts, two of which were majority (78% and 65%) black, and the fifth member elected at-large. By agreement, a lawsuit was refiled in April 1983,[569] and the agreed upon redistricting plan was implemented via a consent order signed in September. In the ensuing elections in 1984, a black candidate was elected from the district with a 78% black majority, but the black candidate lost in the district with a 65% black majority.

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[565] William Bradford Reynolds, Assistant Attorney General, to Honorable J. J. Rayburn, October 20, 1986.

[566] Johnson v. Buchanan (S.D. Ga).

[567] 446 U.S. 55 (1980).

[568] Johnson v. Buchanan.

Jenkins County

In re Talmadge Fries

In June 1982, the City of Millen, the seat of Jenkins County, adopted an ordinance that "No officer or employee of the City of Millen shall continue in the employment of the City after becoming a candidate for nomination or election to any City office." Notably, the ordinance contained an exception that it "shall in no way effect, and specifically excludes from its coverage, those individuals who presently hold the positions of Mayor and Councilman." Thus, by its terms, present office holders were free to hold city employment and run for, or hold, city office. Indeed, one member of the council worked for the Millen Fire Department but was thus exempt from the ordinance's coverage. The ordinance was clearly a change in voting, but the city did not submit it for preclearance.

Talmadge Fries, a black member of the Millen Fire Department, filed to run for city office in December 1982. Prior to the election, he received a letter from the city administrator that he would have to resign his position with the fire department in order to have his name placed on the ballot, and if he declined to do so, "your qualifying fee of $25.00 will be refunded to you and you will not be considered a candidate for election."[570]

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[569] Tomlin v. Jefferson County Board of Commissioners, Civ. No. 683-23 (S.D. Ga.).

[570] H. Carter Crawford to Talmadge V. Fries, November 30, 1982.

Fries contacted the ACLU, which determined that the ordinance had never been submitted for preclearance, and advised the city that the ordinance was unenforceable. Shortly thereafter, the city attorney, in apparent recognition that the ordinance had serious equal application problems and was not likely to be precleared, advised the ACLU that the ordinance had been repealed and that Fries was "at liberty" to run for the city council.[571]

Green v. Bragg

Based on the 1990 census, Jenkins County, which General William T. Sherman passed through and torched on his notorious march to the sea after the fall of Atlanta, was 41% black. The county's three member board of commissioners and board of education, as well as the Millen city council, were elected at-large. Although black residents of the county were politically cohesive, black candidates rarely won board or council seats under the at-large systems.

In 1991, black residents, represented by the ACLU, filed a federal suit against the county and City of Millen, arguing that at-large elections diluted minority voting strength in violation of the Constitution and Section 2.[572] Negotiations followed, and the parties agreed on a new plan for the board of commissioners and board of

[571] R. H. Reeves, II, to Neil Bradley, ACLU, December 16, 1982.

[572] Green v. Bragg, No. 691-078 (S.D. Ga.).

education containing five single member districts, two of which were majority black. The plan was precleared by the Department of Justice and implemented at the elections in November 1993, at which all members of both boards were elected to new terms.

The City of Millen, which was majority black, adopted a plan for a five member commission elected from two double member districts and one single member district. One of the double member districts, and the single member district, were majority black. Under the city's proposed implementation schedule, the double member districts would elect one member in 1993, and then all three districts would elect new members in 1995. The Attorney General approved the districting plan, but objected to the schedule of elections on the grounds that the new plan would not be fully implemented until 1995, and the city had not carried its burden of showing that the delay "has neither a discriminatory purpose nor a discriminatory effect."[573] As a result of the objection, the city agreed to hold elections in 1993 in all three districts.

In 1995, the county attempted to relocate two polling places, one of which was situated in a predominately black community and easily accessible to many voters by foot. One of the new proposed sites was located outside of the city limits in a predominately white neighborhood which had no sidewalks, curving roads, and

[573] James P. Turner, Acting Assistant Attorney General, to Roy E. Paul, Attorney for Jenkins County and the City of Millen, August 2, 1993.

a speed limit of 55 miles per hour. Thus, even if some voters could walk to the proposed polling place, it would have been very dangerous. The county maintained that the proposed site was in racially neutral territory. However, the Attorney General rejected the change and determined that "the county's proffered reasons for the selection of this particular polling site appear to be pretextual, as the selection of this location appears to be designed, in part, to thwart recent black political participation."[574]

The oversight of the county's voting changes provided by Section 5 thus helped ensure that blacks had access to the polls and were able to participate effectively in the electoral process.

Johnson County and the City of Wrightsville

Wilson v. Powell

Buoyed by the 1945 decision in King v. Chapman,[575] which outlawed the white primary in Georgia, blacks in Johnson County began to register to vote in increasing numbers, despite considerable obstacles and white resistance. Three years later, in March 1948, on the eve of Johnson County's Democratic primary, 400 blacks had registered. This prompted swift action by the Ku Klux Klan. On the eve

[574] Deval L. Patrick, Assistant Attorney General, to William E. Woodrum, Jenkins County Attorney, March 20, 1995.

[575] 62 F. Supp. 639 (M.D. Ga. 1945), aff'd sub nom. Chapman v. King, 154 F.2d 460 (5th Cir. 1946).

of the primary a crowd of 700 whites, including some 250 Klan members, gathered on the town square in Wrightsville to hear Dr. Samuel Green, the Grand Dragon of the Georgia KKK, denounce racial equality. "Again you will see Yankee bayonets trying to force social and racial equality between the black and white races," Green, an Atlanta physician, shouted. "If that happens there are those among you who will see blood flow in these streets. The Klan will not permit the people of this country to become a mongrel race." According to Time magazine, no blacks voted the next day.[576]

More than 30 years later, the Klan still made its presence felt in Wrightsville, when a crowd of 75 Klansmen and other white supremacists gathered in April 1980, to oppose civil rights marchers who were peacefully protesting what they said were racial actions and police misconduct by the sheriff.

Three years later, black residents of Johnson County, represented by the ACLU, filed suit in February 1983, challenging at-large voting for the county board of commissioners and the Wrightsville City Council.[577] The county had a black population of 31%, and its county seat, Wrightsville, had a black population of 38%. No black person, however, had ever been elected to either of the governing bodies.

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[576] "Sheet, Sugar Sack & Cross," Time, March 15, 1948.

[577] Wilson v. Powell, Civ. No. 383-14 (S.D. Ga.).

In September 1983, plaintiffs and the City of Wrightsville entered into a consent decree providing for three city council seats elected from single member districts, one of which was 75% black. In the first election under the new plan in November 1983, the first black elected official in the history of Johnson County was elected from the majority black district.

In April 1984, the county commission and the plaintiffs agreed on a consent decree that increased the number of county commission seats from three to five, and provided for elections from five single member districts, one of which was 66% black. At the first election under the new plan in August 1983, a black person was elected from the majority black district.

Johnson County Branch of the NAACP v. Johnson County

Black voters and the Johnson County NAACP, represented by the ACLU, returned to court again in 1992, seeking redistricting of malapportioned election districts for both the board of commissioners and board of education in compliance with the Constitution and the Voting Rights Act.[578] A consent judgment was entered on September 16, approving a redistricting plan for both bodies which was subsequently approved by the Justice Department.

[578] Johnson County Branch of the NAACP v. Johnson County, Georgia, Civ. No., 392-026 (S.D. Ga.)

The Attorney General, however, objected to a voting change submitted that same month by the City of Wrightsville which proposed the relocation of a precinct from the county courthouse to the racially segregated American Legion Hall. In the objection letter, the Department of Justice concluded that:

> the American Legion in Johnson County has a wide-spread reputation as an all-white club with a history of refusing membership to black applicants. Moreover, the American Legion hall, itself, is used for functions to which only whites are welcome to attend. Consequently, the atmosphere at the American Legion is considered hostile and intimidating to potential black voters, and it appears that locating a polling place there has the effect of discouraging black voters from turning out to vote.[579]

In that same 1992 letter, the Attorney General did, however, approve a belated request from the city to approve the 1968 elimination of a segregated polling place at the Wrightsville City Hall and the establishment of an integrated polling place at the county courthouse.

Lamar County

Strickland v. Lamar County

Located in west central Georgia between Atlanta and Macon, Lamar County had approximately 12,500 people, 33.81% of whom were black in 1980. The county's three member board of commissioners was elected at-large. In 1984, in response to

[579] John R. Dunne, Assistant Attorney General, to Charlotte Beall, October 28, 1992.

requests from local residents, the county board of commissioners asked the state reapportionment office to draw some proposed redistricting maps for the county. The board selected a plan, which was subsequently enacted by the general assembly, consisting of four single member districts, one of which was majority black, and one at-large district for the chairman. The plan also included a majority vote requirement.[580] An alternative plan, which the board rejected, called for five single member districts, two of which were majority black, with the chairman selected by the board members.

In March 1986, the Attorney General denied preclearance to the county's proposed plan, saying, in part:

> the commissioners of Lamar County selected the proposed 4-1 plan allegedly because a majority of petition signatures and individuals present at two public hearings supported this plan. We have been advised, however, that a majority of those who attended the hearings actually backed the county's five single-member district plan.[581]

The Attorney General also rejected the county's assertion that under the proposed plan blacks would have an opportunity to elect a candidate to the at-large position and not be limited to one representative from the single majority black district. According to the Attorney General, "the historical lack of success of black candidacies in county at-large elections suggests that the likelihood of a black

[580] Georgia Laws 1985, p. 5020.

[581] William Bradford Reynolds, Assistant Attorney General, to Norman Smith, March 16, 1986, p. 1.

supported candidate defeating a white-supported opponent in a county-wide election is, at best, remote."[582]

The county had also claimed that blacks would likely elect a single black representative under the 4-1 plan, but could not be assured of similar success in either of the two majority black districts under the five single member district plan. The Justice Department disagreed.

> The county's reasoning would appear to overlook, however, the potential for electing candidates of their choice provided to blacks by their percentage of the voting age population in those two districts, thus, affording to them the opportunity secured by the Voting Rights Act. In the circumstances, it is far from clear that the county's decision to adopt the 4-1 plan was free of discriminatory purpose - - a purpose to minimize to the fullest extent possible black voting opportunities within the county.[583]

Two months later, on May 30, 1986, black voters in Lamar County, represented by the ACLU, filed suit against the board of commissioners and the five member county board of education, which was also elected at-large.[584] The suit charged that at-large elections for the board of commissioners and the majority vote requirement violated the Constitution and Section 2. The suit similarly charged that at-large elections for the board of education with a majority vote requirement, and

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[582] Id., p. 2.

[583] Id.

[584] Strickland v. Lamar County, Civ. No., 86-167-2-MAC (M.D. Ga.).

the use of a multi-member residential district in the area of the county having a high concentration of black population, violated the Constitution and Section 2.

Later that year, in October, the district court granted a stay to allow the general assembly an opportunity to enact and preclear new redistricting plans for the board of commissioners and board of education. In 1987, the general assembly enacted legislation for both governing bodies, which the Attorney General precleared, providing for four single member districts, two of which were majority black, and one at-large position.[585]

The plaintiffs, however, contended the new plans were malapportioned, and filed a motion for a preliminary injunction against the holding of a special election on March 8, 1998. The district court denied the motion and the elections went forward.

Plaintiffs renewed their contentions in a motion for summary judgment, but more than three years later, on September 25, 1991, the district court denied the motion on the ground of mootness. According to the court, the one person, one vote challenge was based on 1980 census data, which had been superseded by the 1990 census. The lawsuit was dismissed without prejudice in March 1992.[586]

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[585] Georgia Laws 1987, p. 3752 (board of commissioners) and Georgia Laws 1987, p. 3740 (board of education). See, also, Strickland v. Lamar County, Order of November 25, 1992, pp. 3-4.

[586] Strickland v. Lamar County, Order of November 25, 1992, p. 4.

Laurens County

Concerned Citizens Committee of Dublin & Laurens County v. Laurens County

Laurens County, located along the Altamaha River in middle Georgia, has been a major cotton and timber-producing area. The county is the state's third largest in land area and the City of Dublin is the county seat. Across the Altamaha from Dublin is East Dublin, where African Americans were slightly less than one-third (29%) of the population in 1970. Beginning in the mid-1970s, the Justice Department had objected several times to election changes proposed by the East Dublin City Council. In 1974, the Attorney General objected to changes implementing numbered posts and staggered terms, and to the postponement of city elections.[587] Seventeen years later, when East Dublin again tried to implement numbered posts and a majority vote requirement, the Justice Department again objected to these changes in the context of the at-large council elections.[588] In that 1991 objection, the Attorney General stated:

> Furthermore, it appears that the council adopted the majority vote requirement over the objections of the two minority members of the council and despite the explicitly state[d] concern of Mayor Gornto and others that the proposed change would have a discriminatory effect. Yet, even in the face of these

[587] J. Stanley Pottinger, Assistant Attorney General, to William Malcolm Towson, March 4, 1974 and June 19, 1974.

[588] John R. Dunne, Assistant Attorney General, to William L. Tribble, April 26, 1991.

> concerns, no valid, non-racial reason has been advanced by the city to justify either the majority vote requirement or the change to numbered position for the at-large council seats.

In 1990, Laurens County had a population of 39,988, of which 33.3% were African American. When data from the 1990 census became available, it showed the districts from which the Laurens County Board of Commissioners were elected were significantly malapportioned. The general assembly failed to reapportion Laurens County during the 1992 legislative session, leaving in place districts with a total deviation of 28.27%.

To remedy this inequality, the ACLU filed suit on behalf of the Concerned Citizen Committee of Dublin and Laurens County on July 17, 1992, under the Constitution and Section 2 and Section 5, challenging the malapportioned district voting plans used to elect members to the board of commissioners.[589] County officials subsequently agreed to seek redistricting in the 1994 session of the Georgia General Assembly, and the court ordered a stay of the proceedings in March 1993. Defendants, however, failed to secure a redistricting plan during the 1994 legislative session. The parties then agreed to a plan with five single member districts including two majority black districts, and the new plan was implemented at a special election in December 1994.

[589] Concerned Citizen Committee of Dublin and Laurens County v. Laurens County, Civ. No. 392-033 (S.D. Ga.).

Liberty County

Bryant v. Liberty County Board of Education

Liberty County is home to Fort Stewart, headquarters of the Army's Third Infantry Division. During Reconstruction, the county had been represented in the state senate by Tunis Campbell, one of the most effective and influential blacks in the legislature, until he was literally run out of the state by the forces of White Redemption. The county also had at least one special tie with the modern civil rights movement. In the 1960s, the Dorchester Academy, an all-black school that operated in the county until 1945, was used by Dr. Martin Luther King, Jr., and others to plan desegregation campaigns and train civil rights activists. Today, Liberty County's population of 61,610 is split roughly equally between blacks (42.8%) and whites (46.6%), with a remaining population that is 8.2% Hispanic.

In 1986, under pressure from the black community and the threat of litigation, the state legislature adopted single member district plans for both the Liberty County Board of Commissioners and the Board of Education. Six members of each board were elected from districts, with the chair elected at-large.[590]

Four years later, and under similar pressures, the city of Hinesville, the Liberty County seat, changed from electing its city council at-large by plurality vote to elections from single member districts by majority vote. The change also

[590] Act No. 780 (1986); Act No. 778 (1986).

provided for the election of the mayor by majority vote.[591] The Department of Justice approved the adoption of single member districts for the council, but objected to the majority vote requirement for mayor. It noted that the Attorney General had previously interposed a Section 5 objection in 1971 to the adoption of a majority vote requirement for mayor, as well as majority vote and numbered post requirements for the city council when elections were held at-large:

> Thereafter on three occasions the city requested reconsideration and the Attorney General declined to withdraw the objection. As explained in our most recent determination in this regard, on August 23, 1983, the changes did not pass muster under Section 5 because they would occasion an impermissible retrogression in minority voting strength in the context of at-large elections and racially polarized voting. Our review of the city's election history since 1983 does not suggest that our past analyses were incorrect. Indeed, the apparent basis for the city's change to single-member districts is a concern that municipal elections are characterized by polarized voting. We also note that the black population percentage in the city has increased significantly in the last decade, which serves to heighten the retrogressive effect of the proposed majority vote requirement in the context of city-wide elections. Thus, while the change to single-member districts for councilmanic elections, in one of which blacks constitute a majority of the registered voters, renders the majority vote provision for those elections nonproblematic, the majority vote requirement for mayor continues to have an impermissible effect under the Voting Rights Act.[592]

Based on the 1990 census, the districts for the board of commissioners and board of education were malapportioned with a total deviation of 55.9%. The

[591] Act. No. 825 (1990).

[592] John R. Dunne, Assistant Attorney General, to James W. Smith, Esq., July 15, 1991.

general assembly enacted legislation in 1992, which called for new districts of substantially equal population. However, like other reapportionment bills enacted that year, the legislation became null and void when the justice department failed to preclear the measure before April 27, 1992, the beginning date of qualifying for county commission and school board elections, thus triggering a "poison pill" provision in the law which caused the redistricting measure to expire.

Because Liberty County was left with a malapportioned districting plan based on the 1980 census, the ACLU filed suit in 1992, on behalf of black voters seeking constitutionally apportioned election districts for the county.[593] The court granted plaintiffs' motion for preliminary injunctive relief on July 7, 1992, and the following year the parties agreed to a redistricting plan in which two of the six single member districts contained majority black voting age populations.[594] The plan was precleared by the Justice Department on April 27, 1993.[595]

In 2004, the chair and vice chair of the Liberty County Commission were African American, and under their leadership the county established a Museum of African American History on the grounds of the Dorchester Academy.

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[593] Bryant v. Liberty County Board of Education, Civ. No. 492-145 (S.D. Ga.).

[594] Id., Consent Decree, Order and Judgment, February 11, 1993.

[595] James P. Turner, Acting Assistant Attorney General, to J. Noel Osteen, Esq., April 27, 1993.

Long County and the City of Ludowici

Glover v. Long County

Wallace v. City of Ludowici

Named after Crawford W. Long, the first physician to use anesthesia during surgery, Long County is located in southeast coastal Georgia. Although 26% of the sparsely populated rural county was black in 1980, the county was racially polarized and had never elected an African American to county office. In 1976, the Department of Justice had objected to the proposed use of majority vote and numbered post requirements for school board elections saying:

> We have noted particularly information concerning recent minority political activity and racial bloc voting in the county. Additionally, we have not been apprised of any compelling reasons for the use of candidate residency districts . . . In the context of an at-large electoral system, the opportunity for minority voters to elect a representative of their choice to the board of education is significantly lessened by the use of candidate residency districts.[596]

In June 1985, the five member Long County Commission established a committee to study the possibility of redistricting. Two years later, in January 1987, it came up with a plan to create five election districts, including one that would have been majority black. Later that month the ACLU filed suit on behalf of a group of black and white citizens challenging the at-large method of elections as diluting

[596] J. Stanley Pottinger, Assistant Attorney General, to Honorable J. R. Shaw, July 16, 1976.

black voting strength in violation of Section 2 and the Constitution.[597] Three months later, in April, the parties agreed to a single member district plan for the five county commissioners, including one majority black district. The plan was adopted by the court, precleared by the Department of Justice and the first elections under the new apportionment were held in 1988.

The ACLU also filed suit in Long County in June 1987, on behalf of black residents of Ludowici, the only city in the county, challenging the use of at-large elections for city council as violations of Section 2 and the Constitution.[598] Like the county, the city was approximately one-fourth black, yet no African American had ever been elected to city government. A settlement order was issued in October, establishing five single member districts, and the first election under the new plan was held in September 1989.

Lowndes County

NAACP of Lowndes County v. Tillman

Lowndes County is located in southwest Georgia on the Florida state line. In 1859, the town of Valdosta was established as the new county seat in order to connect the county with a railroad line from Savannah. With this transportation link

[597] Glover v. Long County, Civ. No. 287-20 (S.D. Ga.).

[598] Wallace v. City of Ludowici, Georgia, No. CIV-287-147 (S.D. Ga.).

established, Valdosta became the largest inland market in the world for Georgia Sea Island cotton, until the arrival of the boll weevil in 1915 led to the destruction of cotton crops across the state.

According to the 1980 census, more than 39% of Valdosta's 37,596 residents were African American, yet only one black person had ever been elected to the six member city council, which was elected at-large. In 1983, the Lowndes County Chapter of the NAACP and individual black voters, represented by the ACLU, challenged at-large voting for the city council as violating Section 2 and the Constitution.[599]

Prior to 1963, four of the six council members had been required to reside in specific residential wards. City officials abolished the residency requirement in 1963 and imposed a majority vote requirement. The effect of these changes was to solidify control of the outcome of elections by the white majority.

Litigation brought several years earlier by the United States challenging racial segregation in Valdosta city schools highlighted the problem of race discrimination in Lowndes County. In 1978, the court of appeals vacated a district court ruling holding that a unitary school system had been achieved in Valdosta. Instead, the appellate court found that a high incidence of racially identifiable schools belied the school board's contention that Valdosta had achieved a unitary system. "Fifty-five

[599] Lowndes County Chapter of the NAACP v. Tillman, Civ. No. 83-108-VAL (M.D. Ga.).

percent of Valdosta's elementary school population is black, and 80% of those black students attend schools that are over 90% black. . . Thus we can see that several of Valdosta's elementary schools are virtually one race."[600] Two years earlier, the U.S. Department of Education had withdrawn federal funding from the Lowndes County public schools after finding that four black administrators had been discriminatorily demoted in order to prevent them from being principals in newly desegregated county schools. According to the federal Equal Employment Opportunity Commission (EEOC), "the demotions had the effect of maintaining the status quo of having all-White Administrators as Principals."[601]

The ACLU law suit challenging city council elections was filed the same week the Department of Justice brought a similar suit challenging at-large voting in both Lowndes County and Valdosta.[602] The court consolidated both cases for purposes of discovery and trial.

In September 1984, the Justice Department and city officials reached an agreement that the city would be divided into six single member voting districts, three of which were majority black. The number of city council members was also increased to seven, with the seventh member elected at-large (the 6-1 plan). The

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[600] United States v. The Board of Education of Valdosta, 576 F.2d 37, 38 (5th Cir. 1978).

[601] Harris A. Williams, District Director, Atlanta District Office, EEOC, to Otis G. Lane and Lowndes County Public Schools, June 23, 1987, Charge Number 041851508.

[602] United States v. Lowndes County, Civ. No. 83-106 (M.D. Ga.)

Lowndes County NAACP objected to the addition of the at-large seat on the grounds that it would dilute minority voting strength, but the district court approved the plan. While the 6-1 plan was flawed, it did contain three majority black districts and when elections were held under the new plan in February 1985, three black candidates were elected. The government's law suit against the county was settled on the basis of single member districts and in 2006, one of the county's four commissioners is African American.[603]

Elections for the county board of education were also at-large. And with the general population of the county approximately 75% white, it had not been possible for blacks to win when forced to compete in county-wide elections.[604] From 1970 to 1988, only two African Americans had run for a position on the board of education (in 1970 and 1984) and both had lost. Although black voters had repeatedly appeared before the all white school board to suggest the adoption of district elections, the board had failed to follow through on promises to further explore the possibility of redistricting.

Beginning in 1985, the EEOC had issued a series of determination letters in favor of black teachers and administrators who had alleged discrimination by the

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[603] McDonald, (2003), p. 183.

[604] Kathleen Wilson, "County School District Proposal," The Valdosta (Ga.) Daily Times, September 9, 1987.

Lowndes County Board of Education.[605] Frustrated by adverse conditions in the schools and their exclusion from the county board of education, black residents filed a complaint with the Department of Justice alleging "bold, overt and longstanding racial discrimination in the Lowndes County Georgia School System."[606] Voters also appealed to the ACLU for assistance in bringing suit to force a change, but it did not appear possible to draw a majority black district using a five member format at the time.

Following the 1990 census, the school board voluntarily changed to single member districts and created one majority black district. Since that time there have been as many as two African Americans serving at one time on the seven member board and currently one black member serves on the board.

Macon County

Hall v. Macon County

Macon County is a small, majority (59.5%) black county located in southwest Georgia. Its board of commissioners and board of education are each composed of

[605] Harris A. Williams, District Director, Atlanta District Office, EEOC to Timmy Young and Lowndes County Board of Education, October 30, 1987, Charge No. 110851956; Harris A. Williams, District Director, Atlanta District Office, EEOC, to Otis G. Lane and Lowndes County Public Schools, June 23, 1987, Charge Number 041851508. Harris A. Williams, District Director, Atlanta District Office, EEOC, to Lowndes County Board of Education, September 30, 1985, Charge Number 041861534.

[606] Willie Mack Rose, Concerned Citizens of Lowndes County, to U.S. Department of Justice, November 23, 1987.

five members elected from single member districts. The 1990 census showed the districts were malapportioned with a total deviation of 21.69%. The general assembly failed to redistrict the two boards during its 1992, 1993, and 1994 sessions, and in 1994, the ACLU filed suit on behalf of Macon County residents against county officials seeking a constitutional plan for the 1994 elections.[607]

On July 12, 1994, the court enjoined the upcoming election and ordered the parties to present remedial plans by July 15, 1994. In March 1995, the court ordered a five district plan that remedied the one person, one vote violations and ordered special elections be held.

Marion County

Story v. Marion County

Rural Marion County lies in the heart of the West Georgia cotton belt. The county was home to more than 10,000 people before the Civil War, including 3,600 slaves, but suffered heavy population losses when bank panics, the boll weevil, and the Great Depression combined to cripple the agricultural economy.

The county was governed by a three member commission which, historically, had been was elected from single member districts. In 1957 the districts were abolished in favor of at-large elections with staggered terms and a majority vote

[607] Hall v. Macon County, Civ. No. 94-185 (M.D. Ga.).

requirement. Although blacks were 46% of the county population based on the 1980 census, no black person had ever been elected to the county commission. In 1985, black residents of the county, represented by the ACLU, filed suit challenging at-large commission elections as violating the Constitution and Section 2.[608]

In its answer, the county conceded the "entitlement of all citizens of Marion County to a Board of Commissioners elected from equal population, single-member Commissioner districts in place of the exiting at-large system," and represented that it intended to seek legislation in 1986 establishing single member commission districts. The parties subsequently agreed to increase the size of the council to five members elected from single member districts, two of which would be majority black. The plan was enacted by the general assembly and precleared by the Justice Department, but at a subsequent referendum the plan was rejected by the voters of the county, a majority of whom were white. The defendants then asked the court to adopt a plan containing three single member districts, one of which was majority black, as an interim court ordered plan. The plaintiffs, in turn, asked the court to implement a five member plan, containing two majority black districts. Due to this impasse, no action was taken by the court, and the case was closed without reaching a resolution.

[608] Story v. Marion County Board of Commissioners, Civil Action No. 85-175-COL (M.D. Ga.).

McBride v. Marion County

In 1999, black residents of the county, again represented by the ACLU, filed a second lawsuit challenging at-large elections for the Marion County Commission.[609] The Department of Justice filed a similar case against the county,[610] and the two suits were consolidated. This time, the parties were able to reach a settlement, and on June 13, 2000, the court entered a consent order. Among its findings were:

> *Racially polarized voting patterns prevail in elections in the county, including elections for the county commission.
>
> *No black candidate for the Marion County Board of Commissioners has been elected to office under the at-large method of election. Indeed, no black candidate has been elected to any county office in Marion County in which voting occurs on an at-large basis.
>
> *Black citizens in Georgia and its political subdivisions (including Marion County) have suffered from a history of official racial discrimination in voting and other areas, such as education, employment, and housing. . . . These factors hinder black citizens' present-day ability to participate effectively in the political process.
>
> *[T]here is a strong likelihood that plaintiffs would prevail were these actions to proceed to trial.[611]

A plan was also agreed upon containing three single member districts, one of which was majority black. The new plan, which had previously been precleared by

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[609] McBride v. Marion County Commission, 4:99-CV-134 (M.D. Ga.).

[610] United States v. Marion County, Civil Action No. 4:99-CV-151 (M.D. Ga.)

[611] Id., Order of June 13, 2000.

the Department of Justice, was implemented at the elections in 2000.

Black voters, however, continued to have problems participating in county elections. In 1965, the county school board had adopted at-large elections but failed to submit the change for preclearance under Section 5.[612] The board was sued in 1984 by the Marion County Voter Education Project, which resulted in the implementation of five single member districts for the board, two of which were majority black.[613]

When the 2000 census showed the districts for the school board were malapportioned, the county redrew them and submitted the new plan for preclearance. The plan retained a significant black population in one of the districts (District 1), but reduced the black population in District 4 to a bare majority (50.7% BVAP). The county argued that the reduction in black population in District 4 was unavoidable due to a decline in the overall black population of the county, but the Department of Justice disagreed, saying elections in Marion County were:

> marked by a pattern of racially polarized voting . . . [and] the significant reduction in the black voting age population in District 4, and the likely resulting retrogressive effect on the ability of black voters to elect a candidate of choice to two seats on the board, was neither inevitable nor required by any constitutional or legal imperative.[614]

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[612] McDonald (2003), pp. 131-32.

[613] Marion County Voter Education Project v. Grier, Civ. No. 84-97-COL (M.D. Ga.).

[614] Ralph F. Boyd, Jr., Assistant Attorney General, to Wayne Jernigan & Phillip L. Hartley, October 15, 2002.

The county submitted a revised plan to the Justice Department in 2002 that provided for a five member school board with four single member districts, and one additional position elected at-large. Two of the election districts had a black majority, and the plan was approved in 2003. Today there are two African American members of the Marion County school board.

McDuffie County

Bowdry v. McDuffie County Board of Commissioners

The ACLU originally challenged the at-large method of electing the McDuffie County Board of Commissioners, the board of education, and the Thomson City Council in 1976.[615] The case, which was filed on behalf of black voters, was settled in 1978 by entry of a consent order adopting district election plans for all three jurisdictions. Although the plans later became malapportioned under both the 1980 census and the 1990 census, the defendants failed to enact redistricting plans and conducted the 1992 primary under the preexisting plans. Plaintiffs filed a motion in October to enjoin the pending November elections, but at a hearing on October 28, 1992, the court refused to stop the elections, although it did require that special elections be held in 1993 under properly apportioned and precleared plans.

[615] Bowdry v. McDuffie County Board of Commissioners, Civ. No. 176-128 (S.D. Ga.).

Meriwether County

Bray v. City of Greenville

The City of Greenville in Meriwether County is predominately black, and a majority of Greenville elected officials have traditionally been African American. Meriwether County, by contrast, is predominantly white and, prior to passage of the Voting Rights Act, it elected its board of commissioners from single member districts. After passage of the act and increased black registration, the county adopted at-large elections for the board to ensure the white majority would continue to control elections. The change was submitted for preclearance, but the Attorney General objected, noting that under the existing plan, two of the districts were majority blacks while the at-large plan "would have the effect of abridging minority voting rights in Meriwether County."[616]

In the May 1987 mayoral election, the incumbent, John Carter, narrowly beat a challenger, James Bray, by four votes. Bray challenged the election, and after a hearing on September 16, 1988, the Superior Court of Meriwether County set aside the results for errors in the tabulation of absentee votes and ordered city officials to conduct a special election on October 26.[617] Under Section 5, a special election ordered by a state court is a change in voting requiring preclearance. Section 5,

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[616] J. Stanley Pottinger, Assistant Attorney General, to Ben R. Freeman, July 31, 1974.

[617] Bray v. City of Greenville, Case No. 87-V-179 (Ga. Sup. Ct.).

however, gives the Attorney General 60 days to act upon a submission, a period of time that extended beyond the date set by the superior court for the special election.

City officials submitted the special election for preclearance, but were advised the day before the election that no decision had been reached. The mayor and council, upon the advice of the city attorney, then notified the superior court that the submission had not been precleared and that they were therefore canceling the election. James Bray, the defeated challenger, then moved the superior court to hold the mayor and council members in contempt for failing to hold the election, and the court did so.

In a harsh and punitive decision, the state court held the mayor and four council members, all of whom were black, in contempt of court, fined them $500 each, ordered them to pay Bray's attorneys' fees in the amount of $5,250, - all out of their personal funds, and directed that they be incarcerated in the county detention center for 20 days. The mayor and council members could avoid jail time only if they paid the fines and fees by a date set by the court. This was no doubt the first time in the history of the Voting Rights Act that local officials had been ordered to pay fines and costs and go to jail for complying with the preclearance requirements.

The mayor and council, represented by the ACLU and the Greenville City Attorney, removed the state case to federal court under a law that permits removal where a defendant is acting under compulsion or authority of federal law – in this

instance the Voting Rights Act.[618] The federal court vacated the contempt order and directed city officials to conduct a special mayoral election on January 4, 1989, and to preclear the election under the Voting Rights Act. The defendants complied with the court's order, the election was held, and Bray was elected the new mayor of Greenville.

Miller County

Thompson v. Mock

Miller County, located in southwest Georgia, was home to Governor Marvin Griffin. In the wake of the 1954 Brown decision ending segregation in public schools and increased civil rights activity in the state, he warned that "the majority race in Georgia is under siege" and urged "a Solid White Vote [in all elections] until sanity, and with it safety, returns."[619] Although the black population of the county was approximately 28%, prior to passage of the Voting Rights Act only six blacks were registered to vote.

Miller was one of the counties that switched from district to at-large elections for its board of commissioners following increased black voter registration after passage of the Voting Rights Act. It made the change in 1976, and the next year, it

[618] Bray v. City of Greenville, No. 3:88-CV-127 (N.D. Ga.).

[619] Quoted in McDonald (2003), p. 72.

changed the method of selecting members of the county board of education from grand jury appointment to elections at-large. Both changes were implemented, but neither was submitted for preclearance under Section 5.

In 1980, the ACLU filed suit on behalf of black voters against the county board of commissioners and board of education alleging that their use of at-large elections violated Section 5 and the Constitution.[620] In June 1980, a three-judge district court enjoined further at-large county elections absent preclearance. The suit against the county commission was subsequently settled by consent order creating one two member and four single member districts, with one district being majority black. The suit against the board of education was settled by consent order in February 1981, creating five single member districts, with one of the districts being majority black. The plan was formally enacted by the legislature and approved by the voters in a referendum later that year.

After release of the 1980 census, the parties agreed upon a new redistricting plan for the county commission retaining a majority black district, which was enacted by the legislature in 1983.

[620] Thompson v. Mock, No. 80-13 (M.D. Ga.).

Mitchell County

Cochran v. Autry

In 1979, the ACLU filed suit on behalf of black voters challenging at-large elections for the Mitchell County Board of Commissioners and Board of Education as diluting minority voting strength in violation of the Constitution and Section 2.[621] Despite the fact that blacks were nearly 50% of the population, no black person had ever been elected to the board of commissioners and no more than one black person ever served at one time on the board of education.

Located in rural Georgia, south of Albany, Mitchell County has a long and violent racial past. In 1868, during Reconstruction, whites attacked a black political rally in Camilla, the county seat, in what became known as the Camilla Massacre. An undetermined number of black participants were killed and 30 or 40 people were wounded.[622]

In the 1970s, the lack of black political representation had direct consequences for employment and the availability of services to black Mitchell County residents. There were no black personnel in the county commissioner's' office or the tax assessor's office. There were no black deputies at either the sheriff's department or

[621] Cochran v. Autry, Civ. No. 79-59-ALB (M.D. Ga.)

[622] McDonald (2003), p. 23.

the county prison, where discriminatory practices persisted. Sections of roads through the black community remained unpaved.[623]

As in a number of other Georgia jurisdictions, no black person had served on the grand jury in Mitchell County.[624] After the Supreme Court in 1967 called into question Georgia's segregated system of jury selection, the state enacted legislation requiring fair racial representation on grand juries. Faced with the prospect that a more racially representative grand jury might appoint black members to the school board, Mitchell County then abandoned grand jury appointments and switched to at-large elections in 1970. Though preclearance was required by Section 5, the change was not submitted to the Justice Department until 1979.

In 1976, the federal district court in Albany had found the grand and traverse jury lists for Mitchell County still to be "racially discriminatory."[625] Between 1970, when the school board switched from grand jury appointment to at-large elections and subsequently implemented a majority vote requirement, and 1979, no more than one black person at a time had served on the seven-member board of education.

On September 15, 1978, the Department of Justice objected to election changes in the Mitchell County school district, which required residency districts, designated

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[623] Wayne Mixon and Ed Brown to the Mitchell County Chairman and Board of Commissioners, undated, c. 1976.

[624] McDonald (2003), pp. 133-134.

Brown v. Culpepper, 559 F. 2d 274 (5th Cir. 1977).

posts, and a majority vote requirement. While that objection was later withdrawn, the language of the September 15, 1978, Attorney General's letter was clear,

> Under recent Supreme Court decisions, to which we feel obligated to give great weight, election systems containing such features have been found to have the potential for minimizing and canceling out the voting strength of racial minorities.[626]

Also in the 1970s, voting precincts at Camilla, Pelham, and Baconton were staffed by members of the Rotary, Pilot, and Lions Clubs, none of which had any black members. In 1976, Ed Brown, a state officer of the NAACP, ran unsuccessfully for the state house from Mitchell County. In 1979, he ran unsuccessfully for mayor of his hometown, Camilla, and he encountered open hostility campaigning in the white community. On one occasion a white man tore up Brown's campaign card as he stood on the man's front doorstep. On another occasion, an elderly white man said, "You're trying to take over. I've seen the time in Mitchell County when people like you would just disappear." The assaults were not simply verbal. During one of his campaigns, Brown's car was burned.[627] In 1980, the Department of Justice sent 19 federal officials to observe elections in Mitchell County.[628]

Following the 1980 decision of the Supreme Court in Mobile v. Bolden, which required proof of intentional discrimination in a vote dilution case, the litigation

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[626] James P. Turner, Acting Assistant Attorney General, to Charles Stripling, September 15, 1978.

[627] McDonald (2003), pp. 118, 156-157.

[628] Observation of Elections Under the Voting Rights Act of 1965, U.S. Department of Justice, Civil

against the county commission and board of education was stayed. But after the amendment and extension of the Voting Rights Act in 1982, adopting a "results" test for Section 2 violations, the parties agreed to settle the litigation. In May 1984, the parties entered into a consent decree providing for single member districts for the five member board of commissioners, with two of the districts majority black. At the elections held in 1984, two black candidates were elected, marking the first time in the 20th century that African Americans were elected to the county commission.

The consent decree also provided for a six member board of education elected from single member districts, with the chair elected at-large. Three of the six districts were majority black, and in the August 1984 election black candidates won in two of the three majority black districts.

wBrown v. McNeill

McCoy v. Adams

In 1984, the ACLU brought suit on behalf of black voters against two municipalities in Mitchell County, Camilla,[629] the county seat, and Pelham, for their use of at-large elections.[630] Camilla was one of the 30 or more Georgia cities that adopted a majority vote requirement after the 1970 extension of the Voting Rights

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Rights Division, Voting Section, March 12, 1981.

[629] Brown v. McNeill, Civ. No. 84-248 (M.D. Ga.).

Act. Camilla had a black population of 61%, but only one black person had ever been elected to the city council.

Prior to filing the lawsuit, the plaintiffs and city officials agreed to enter into a consent decree after the lawsuit was filed enjoining the regularly scheduled city election in December, and scheduling a special election for late February 1985. The parties also agreed to divide Camilla into two three member districts--one predominantly white, the other predominantly black--and that at the special election in 1985, two posts in the majority black district would be open for election. Elections were held in April 1985, and two black candidates were elected, one of whom was Ed Brown, the state NAACP officer.

Until 1964, the Pelham City Council controlled the method of selecting the board of education under a 1901 city ordinance, but that year the Georgia General Assembly repealed the ordinance and established a seven member board, elected at-large, with the mayor serving as an ex officio member. In 1971, the legislature decreased the number of members to six, plus the mayor, and instituted a residential ward system, with a majority vote requirement. Both changes differed from election practices before November 1, 1964, but neither was submitted for preclearance as required by Section 5.

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[630] McCoy v. Adams, Civ. No. 84-240-ALB-AMER (M.D. Ga.).

In 1980, black residents of Pelham were 47% of the population, but no black person had ever been elected to the city council, and only one black person had been elected to the local board of education. Prior to filing suit in 1984, the parties met and discussed alternatives to the at-large system, but local officials stymied efforts to implement single member districts by seeking to reduce the size of both elective bodies from six members to five. Such a reduction would have provided black majorities in only two districts compared to three in a six district plan. In light of the discriminatory effect of the city's proposal, the plaintiffs filed their lawsuit.[631]

Subsequently, the parties entered into a consent decree on November 14, 1986, enlarging both the council and school board to seven members, elected from two districts. One district, majority black, would elect three members and the other, majority white, would elect four members. The Department of Justice approved the changes and elections implementing the settlement were held in January 1987. Black candidates were elected to three seats on the city council and three seats on the city school board. These results stood in sharp contrast to the decades of exclusion of blacks from meaningful participation in government in Pelham and Mitchell County.

[631] McCoy v. Adams.

Morman v. City of Baconton

The City of Baconton, another municipality in Mitchell County, was required to redistrict after the 2000 census, and again Section 5 was critical in blocking the use of an admittedly unconstitutional plan.

In April 2003, the city enacted a redistricting plan for its mayor and five member city council based upon the 2000 census. The preexisting plan, which had been enacted in 1993, contained a total deviation of 49.7%. The city submitted its new plan to the Attorney General and it was precleared on October 17, 2003. However, prior to preclearance the city had allowed candidates to qualify under the old 1993 plan.

To complicate matters further, despite preclearance, the city prepared to hold city council elections in November 2003, under the old plan. The city, to its credit, attempted to secure an order from the Superior Court of Mitchell County enjoining the November 4 election under the 1993 plan, but the state court refused to implement the precleared 2003 plan, and instead ordered elections to go forward under the malapportioned 1993 plan. The order of the state court was itself a voting change that could not be implemented absent Section 5 preclearance.

Black residents of Baconton, with the assistance of the ACLU, then filed suit in federal court to enjoin use of the 1993 plan on the grounds that it would violate

Section 5 and the Fourteenth Amendment.[632] The day before the election the court held a hearing, and, hours before the polls opened, granted an injunction prohibiting the city from implementing the unprecleared and unconstitutional plan.[633] The court further ruled that a special election for the city council would be held under the precleared 2003 plan in March 2004, to coincide with the presidential preference primary, which was the next regularly scheduled election. These events show how Section 5 continues to play a central role in preventing the use of plainly unconstitutional election plans.

Morgan County and the City of Madison

Butler v. Underwood

Edwards v. Morgan County Board of Commissioners, Board of Education, and Board of Registrars

Morgan County is located approximately one hour's drive, due east, of Atlanta. The county was 45% black in 1964, and elected its board of commissioners from single member districts, yet no blacks had been elected to any county office. After passage of the Voting Rights Act and the prospect that one or more of its election districts would contain a majority of registered black voters, the county in 1971 abandoned its district system in favor of at-large voting. This change allowed

[632] Morman v. City of Baconton, Georgia, Civ. No. 1:03-CV-161-4 (WLS) (M.D. Ga.).

[633] Id., Order of November 3, 2003.

the white majority to continue to control the election of all members of the board of commissioners. Although the change was required to be precleared, the county ignored Section 5.

Notably, in July 1975, the Justice Department objected to the adoption of majority vote and numbered post requirements for the city council of Madison, the county seat, because of the potential - in concert with at-large voting - to dilute minority voting strength, saying:

> We are unable to conclude that the implementation of the majority requirement and the numbering of the City Council posts does not have a racially discriminatory effect.
>
> Our analysis demonstrates that under Madison's current system of at-large plurality elections, minority race voters have the potential to elect a candidate of their choice. This minority voting strength potential is lost, however, if candidates must restrict their candidacies to a single, specific post, and must receive more than half of the votes cast.[634]

The following year, the ACLU filed suit on behalf of black voters challenging at-large elections for the county board of commissioners, as well as for the city council of Madison, as violating the Voting Rights Act and the Constitution.[635] In 1978, the district court ordered elections for the county board of commissioners returned to the preexisting district system because the 1971 change to at-large voting had never been precleared. The court also found that at-large elections in the City of Madison "may have denied plaintiffs and their class equal access to the political

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[634] J. Stanley Pottinger, Assistant Attorney General, to E.R. Lambert, July 29, 1975.

[635] Butler v. Underwood, Civ. No. 76-53-ATH (M.D. Ga. 1978).

system in derogation of their rights under the Fourteenth and Fifteenth Amendments of the Constitution of the United States," and ordered the use of a three district plan for the city council.[636]

The 1980 census showed that the 1976 court-ordered districting plan for the county was malapportioned. The general assembly enacted a remedial plan in 1982, but local officials proceeded to enforce it during the upcoming elections, and again without complying with Section 5, which had just been extended by Congress for 25 years.

Seeking to block use of the unprecleared plan, the plaintiffs again applied to the federal court for injunctive relief under Section 5, which was granted. Local officials finally submitted the new plan and it was precleared. Elections were held in October 1982, and Walter C. Butler, Jr., who later became state president of the NAACP from 1993 to 2005, was elected to the Morgan County Commission.

The 1990 census showed that the board of commissioners and the Morgan County Board of Education, whose members were elected from the same five single member districts, were malapportioned with a total deviation of 26.1%. The general assembly enacted a remedial plan, but it was not precleared before the April 27, 1992, deadline and died as a result of a "poison pill" provision in the legislation.

[636] Id., Order of December 14, 1978.

Because Morgan County had a malapportioned plan, the ACLU filed suit on May 1, 1992, on behalf of black voters seeking constitutionally apportioned election districts.[637] The parties entered into a consent decree, pursuant to which the 1992 elections went forward as scheduled under the malapportioned plan, but provided for a new redistricting plan for the two boards which was ordered into effect on an interim basis effective December 1, 1992.[638] That plan contained two majority black districts with 62.49% and 52.25% black voting age population, respectively. In 1993, the Georgia General Assembly enacted the interim plan, which was precleared by the Department of Justice, and implemented at the regular elections in 1994.

Muscogee County and the City of Columbus

Fourth Street Baptist Church v. Board of Registrars of Columbus/Muscogee County

In Muscogee County, more than 15 years after passage of the Voting Rights Act, 60% of voting age whites were registered to vote compared to 48% of voting age blacks. In an effort to increase black registration, the Fourth Street Baptist Church in Columbus asked the county board of registrars in 1983 to designate the church as a satellite voter registration site. State law expressly authorized the designation of churches as satellite voter registration sites, and other counties had regularly made

[637] Edwards v. Morgan County Board of Commissioners, Civ. No. 92-54-ATH(DF) (M.D. Ga.).

[638] Id., Consent Decree and Order, July 20, 1992.

such designations. The Muscogee County board, however, turned down the request because it had adopted a policy of not allowing registration to be conducted at churches on the grounds that it would violate the First Amendment doctrine of separation of church and state.

The Fourth Street Baptist Church, its minister and members, and represented by the ACLU, sued the board of registrars in state court in January 1984, alleging that the action of the board violated state law, the federal Constitution, and resulted in discrimination against blacks, who continued to suffer the effects of past official discrimination in registering and voting, in violation of Section 2.[639] The state court, however, turned a deaf ear to the complaints of the black community and, without conducting a hearing of any kind, dismissed the lawsuit on April 13, 1984. In a terse, one paragraph opinion it held that, while the state statute authorizing the designation of churches as satellite voter registration sites was constitutional, local registrars had absolute, unreviewable discretion in designating or refusing to designate additional registration sites.

Plaintiffs appealed but the Georgia Supreme Court affirmed. Without reaching the issue of the constitutionality of the board's separation-of-church-and-state policy, the court held that "nothing . . . requires that a Board of Registrars designate churches as voter registration sites, and nothing requires that the Fourth

[639] Fourth Street Baptist Church v. Board of Registrars of Columbus/Muscogee County, Georgia, No. C84-330 (Sup. Ct. Muscogee County).

Street Baptist Church be so designated." And throwing in some legal obfuscation for good measure, it held that the plaintiffs' case should be dismissed for the additional reason that it had been brought as an action for "declaratory judgment," rather than as one for "mandamus."[640] The decision showed a remarkable level of indifference by the state's highest court to the depressed level of black voter registration.

Newton County

Ellis-Cooksey v. Newton County Board of Commissioners

Newton County, located 30 miles east of Atlanta, had a population of 41,808 in 1990, of whom 22.4% were African American. The county also had a long history of adopting discriminatory election procedures and ignoring Section 5.

In 1967, two years after passage of the Voting Rights Act, the county abandoned its sole commissioner form of government and switched to a five member board of commissioners elected from three single member districts, and one multi-member district composed primarily of the City of Covington, the county seat, which elected two members. Approximately 44% of the population of Covington was black and could have constituted a majority in a single member district. The county did not submit the 1967 change for preclearance.

In 1971, in the face of increased black voter registration, Newton County

[640] Fourth Street Baptist Church v. Columbus Board of Registrars, 320 S.E.2d 543, 544 (Ga. 1984).

abolished its district system and adopted at-large elections for all five commission seats. The change was covered by Section 5, but the county did not submit it for preclearance. Four years later, and only then under threat of litigation, the county submitted its 1967 and 1971 changes for preclearance, and they were objected to by the Department of Justice.

Nothing that "no black has ever been elected to serve on the County Board of Commissioners," the department concluded that the at-large voting provided for in the 1967 plan "will operate to minimize or dilute the voting strength of the minority and, thus, have an invidious discriminatory effect." The department also found that "a similar discriminatory effect will be occasioned by the changes [in 1971] . . . which results in requiring all candidates for the Board of Commissioners to run for staggered terms, at-large, with a residency requirement in each of the districts."[641] As a result of the objection, the county returned to district elections for the county commission.

The board of education, whose members were traditionally appointed by the grand jury, adopted an election scheme in 1967. Three members were elected from single member districts, two members were elected from a multi-member district composed of the city of Covington, and two members were elected at-large. The change was not submitted for preclearance until 1975, when it was objected to by the

[641] J. Stanley Pottinger, Assistant Attorney General, to John P. Howell, January 29, 1976.

Department of Justice, which noted that "no black has ever served on the Newton County Board of Education," and concluded that the board's voting system, "especially with respect to the multimember district within the City of Covington, will operate to minimize or dilute the voting strength of the minority and, thus, have an invidious discriminatory effect." The department also declared that "a similar discriminatory effect will be occasioned by . . . requiring all Board of Education members to run for staggered terms at large with residency required in the county's districts."[642] Rather than face litigation, the school board adopted the same district lines as the county commission.[643]

The 1990 census showed the five single member districts for the board of commissioners and board of education were malapportioned, with a total deviation of 38.6%. After the legislature failed to enact a remedial plan, the ACLU filed suit on behalf of black voters in Newton County in June 1992, seeking constitutionally apportioned districts for the commission and school board.[644] The suit also sought to enjoin upcoming primary elections, scheduled for July 21, 1992, as well as the November 3 general election.

The parties settled the case the following month and the court issued an order

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[642] J. Stanley Pottinger, Assistant Attorney General, to John P. Howell, November 3, 1975.

[643] McDonald (1982), pp. 42-3.

[644] Ellis-Cooksey v. Newton County Board of Commissioners, Civ. No. 1 92-CV-1283-MHS (N.D. Ga.)

that "[t] he 1984 district plan does not constitutionally reflect the current population."[645] Rather than enjoin the upcoming elections until a new apportionment plan could be adopted by the legislature, the court ordered the 1992 elections to go forward using a districting plan jointly prepared by the plaintiffs and defendants. Under that plan, African Americans made up a majority of one of the five single member districts, and 26.81% of the population in a second district.

Subsequent to the court's order, the Department of Justice precleared the redistricting plan on August 14, 1992. Candidate qualifying was reopened and a special primary election was conducted under the new plan on September 15, 1992, followed by the general election on November 3, 1992.

In the absence of Section 5, and the continuing role it played in the 1992 redistricting, black voters would doubtlessly continue to be excluded from equal participation in the political process in Newton County.

Peach County

Richardson v. Peach County

A largely agricultural county in middle Georgia, located just south of Macon, Peach County is home to Fort Valley State University, a historically black institution founded in 1895, and a major employer in the county. Other employers included

[645] Id., Order of July 19, 1992, p. 3.

Blue Bird, the school bus manufacturer, which employed 1,600 workers, and an agricultural pesticide and fertilizer company in operation since 1910, which settled lengthy litigation in state court in 1998 for arsenic and other chemical pollution that had a disparate impact on black residents.[646]

In June 1994, the ACLU filed suit on behalf of black voters in Peach County challenging the malapportionment of the board of commissioners and board of education as a violation of the Constitution and Sections 2 and 5.[647] The challenged plan contained a total deviation of 81.78%. The suit asked the court to enjoin use of the existing districting plan at the upcoming July primary elections.

Peach County, which is 47.5% black, has a long history of infringing on the voting rights of African Americans. In 1974, the Attorney General objected to the adoption of majority vote and numbered post requirements by Fort Valley, the Peach County seat, because he was unable to conclude that the voting changes, in conjunction with the city's use of at-large elections, would "not have a racially discriminatory effect." The Attorney General further suggested that the proposed changes would be precleared if the city adopted "a racially neutral election system, such as district representation."[648]

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[646] In Re: Ft. Valley Litigation, Master File No. 94VS0000001, Final Order Approving Settlement, October 12, 1998.

[647] Richardson v. Peach County, Georgia, Civ. No. 94-228-2-MAC (DF) (M.D. Ga.).

[648] J. Stanley Pottinger, Assistant Attorney General, to Charles R. Adams, May 13, 1974.

Black voters, represented by the ACLU, later sued the three member Peach County Board of Commissioners in 1976, for its use of at-large elections and for failing to preclear the adoption of staggered terms in 1968.[649] The three-judge court agreed that the staggered term requirement had not been precleared and enjoined its further use absent compliance with Section 5. However, the court refused to set aside the 1976 election which had been held under the unprecleared staggered term format. Plaintiffs appealed, and the Supreme Court remanded the case to the district court with instructions to allow the county 30 days to seek preclearance. If preclearance were granted, the matter would be at an end; however, if preclearance were denied, plaintiffs could request additional relief in the form of new elections under the preexisting format. The county submitted the staggered term provision and it was precleared. The opinion of the Supreme Court thus established the precedent of "retroactive" preclearance of unsubmitted voting changes.[650]

The challenge to at-large elections for the board of commissioners was settled by consent decree in 1979. Under the agreement, the size of the commission was increased to five members, with four members elected from single member districts and one member elected at-large. The staggered term requirement was retained.[651]

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[649] Berry v. Doles, Civ. No. 76-139 (M.D. Ga.).

[650] Berry v. Doles, 438 U.S. 190 (1978).

[651] Berry v. Doles, Civ. No. 76-139 MAC (M.D. Ga.), Final judgment and decree, November 19, 1979.

In 1992, after passage of legislation by the general assembly the previous year which abolished grand jury appointment of school boards and required their election instead, the Peach County Board of Education adopted the same method of elections as the board of commissioners: four single member districts and one seat elected at-large.

Even though the county had adopted district elections in 1979, it had failed to reapportion after either the 1980 or 1990 census. After the ACLU filed suit in 1994, challenging the county's malapportioned districts, the parties agreed on a new plan that increased the size of the board of commissioners and board of education from four to six members and utilized single member districts. The new "Peach 6" plan continued the use of staggered terms.[652] The plan was precleared by the Attorney General on January 23, 1995, and elections were held immediately thereafter.

Pike County and the Town of Zebulon

Hughley v. Adams

Pike County adopted at-large elections for its board of education in 1972 under circumstances that strongly indicate race was a primary factor in the decision. The members of the school board were traditionally appointed by the grand jury, but that system was changed in 1967, when the legislature approved a plan to elect

[652] Richardson v. Peach County, Georgia, Order of September 29, 1994, p. 6.

the five member board from single member districts. The county had a population of some 9,000 people, 26% of whom were black. No black person, however, had ever served on the school board or any elected board in the county.

Two black candidates ran for the school board under the district system in 1970, marking the first time in history that African Americans had run for a county office. The two were defeated, but both ran strong races and one, the Rev. Robert Curtis, made it into a run off.[653] Before the next election, and without seeking preclearance, the county switched to at-large voting, insuring that the white majority would control the election of all seats on the board.

In February 1978, the Department of Justice contacted local officials and requested them to submit the school board's plan for preclearance. The county did so, and the Attorney General entered an objection:

> Because of the potential for diluting black voting strength inherent in the use of at-large elections with residency requirements in Pike County, we are unable to conclude that the County has sustained its burden of showing that the change to at-large elections with residency requirements will not have a racially discriminatory effect in Pike County. . . It is our view that the change accomplished by H.B. 1947 would represent such a retrogression.[654]

The county, however, ignored the objection and continued to hold elections at-

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[653] Atlanta Constitution, December 10, 1980.

[654] Drew S. Days III, Assistant Attorney General, to James D. Turpin, March 15, 1979.

large until it was sued by black residents, represented by the ACLU, in 1980.[655] The plaintiffs sought enforcement of Section 5 and an injunction against further use of the objected to at-large system.

In July 1980, a three-judge court enjoined further use of the county's at-large plan and remanded the case to a single judge for implementation of a remedy. Because the preexisting single member districts were malapportioned, a new plan was required. Following a trial in September 1980, the court accepted the defendants' proposed plan, and the plaintiffs appealed. They contended the county's plan could not be implemented absent preclearance under Section 5, and that the plan, which contained five majority white districts, was an inadequate remedy for the Section 5 violation and the dilution of minority voting strength.

In February 1982, the court of appeals remanded the case to the district court, ruling that the redistricting plan was a legislative plan and was thus subject to Section 5 preclearance.[656] A hearing was conducted on remand in September 1982, and after opening arguments, the judge indicated he wanted the defendants to consider an interim remedy of immediately appointing a black person to the board of education. The board agreed to do so, marking the first time in the history of Pike County that an African American served on any elective county board.

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[655] Hughley v. Adams, No. 80-20N (N.D. Ga.).

[656] Hughley v. Adams, 667 F.2d 25 (11th Cir. 1982).

The parties subsequently agreed to establish six single member districts for the board, one of which had a black majority of 65%. The new redistricting plan was precleared by the Attorney General on March 11, 1983. The consent decree also provided for satellite voter registration and for the appointment of blacks as deputy registrars. Black voter registration increased substantially as a result, and in August 1984, a black person was elected to the school board from the majority black district. Thus, the role of Section 5 in securing a racially fair method of elections for the board of education in Pike County is apparent.

The Town of Zebulon

The ACLU, on behalf of the Pike County NAACP and black voters living in Zebulon, the county seat, also wrote to members of the Pike County legislative delegation in November 1983, advising them that in light of recent court decisions at-large elections for the county commission and the Zebulon city council were likely in violation of Section 2. Following negotiations with county and city officials, the legislature enacted legislation in 1984 providing for: (1) the election of the four member Zebulon City Council from two, two member districts, one of which was 65% black; and (2) the election of the five member Pike County Commissioners from four single member districts, with the chairman elected at-large. One of the districts had a black population of 62%, and in elections held in that district in August, a black candidate defeated the white incumbent. The first election for the Zebulon City Council was held

under the new plan in December 1984, and a black candidate was elected.

Complaints of discrimination in voting in Pike County, however, have been ongoing. In October 30, 1989, Phyllis Beck, a black resident of the county, wrote a letter to the U.S. Attorney in Atlanta, noting that Zebulon was conducting a special voter registration drive on the eve of municipal elections. No public notice of the drive had been given, in the newspapers or otherwise, and city officials called only unregistered white voters asking them to register, advising them that City Hall would remain open beyond its regular hours until 8:30 p.m.[657] It does not appear that the U.S. Attorney took any action on Ms. Beck's complaint.

Pulaski County and the City of Hawkinsville

Lucas v. Pulaski County Board of Education

In 1982, the general assembly enacted legislation providing for elections for the Pulaski County Board of Education from seven single member districts.[658] The 1990 census showed that the districts were malapportioned with a total deviation of 47.75%. The legislature, however, failed to enact a remedial plan and elections were scheduled to be held in 1992 under the unconstitutional plan. Black residents of the county, who were 32.5% of the population, and represented by the ACLU, filed suit

[657] Phyllis D. Beck to U.S. Attorney Robert L. Barr, October 30, 1989.

[658] Ga. Laws 1982, p. 2664.

in 1992 to enjoin the upcoming elections.[659] The plaintiffs also challenged at-large elections for the five member board of commissioners of the City of Hawkinsville, the county seat.[660] It is worth noting that as of 1989, no blacks had ever served as county commissioner, and there were no black officials, administrators, professionals, para-professionals, department heads or supervisors employed by the county.

On October 14, 1992, the district court entered a consent order involving the board of education, affirming that "Defendants do not contest plaintiffs' allegations that the districts as presently constituted are malapportioned and in violation of the Fourteenth Amendment of the Constitution." The order also enjoined further elections for the board of education, including the scheduled November 3, 1992, election, until the general assembly was able to enact new reapportionment legislation and receive preclearance from the Justice Department under Section 5. A satisfactory plan was adopted and precleared, and the parties agreed to dismiss the case against the board of education by order of February 14, 1995.

Hawkinsville was 49.6% black, but only one black person had ever won a contested election in the past 25 years, and no African American had ever served as chairman of the city commission. The complaint, which charged that Hawkinsville's

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[659] Lucas v. Pulaski County Board of Education, Civ. No. 92-364-3 (MAC) (M.D. Ga.).

[660] Black residents had also challenged the sole commissioner form of government in Pulaski County in 1989. See Sutton v. Anderson, Civ. No. 89-58-1 (M.D.Ga.), and supra p. 153 .

at-large elections violated the Constitution and Section 2, also cited the city's majority vote requirement and its use of numbered posts and staggered terms as mechanisms which enhanced the opportunity for discrimination against minorities.

As evidence of racial polarization and discrimination in voting, the law suit cited a number of facts:

> * No black candidates had ever run for county-wide office and only one black candidate had ever won election to the Hawkinsville board of commissioners.
>
> * Black voter registration in the city lagged significantly behind whites, with only 48.9% of African Americans registered to vote, compared to 66.7% for whites in 1980. In 1993, the gap was 74.4% for blacks, and 89.8% for whites.[661]

With only one voting precinct in Hawkinsville, it was impossible to perform a statistical analysis of racial polarization in city elections, but an analysis by plaintiffs' expert of three county wide elections where an African American candidate ran for office revealed a distinct pattern of racially polarized voting where the average level of white crossover voting was a mere 1.46%.[662] With two-thirds of Pulaski County's registered voters living in Hawkinsville, and a similar racial breakdown of registered voters in the county and city, plaintiffs argued that these results were statistically representative of racially polarized voting in the city.

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[661] Lucas v. Pulaski County Board of Education, Plaintiffs' Proposed Findings of Fact and Conclusions of Law, March 13, 1995, pp. 16.

[662] Id., p. 6.

Other socio-economic racial disparities were evident:

> * One half (50.52%) of blacks in Hawkinsville lived below the poverty level in 1989, compared to just 9.52% of whites.[663]
>
> * A substantial majority (61.4%) of blacks over age 25 had no high school diploma, while 76.3% of whites had at least a high school diploma.
>
> * Of all black households, 8.8% lacked complete plumbing compared to no white households.
>
> * Schools in both the city and county were not desegregated until 1970, and even then the county maintained segregated bus routes.[664]

Shortly before trial, on November 9, 1995, the court on its own motion dismissed the complaint without prejudice. As it had done in several other cases, it said that the case could not proceed until "all issues are finally decided in the case of Holder v. Hall, 512 U.S. (1994)." It dismissed the case "subject to the right of plaintiffs to refile the same in the event that the remaining issues in Holder are decided favorably to them."[665] Because the case against Hawkinsville did not involve a sole commissioner, the resolution of Holder v. Hall was arguably not relevant. However, given that the court had made pre-trial rulings unfavorable to

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[663] Id., p. 12.

[664] Id., pp. 12, 14, 30.

[665] Lucas v. Pulaski County, Order of November 9, 1995.

plaintiffs, it was decided not to appeal in favor of the possibility of refiling at a later date.

Putnam County

Clark v. Putnam County

Eatonton, the county seat of Putnam County, was the home of Joel Chandler Harris, the author of the Uncle Remus tales. In 1976, Willie Bailey and other black residents of Putnam County, represented by the ACLU, filed suit challenging at-large elections for the city's mayor and commission, the county commission, and the county board of education as diluting minority voting strength. After repeated attempts to get the parties to settle, the court issued a detailed opinion in 1981, striking down the challenged systems as having been adopted, and being maintained, purposefully to discriminate against blacks in violation of the Constitution.[666]

The court found voting was racially polarized. Schools and juries had been segregated. Few blacks were employed by the city or county or had been appointed to local boards and commissions. The municipal housing authority was operated on a racially segregated basis. The swimming pool was white only until 1969. Public funds had been used to pave the road to an all white private school, which opened

[666] Bailey v. Vining, 514 F. Supp. 452 (M.D. Ga. 1981).

following the desegregation of public schools. The golf course, operated on land owned by the county, was segregated. Voting lists were maintained on a segregated basis. No blacks were appointed as deputy registrars until after a lawsuit was filed in 1976, and there were virtually no black election officials in the city and rural precincts. Blacks were excluded from participating in the affairs of the Democratic Party. Blacks had a depressed socioeconomic status that hindered their ability to support candidates for public office. Despite the fact that blacks were 49% of the population, no black candidate had ever won a contested at-large election in the county during the 20th century. The court concluded, not only that blacks "have not had equal access to the political processes," but "[t]here is no doubt that the at-large electoral systems in Putnam County were in the past, and are today, maintained for the specific purpose of limiting the county's and city's black residents' ability to meaningfully participate therein."[667]

At the court's direction, the parties agreed on remedial districting plans for the three bodies. The plans were implemented in 1982, and a total of seven blacks were elected to office.

The election plans for the county commission and school board contained four single member districts, two of which were majority black, with a fifth member

[667] Id. at 454-63.

elected at-large. In 1992, the court amended its order to reflect the 1990 census, but retained the two majority black districts.

In 1997, four white plaintiffs filed a lawsuit challenging the constitutionality of the majority black county commission districts as racial gerrymanders in violation of the Shaw/Miller line of cases.[668] Several of the original plaintiffs in the 1976 lawsuit, again represented by the ACLU, sought to intervene to defend the challenged plan. Although minority residents have been permitted to intervene in virtually every one of the Shaw/Miller challenges, let alone minority plaintiffs who had participated in prior litigation that produced the plan at issue, the district court denied intervention. The intervenors appealed the district court's order to the Eleventh Circuit, which reversed,[669] holding that the county commissioners' representation of the black intervenors might be inadequate and that they were entitled to intervene.

In January 2001, the district court dismissed the white plaintiffs' complaint. It found traditional districting principles were not subordinated to race. The district lines, while intended to maintain two majority black districts, were the natural outcome of traditional districting principles as applied to the demographic and geographic realities of the county. The plan utilized geographic compactness,

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[668] Clark v. Putnam County, 168 F.3d 458 (11th Cir. 1999).

[669] Id. at 463.

adherence to natural boundaries, the preservation of communities of interest, and the protection of incumbents. The district court also found that because the county had two concentrations of African Americans, it would have been difficult to have divided the county differently without raising problems of minority vote dilution.[670]

The white plaintiffs appealed, and in a 2-1 decision the court reversed.[671] It held the district court erred in failing to find unconstitutional intentional discrimination. It also made findings that were completely tautological, including that the existing minority districts were not needed because African American candidates were being elected in those districts, while ignoring the evidence that no African American had ever won countywide or in any majority white district.

The 2000 census showed the county was approximately 30% black and the districts for the board of commissioners and board of education were malapportioned. Because the court of appeals had ruled that the 1992 plan was unconstitutional, the benchmark for the 2000 redistricting was the 1982 plan – the most recent legally enforceable plan. Placing the 2000 census data on the 1982 plan showed the continued existence of two majority black districts. The county, however, proposed a plan, which was adopted by the legislature, that had only one majority minority district and cut the black population in the other formerly

[670] Clark v. Putnam County, Civ. No. 97-622 (M.D. Ga.).

[671] Clark v. Putnam County, 293 F.3d 1261 (11th Cir. 2002).

majority black district in half. The plan was submitted for preclearance, but the Department of Justice objected, concluding that black voters had elected candidates of their choice in the majority black districts, and that "[o]ur statistical analysis also shows that white voters do not provide significant support to candidates supported by the minority community." The department also concluded that the reduction of black population in the formerly majority black district "casts substantial doubt on whether minority voters would retain the reasonable opportunity to elect their candidates of choice under the proposed plan," and that the retrogressive effect of the plan was "neither inevitable nor required by any constitutional or legal imperative," as demonstrated by the presence of alternative plans that were fairer to the black community.[672]

The white plaintiffs filed a second lawsuit challenging the 1982 plan for the county commission and school board as being malapportioned.[673] The malapportionment was undisputed, and the ACLU intervened in the new lawsuit on behalf of the same minority voters as in the first suit in order to participate in the development of a constitutional remedial plan. Two majority black districts could be drawn, but only by reducing the black population to a bare majority, a result which the ACLU intervenors did not advocate. The court implemented a plan that

[672] J. Michael Wiggins, Acting Assistant Attorney General, to Robert T. Prior, August 9, 2002.

[673] Clark v. Putnam County, Civ. No. 02-262 (M.D. Ga.).

retained one district at 57% African American voting age population, and created another with a black voting age population of 43%.

A special election was held in 2002 for the two school board seats held by African Americans, and two black candidates were elected. No county commission seats were up for election in 2002. In its 2003 session, the general assembly adopted the court's plan for use in future elections for both the school board and the county commission.

The litigation in Putnam County was lengthy, and illustrates how contested the issue of political power can be at every level of government; and, especially how issues of race continue to play a central role in those contests. In situations such as these the critical role played by Section 5 in protecting the rights of minority voters is evident.

Randolph County

Cook v. Randolph County

Randolph is a majority (58%) black, rural county located in southwest Georgia. Prior to passage of the Voting Rights Act, only 11.5% of the black voting age population was registered to vote. Black voter registration was depressed for a variety of reasons, including challenges by local registrars to the qualifications of blacks who were on the voter rolls. In one case, the court found the removal of blacks from the voter lists "constituted an illegal discrimination against them on

account of their race and color," ordered them restored to the rolls, and ordered that they collect damages from the registrars in the amount of $20 per person.[674]

In January 1993, the general assembly enacted legislation redistricting the five member county commission. Based on the 1990 census, the existing plan had a total deviation of 29.97%. Also in 1993, the legislature adopted the same districts for election of the five member board of education.[675] At the time the legislation was enacted, Randolph County was one of only a handful of counties in the state that still used the grand jury method of school board appointments. Significantly, the 1993 law contained a new requirement that members of the board of education possess a high school diploma or general educational development (GED) equivalent.

The 1993 laws were submitted for preclearance and the Department of Justice approved the election of the school board from single member districts. However, it objected to the proposed redistricting plan on the grounds that it unnecessarily fragmented the black population in one of the previously majority blacks districts. According to the objection:

> There appears to be a pattern of racially polarized voting and substantially lower levels of participation by black voters relative to white voters in Randolph County elections. In this

[674] Thornton v. Martin, 1 R.R.L.Rptr. 213, 215 (M.D. Ga. 1956).

[675] 1993 Georgia Laws, 3588 (county commission districts) and 1993 Georgia Laws, 3568 (board of education districts).

> context, the identified fragmentation of black population concentrations has the effect of limiting the opportunity for black voters to elect candidates of their choice. Our examination of the information in your submission fails to show that this fragmentation was required in order to comply with the county's legitimate redistricting criteria.[676]

The Attorney General also objected to the educational requirement for school board members on the grounds that it would have a racially discriminatory, regressive effect:

> It does not appear that state law generally requires or endorses the proposed educational qualification. In addition, the existing system of grand jury appointments to the school board has no such requirement, and it appears that in practice persons have been appointed to the school board who did not meet this requirement.
>
> According to the 1990 census, approximately 65 percent of black persons age 25 and older do not possess a high school diploma or its equivalent, compared to only 36 percent of white persons age 25 and over. Hence, requiring that persons who wish to run for the school board demonstrate that they have a high school diploma or a GED equivalent would appear to have a disparate impact on black residents of Randolph County. Moreover, it appears that a number of candidates of choice among black voters in previous elections would be barred from serving on the school board by this provision. Under these circumstances, where the pronounced disparate impact of the proposed educational requirement appears to have been well-known, your submission does not provide an adequate non-racial justification for this requirement.[677]

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[676] James P. Turner, Acting Assistant Attorney General, to Jesse Bowles, III, June 28, 1993, pp. 2-3.

[677] Id., pp. 3-4, internal citations omitted.

In light of the Attorney General's objection, and the existence of malapportioned districts, the county had another plan drafted by the State Legislative Reapportionment Office which it submitted to the Department of Justice for preclearance. Despite the fact that the county had no authority under state law to adopt a redistricting plan, such authority being reserved to the state legislature, the county announced plans to conduct the November 2 school board election under the new plan.

On October 5, 1993, black voters, represented by the ACLU, filed suit.[678] They asked the court to enjoin elections for the school board and board of commissioners on the grounds that the districting plan for both bodies was either malapportioned in violation of the Constitution and Section 2, or had not been precleared pursuant to Section 5. Later that month, on October 29, the parties signed a consent order stipulating that the existing county districts were malapportioned, and agreeing on a redistricting plan containing five single member districts with a total deviation of 9.35%. Three of the five districts were majority black. Defendants also agreed not to seek to enforce the provision in the 1993 law requiring board of education candidates possess a high school diploma or GED.[679] The reapportionment plan was adopted as an interim plan and implemented at the board of education special

[678] Cook v. Randolph County, Civ. No. 93-113- COL (M.D. Ga.).

[679] Id., Order and Decree of October 29, 1993.

election in December 1993. It was submitted by defendants for enactment in the 1994 General Assembly, and subsequently submitted to the Department of Justice for preclearance.

Richmond County

United States v. City of Augusta

Hasan v. Mayor and City Council of Augusta

As Georgia's second oldest city, Augusta has a long history of voting discrimination. Political campaigns have been characterized by overt and subtle racial appeals. In 1981, the Department of Justice objected to the city's adoption of a majority vote requirement because:

> An analysis of ward returns demonstrates that voting in the City of Augusta generally follows a pattern of racially polarized voting. Although blacks constitute 49.88 percent of the population of the city (according to the 1970 census), only four of the sixteen councilmembers are black. Our analysis also revealed that even some of these black candidates who have been successful won only because of the plurality requirement. Therefore, on the basis of our review, the adoption of the majority vote requirement would appear to represent a retrogression in the position of black voters.[680]

[680] James P. Turner, Acting Assistant Attorney General, to Samuel F. Maguire, March 2, 1981, p. 2.

Also, in 1987, the Department of Justice, in an objection that was later withdrawn as part of a court settlement, objected to the city's "ambitious annexation program," writing,

> While the city's efforts to increase its size do not, per se, violate the Voting Rights Act, we are concerned regarding the annexation standards applied to black and white residential areas. In this regard, it appears that the city's present annexation policy centers on a racial quota system requiring that each time a black residential area is annexed into the city, a corresponding number of white residents must be annexed in order to avoid increasing the city's black population percentage. Our information indicates that several black communities adjacent to the city actively have sought annexation but that such annexation requests have been delayed or denied while a white residential area containing approximately the same number of people can be identified for annexation.
>
> We are aware of efforts by the city's Annexation Office to conduct door-to-door surveys in identifying areas for annexation and it appears that these efforts have been concentrated in white residential areas to balance the black residential areas that actively have sought annexation. The annexations now submitted for Section 5 review appear to have been effectuated pursuant to this racial quota policy.
>
> Our review of the Augusta annexations, however, reveals that the city's annexation policy centers, to a significant extent, on race, and that such policy has an invidious impact on black citizens.[681]

In June 1987, the ACLU filed suit in federal court on behalf of black voters in the City of Augusta challenging at-large voting for the Augusta City Council as

[681] William Bradford Reynolds, Assistant Attorney General, to Charles A. DeVaney, July 27, 1987, pp. 1-2.

violating the Constitution and Section 2.[682] Although Augusta's population was approximately 50% black, and in 1981 the city had elected its first black mayor and several black council members, blacks remained significantly underrepresented on the city council. In addition to the discriminatory effect of at-large elections, there was strong evidence that at-large voting had been adopted for the express purpose of diluting the black vote.

The complaint was filed by the ACLU after black voters were denied intervenor status in a separate law suit challenging Augusta's at-large system that had been brought by the Attorney General five months earlier, in January 1987.[683] The government's suit alleged that the city's apportionment, which ironically the Attorney General had precleared a week earlier under Section 5, still violated Section 2 on the grounds that "the at-large method of election denies black citizens a fair opportunity for effective political participation."[684]

After being denied intervenor status and in view of past disagreements between minority voters and the Attorney General over the interpretation and application of the Voting Rights Act, black plaintiffs felt it was necessary to file a suit of their own. In a number of voting cases, challenges brought by the government to

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[682] Hasan v. Mayor and City Council of Augusta, Civ. No. CV187-087 (S.D. Ga.).

[683] United States v. City of Augusta, Civ. No. CV187-004 (S.D. Ga.).

[684] Id., Order of July 22, 1988, p. 1.

discriminatory voting practices would have been compromised or abandoned but for the presence of minority intervenors. In Augusta, black voters also wanted to be involved in the remedial phase of litigation to help determine the form and method of electing their city government. In addition to appealing the denial of intervenor status, the ACLU sought to have its case consolidated with the government's law suit.

In July 1987, the court denied consolidation of the two cases and stayed the ACLU's case pending resolution of the government's case. Two years later, in February 1989, after a settlement implementing a remedial election plan was reached in the government's case, the ACLU's dismissed its pending case. Pursuant to the settlement agreement, the City of Augusta "adopted a new method of election which affords its black constituency a realistic opportunity to elect candidates of their choice to at least 6 of 13 seats on the new council."[685]

The ACLU also took legal action on July 14, 1988, successfully blocking a special election set for July 19, on consolidation of the City of Augusta with surrounding Richmond County because the date of the election had not been precleared under Section 5. Efforts to consolidate the City of Augusta with Richmond County, which had first begun in 1971, were opposed by a substantial majority of black voters because blacks were a minority in the surrounding county

[685] James P. Turner, Acting Assistant Attorney General, to Linda W. Beazley, May 30, 1989, p. 2.

and they felt consolidation would dilute the overall impact of the black vote, especially in Augusta. The plaintiffs contended that the referendum was set at a special time, rather than at the time of a regularly scheduled general election, because the black turnout would be lower, and thus the referendum would be more likely to pass.

The Attorney General objected to the July 19 date, noting that the issue of consolidation "has divided the electorate largely along racial lines." He further noted that "the date for the referenda election was chosen without any apparent consideration or serious solicitation of the views of the black community with respect to an appropriate date for the election," and that the evidence suggested "the July 19 date was calculated to disadvantage the black constituency by timing the election so as to take advantage of conditions that would suppress the black voter turnout."[686]

The city and county then held a referendum on consolidation at the time of the general election in November 1988. Voters approved the measure, but the Attorney General denied preclearance, saying:

> our analysis suggests that the proposed consolidation could reduce significantly the electoral effectiveness of the majority-black population of the City of Augusta by the manner in which it is merged with the majority-white population of Richmond County, resulting in diminished opportunities for black

[686] William Bradford Reynolds, Assistant Attorney General, to Linda W. Beazley, July 15, 1988.

> citizens to elect representatives of their choice to govern their affairs.[687]

The Attorney General further concluded that the county and city had not carried their burden of proving "that the proposed changes are not tainted . . . by an invidious racial purpose" to dilute minority voting strength.

In yet another referendum in 1996, voters approved the consolidation of Augusta and Richmond County, making Augusta the second largest city in Georgia, with a population of 195,182 in 2000.[688] A consolidation plan was adopted providing for a 10 member commission elected from eight single member districts and two super districts, and with a mayor (with limited powers) elected at-large. Each of the two super districts was created by combining four single member districts and each superdistrict elects one member. One super district is majority black and the other is majority white. The plan satisfied the Department of Justice's objections to consolidation, and was precleared. Blacks have consistently elected half of the commission members.

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[687] James P. Turner, Acting Assistant Attorney General, to Linda W. Beazley, May 30, 1989, p. 4.

[688] The New Georgia Encyclopedia, Cities and Counties, Augusta, accessed online January 12, 2006, http://www.georgiaencyclopedia.org/nge/Article.jsp?id=h-955.

Schley County and the City of Ellaville

In re the City of Ellaville

Located in west central Georgia, approximately a dozen miles northwest of the Andersonville Prison historic site, the town of Ellaville is the county seat and only incorporated town in Schley County. In 1980, Ellaville had a population of 1,684 people, 43% of whom were black and lived predominantly in the northern section of the city. Since at-large elections were adopted in 1914, only one black candidate had managed to get elected to the city council.

In 1984, a group of black Ellaville residents, represented by attorneys from the Georgia Legal Services Program, began meeting with city officials to persuade them to adopt single member district elections, but the mayor and the city clerk were opposed. With help from the ACLU, Legal Services attorneys devised a five member redistricting plan containing two majority black districts.

In September, a large delegation of black citizens appeared before the city council to argue their case, thus prompting city officials to unanimously adopt a city ordinance requesting that the local representatives to the Georgia General Assembly introduce single member district legislation during the 1986 session.[689] Later that fall, and with help from the ACLU, the Legal Services attorneys drafted a Section 2 complaint against the city, but it was not filed.

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[689] "Blacks Seek Voting Changes," Patriot-Citizen, September 20, 1984; An Ordinance to Provide for Council Districts for Election of Said Members to Ellaville City Council, December 16, 1984.

When the legislature convened in 1986, it enacted local reapportionment legislation for Ellaville creating five single member districts, two of them majority black, with district elections becoming effective that December.[690] The change to single member districts was approved by the Department of Justice, which also precleared the 1971 adoption of numbered posts in city elections - a voting change that had not previously been submitted for preclearance.[691]

Screven County

Culver v. Krulic

Screven is a rural county located along the Savannah River in southeast Georgia's coastal plain. Black voter registration was historically depressed, and after passage of the Voting Rights Act, federal examiners were sent to Screven County and registered 1,448 black voters.[692]

In 1964, Screven County replaced its grand jury method of appointing members of the board of education with a system consisting of seven members, six of whom were elected from single members districts and the seventh at-large. The districts for the board of education were severely malapportioned, with a deviation

[690] Senate Bill 469, Act. 900, 1996 Georgia General Assembly Session.

[691] William Bradford Reynolds, Assistant Attorney General, to Jeanette H. Peedes, Mayor, City of Ellaville. Undated.

[692]U.S. Commission on Civil Rights, The Voting Rights Act: Unfulfilled Goals (Washington, D.C.; September 1981), p. 103.

from ideal district size of 195.77%. The county elected its five member commission at-large, and in 1972, without seeking preclearance under Section 5, it adopted staggered terms for commission members. As late as 1984, and even though Screven County was 45% black, no black person had ever been elected or served on either the board of commissioners or board of education.

Inequalities in public education, which have a direct impact on political participation, were particularly evident in Screven County. When schools were desegregated by court order in 1972, the county board of education sold or leased one of its public school facilities to a new private academy for one dollar and allowed white students attending the private school free use of other public school facilities, including the football stadium.

In 1984, the ACLU filed suit on behalf of black voters to enjoin at-large elections for the board of commissioners as diluting minority voting strength, as well as the county's use of staggered terms absent preclearance. The plaintiffs also charged that the board of education districts were malapportioned, and that the method of electing the board diluted black votes.[693]

Both boards agreed to settle the case by adopting the same seven single member districts. Two of the new districts had 65% black populations and one had 54%. Under the terms of the consent agreement signed November 5, 1984, elections

[693] Culver v. Krulic, Civ. No. 484-139 (S.D. Ga.).

previously scheduled for the following day were rescheduled to January 1985. Black candidates were subsequently elected to two seats on the county commission and one on the school board, while a white incumbent retained his school board seat in a 65% black district.

Watson v. Screven County Board of Commissioners and Board of Education

The 1990 census showed the seven districts adopted in 1984 in Screven County were malapportioned with a total deviation of 60.9%. The general assembly failed to reapportion the county during its 1992 legislative session, and on June 3, the ACLU, on behalf of black residents, filed suit against the county seeking to enjoin use of the malapportioned plan.[694] A month later, the parties signed an order acknowledging that both Screven County boards "appear to be malapportioned," and the court enjoined the primary election scheduled for July 21.[695] The parties negotiated over plans during the summer, and in a consent decree signed August 31, 1992, the parties agreed to hold special primary elections on November 3 in five of the seven redrawn districts. The Justice Department precleared the plan on October 30.

[694] Watson v. Screven County, Civ. No. 692-072 (S.D. Ga.).

[695] Id., Order of July 7, 1992, p. 2.

After the new plan was implemented, black voters succeeded in electing their candidates of choice to two seats on the board of education and a seat on the county commission. These numbers increased to three and two, respectively, later in the decade. The black candidate elected to the county commission in 1992 became chair of the commission in 2002, a post he still held in 2006. Creating fair representation on the county commission also led to the integration of formerly all white appointed boards in the county, including the zoning board, the industrial development board, and the board governing the local Department of Family and Children Services.

Despite the advances in black political participation, and despite requests from local black residents, the county superintendent of elections had never appointed a black as manager of a local polling place until the county was sued by the United States in 1992.[696]

Seminole County and the City of Donalsonville

Moore v. Shingler

Seminole County, the legendary home of Chief Oceola, is located in the far southwest corner of the state, bounded by Florida and Alabama. The town of Donalsonville, the county seat, was 47% black, but as of 1984 no black person had ever been elected to the city council. Black voters, represented by the ACLU, filed

[696] United States v. Screven County, Georgia, Civ. No. 692-154 (S.D. Ga.).

suit that year alleging that the at-large method of elections for the city council diluted minority voting strength in violation of Section 2 and the Constitution.[697]

Seminole County had a history of discrimination against blacks in voting. Unlike many Georgia counties that switched from district to at-large elections after passage of the Voting Rights Act, Seminole County, which was 35% black, relied on grossly malapportioned commission districts to minimize the impact of black voters. The districts for the county commission had been drawn in 1933, and by 1980 the district encompassing Donalsonville, which had the county's largest concentration of black voters, had grown to more than 2,200 voters. By contrast, the Rock Pond district, which also elected one member to the county commission, had just 170 registered voters. When the county refused to redistrict, a lawsuit was filed by the ACLU on behalf of black voters in April 1980, and the court ordered the county to reapportion.[698] At the next election, Donald Moore, a black school teacher, was elected to the county government from the town of Donalsonville.

After the 1984 complaint was filed against the city, local officials offered to settle the case by increasing the size of the council from four to six members and dividing the city into two three-member districts, one of which would be majority black. The plan, which was agreeable to the plaintiffs, was adopted, and elections

[697] Moore v. Shingler, Civ. No. 84-71-THOM (M.D. Ga.).

[698] Williams v. Timmons, Civ. No. 80-26 (M.D. Ga.).

were held in 1986. Today, Donalsonville has a population of 2,911 that is 58.7% black, 3.9% Latino and 37.2% white. The city has a six member council elected from two districts with numbered posts and the mayor elected at-large. Presently three council members are African American and three are white, as is the mayor.

Spalding County and the City of Griffin

Based on the 1980 census, Spalding County had a population of 47,899, of whom 27% were black. No black person, however, had ever been elected to the county board of education or to the commission of the city of Griffin, the county seat, which was 42% black. Black voters faced a number of obstacles electing candidates to public office, including at-large elections, bloc voting by the white majority, and depressed levels of black registration.

In 1981, for example, the Griffin-Spaulding County Board of Education tried to abolish its two multi-member election districts in favor of a numbered post system. The Department of Justice objected to the change, finding "a general pattern of racially polarized voting in Griffin-Spaulding County Board of Education elections," and that "no black candidate had ever defeated a white candidate for election to the school board."[699]

[699] James P. Turner, Asstant Attorney General, to James C. Owen, Attorney for Spalding County, July 6, 1981.

Spalding County VEP v. Cowart

In 1984, the ACLU represented black citizens in a lawsuit challenging the county's refusal to designate additional sites for voter registration in the black community.[700] After lengthy negotiations, and in light of the fact that the Georgia Secretary of State had already implemented regulations allowing for satellite voter registration, the parties settled the suit. The agreement called for the local registrar to allow registration at a number of additional sites in the black community, thus helping to increase the number of registered black voters.

Reid v. Martin

The Spalding County Board of Commissioners consisted of three members elected at-large by majority vote to staggered terms. The city council of Griffin consisted of five members elected at-large, by majority vote, with four council members elected from numbered posts. The five council members selected one of their number to serve as mayor.

In late 1983, the ACLU, on behalf of black residents, asked the local legislative delegation to change the method of elections in Spalding County to provide minority voters a better opportunity to elect candidates of their choice. The delegation never responded, but the county did place a "straw poll" question on the

[700] Spalding County VEP v. Cowart, No. 3-84-CV-79 (N.D. Ga.).

March 1984 presidential preference primary ballot concerning the county's method of elections. Voters overwhelmingly favored district elections and enlarging the county commission to five members.

Despite these "straw poll" results, two of the three commissioners opposed any change in the election scheme. Thus, in May 1984, the ACLU represented black residents in a lawsuit challenging the county and city's use of at-large elections as racially discriminatory in violation of the Constitution and Section 2.[701]

In the August 1984 primary, one of the commissioners who opposed changing the county's method of elections lost his seat to a candidate who favored creating five single member districts. The county commission then moved to stay the litigation to allow the county to develop a new plan, which the court granted.

After the new commissioner was sworn in, the commission agreed to create five single member districts that would be acceptable to plaintiffs, but the local legislative delegation said they would only introduce a plan that retained at least one at-large seat. The county conducted another straw poll and voters again supported the five district plan. As a result, the legislative delegation agreed to introduce the commissioners' plan during the 1985 session. The legislature adopted the plan, and the Attorney General precleared it. On October 22, 1985, the county held a special election to fill the two newly created commission seats and one black

[701] Reid v. Martin, Civ. No. C-84-60-N (N.D. Ga.).

person was elected.

The city, in response to the plaintiffs' lawsuit, proposed a plan with four single member districts and one at-large seat. One of the districts had a black population of 65%, but a bare majority of black registered voters. Despite the black community's objection to the at-large seat, the city had the plan introduced in the legislature, and it was adopted, and submitted for preclearance. Because the Department of Justice had not precleared the plan by mid-September 1985, the court granted the city's unopposed motion to stay the November elections.

The Attorney General objected to the city's proposed plan, finding that "[e]ven though the black population has increased to 42 percent of the city, only one district has been created with sufficient black population to constitute a voting age majority and, thus, allow blacks a realistic opportunity to elect a candidate of their choice to office." The Attorney General further noted that "the city [had] fragmented" concentrations of black population between two predominantly white districts and that:

> the Voting Rights Act does not allow a covered jurisdiction to fragment or manipulate cohesive minority residential areas or adopt a particular method of election for the purpose of avoiding the higher black percentages that would logically result from the nonracial development of a districting plan.[702]

In light of the objection, the parties agreed to expand the council to seven

[702] William Bradford Reynolds, Assistant Attorney General, to Andrew J. Whalen, III, Attorney for Spaulding County, September 25, 1985.

members and utilize six single member districts. The city held elections under the new plan in 1986, and two black candidates were elected.

NAACP v. City of Griffin

In 2001, Griffin adopted a redistricting plan for the November elections based on the 2000 census. Only two of the six single member districts in the new plan were majority black, although the census showed the city's black population had increased from 42% to 49%. When the plan was submitted for preclearance, the local NAACP urged the Department of Justice to object.

On August 22, 2001, the Department of Justice requested more information from the city to make its determination under Section 5, but the city was not responsive. The city then announced that the November 6, 2001, election for the board of commissioners would be conducted using the existing plan, despite the fact it was malapportioned with a deviation of 93.55%. The local NAACP, represented by the ACLU, filed a law suit to enjoin the November elections, arguing that the malapportioned plan violated one person, one vote.[703] The court scheduled a hearing the day after the plaintiffs filed suit, and at the hearing the city agreed to postpone the elections until it created a new plan. Thereafter, the city adopted a new single member district plan with six members, three of which had a majority

[703] Griffin Branch, NAACP v. City of Griffin, Civ. No. 3:01-CV-154-JTC (N.D. Ga.).

black voting age population. The city held a special election in March 2002, and three African American candidates were elected.

NAACP v. Griffin-Spalding County Board of Education

In 2002, the Spalding County sought legislation to hold a referendum on whether its school board should be reduced from 10 members to 5 or 7. The members were elected from single member districts and by majority vote. The 10 member board had been implemented in the early 1980s, as a result of a vote dilution lawsuit, and African Americans had long held four of the ten seats.

The referendum legislation was enacted by the general assembly, the city adopted it on March 7, and it was submitted for preclearance the next day. Then, despite not having received preclearance, the city proceeded with plans to hold the referendum. Representative John Yates, who introduced the bill, said "Spalding County will have to proceed with the March [19] election and then worry about the Justice Department."[704]

On March 15, 2002, the ACLU filed suit on behalf of the local NAACP, seeking to enjoin the unprecleared election.[705] Later that evening the Department of

[704] Travis Rice, "School-Board Size: Issue On Its Way to Ballot," Griffin Daily News, February 10, 2002.

[705] NAACP v. Griffin-Spalding County Board of Education, Civ. No. 02-022 (N.D. Ga.).

Justice precleared the referendum, and plaintiffs dismissed their lawsuit as moot.[706]

The referendum passed with 70%support and the city adopted a plan in which African Americans were a majority of registered voters in two districts, and a majority of the black voting age population in a third. African Americans went on to win two seats in the 2002 elections.

Sumter County and the City of Americus

Sumter County, home of the notorious Andersonville Prison, and in more modern times the home of President Jimmy Carter, was one of the largest slave owning counties in the state. By 1850, county residents owned nearly 4,000 slaves, making it one of the most prosperous of Georgia's pre-Civil War "Black Belt" counties.

In 1960, Sumter County had a population of 24,641, of whom 52.5% were black. Like other majority black counties in the Deep South where whites feared they had more to lose if blacks secured political power proportional to their population, white resistance to the civil rights movement in Sumter County was intense, unceasing, and often violent. As noted by the ACLU in its 1982 special report, Voting Rights in the South:

> Prior to the passage of the 1965 Voting Rights Act, only 548 blacks were registered to vote in Sumter County, 8.2% of the

[706] Joseph D. Rich, U.S. Department of Justice, to Timothy N. Shepherd, March 15, 2002.

> eligible population. Voting was segregated and blacks were excluded from positions as election managers and poll workers. The Jaycees, an all white organization, ran county elections. The Democratic Party was racially exclusive and no blacks served on its executive committee until 1975.
>
> Beginning in the early 1960s, SNCC and other civil rights groups launched voter registration drives in Sumter County. Shortly thereafter, in 1963, four SNCC workers involved in those campaigns were arrested and charged with insurrection – at that time a capital offense in the State of Georgia. The four were held without bail until a three-judge court enjoined the prosecutions, ruled the insurrection statute unconstitutional, and ordered the defendants admitted to bail. The prosecutor, Stephen Pace Jr., later admitted that, 'the basic reason for bringing these insurrection charges was to deny the defendants . . . bond . . . and convince them that this type of activity is not the way to go about it.' Remaining charges against the four were eventually dismissed.[707]

Sumter County was the subject of several federal court decisions in the 1960s and 70s enjoining racial segregation in county elections and other discriminatory practices that denied blacks the right to vote or diluted black voting strength.[708] Following increased black voter registration and participation after passage of the

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[707] Laughlin McDonald, Voting Rights in the South: Ten Years of Litigation Challenging Continuing Discrimination against Minorities (New York; ACLU, 1982), pp. 76-77.

[708] See United States v. Chappell and Bell v. Horne (M.D. Ga. 1965), 10 R. Rel. L. Rptr. 1247 (noting racial segregation in county elections; county interference with black voters; maintaining voter lists on a racial basis; and prosecuting blacks for their attempts to vote, and failing to release them on their own recognizance); Bell v. Southwell 376 F. 2d 639, 644 (5th Cir. 1967) (citing the "gross, spectacular, and completely indefensible nature of state imposed, unconstitutionally racially discriminatory practices" at a justice of the peace election, including segregated voting lists, segregated voting booths, intimidation of black voters by election officials, and the "unwarranted arrest and detention" of blacks who protested racial discrimination); Wilkerson v. Ferguson, Civ. No. 77-30 (M.D. Ga.) (successful challenges to at-large elections for the Americus City Council and the Sumter County Commission).

Voting Rights Act, white officials in Sumter County adopted a pattern of non-compliance with Section 5. In 1968, the City of Americus changed its method of holding mayoral and city council elections from plurality to majority vote, but did not submit the changes for preclearance. The new majority vote requirement was used to exclude plurality winning blacks from office on two occasions, in 1972 and 1977.[709] Then, in June 1978, the Sumter County Democratic Party abolished its primaries, but failed to comply with Section 5 prior to holding general elections in December.

Edge v. Sumter County School District

Perhaps the most egregious Section 5 violation involved the refusal of the county board of education to honor an objection to at-large voting by the Attorney General. Litigation to enforce the Section 5 objection was filed by the ACLU on behalf of local residents in 1980, two years before the 1982 extension of Section 5, but the lawsuit was not resolved until 1986.[710]

Prior to 1968, members of the board of education were appointed by the grand jury. That year, the general assembly enacted legislation providing for the election of school board members from a combination of at-large and single member

[709] McDonald (1982), 45.

[710] Edge v. Sumter County School District, No. Civ-80-20-AMER (M.D. Ga.).

districts.[711] In July 1972, in response to a lawsuit brought by Sumter County residents, including then Governor Jimmy Carter – who had served on the Sumter County School Board from 1955 to 1962 - a federal district court ruled the board of education districts were unconstitutionally apportioned and entered an order allowing the board an opportunity to seek a legislative remedy.[712] Instead of curing the malapportionment of the single member districts, the general assembly enacted legislation that abolished the districts altogether and required members of the board to be elected at-large.[713] The board submitted the change to the Department of Justice for preclearance but the Attorney General objected, saying:

> Our investigation reflects that there are significant concentrations of black citizens in parts of Sumter County and that the requirement that all candidates must be voted on county-wide would result in the dilution and minimization of the voting strength of black citizens.[714]

County officials then "withdrew" the submission, taking the position that the plan was court ordered and thus exempt from Section 5. In a July 24, 1973, letter the board of education informed the Justice Department that it considered its submission a "useless and unlawful act," and the Attorney General's objection

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[711] Georgia Laws 1968, p. 2065.

[712] Carter v. Crenshaw, Civ. No. 768 (M.D. Ga.).

[713] Georgia Laws 1973, p. 2127.

[714] J. Stanley Pottinger, Assistant Attorney General, to Henry L. Crisp, July 13, 1973.

"illegal, void and of no effect." On September 12, 1973, the department responded, informing the county that the legislative plan "was properly subject to the pre-clearance requirements of Section 5 of the Voting Rights Act" and that the change to at-large elections was "inoperable in view of the objection."[715] Defying the Attorney General, the board refused compliance and continued to hold at-large elections under the 1973 law.

After the ACLU filed suit against the board of education in 1980, the three-judge district court entered an order on December 1, 1981, granting plaintiffs' summary judgment on their Section 5 claim and remanded the case to a single judge district court to supervise the development and implementation of a new remedial election plan.[716] Defendants appealed and the Supreme Court summarily affirmed on June 1, 1982.[717]

Pursuant to orders of the single judge court, the board prepared a reapportionment plan and submitted it for preclearance. According to the 1980 census, 43.4% of the 13,240 residents in the Sumter County School District were black, yet no black person had ever been appointed or elected to the school board. The redistricting plan submitted for preclearance provided for one at-large and six

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[715] Edge v. Sumter County School District, No., Civ-80-20-AMER, (M.D. Ga.), Plaintiff's Pre-Trial Brief, p. 3.

[716] Edge v. Sumter County School Dist., 541 F. Supp. 55 (M.D. Ga. 1981).

[717] Sumter County School District v. Edge, 456 U.S. 1002 (1982).

single member districts, of which only two were nominally majority black. According to plaintiff's expert, Professor Michael Binford, when the board's plan was adjusted for the percentage of blacks and whites who were eligible voters, the percentage of blacks and whites who were actually registered, and the expected turn out rate for blacks and whites, "no district would have anywhere near a majority of black voters."[718]

The board's plan was objected to by the Attorney General in December 1982, on the ground it did not "fairly reflect the black voting strength in the school district." The department further stated that the plan:

> fragments the black voting strength for apparently no compelling governmental reason and such fragmentation need not exist in a fairly drawn plan. Our analysis also has revealed evidence of racially polarized voting, non-responsiveness on the part of the school board members to the particularized needs of the black community, and other factors which, in the context of a history of racial discrimination in the county, increase the likelihood that the proposed redistricting plan will deny black voters an equal opportunity to elect representatives of their choice.[719]

The Justice Department also noted the school district's failure to consider a more equitable plan proposed by plaintiffs:

> In this connection, we note that the ACLU had provided the school district with an alternate plan which contains seven

[718] Edge v. Sumter County School District, No., Civ-80-20-AMER, Plaintiff's Pre-Trial Brief, p. 4.

[719] William Bradford Reynolds, Assistant Attorney General, to Henry L. Crisp, December 12, 1982, p. 1.

> contiguous single-member districts, of which three districts would contain black population percentages of over 60 percent, including two with black populations of more than 65 percent. Our understanding is that the school district did not consider that plan, nor has it presented any legitimate reasons for not doing so. Furthermore, our analysis shows that by a mere adjustment of boundary lines in the six-one plan, contiguous and fairly drawn districts of about 65 and 72 percent could result.
>
> The information which has been provided also suggests that the submitted plan was designed with the purpose of minimizing minority voting strength in the school district. Thus, it appears that the board consciously did not consider the alternate plan proposed by the ACLU because of racial considerations and similarly did not obtain or seek input from the minority community, which comprises 43 percent of the district's population.[720]

The defendants prepared a second plan and submitted it to the Department of Justice. Like the first, it contained one at-large and six single member districts, but it avoided some of the fragmentation of the prior plan and contained three majority black districts with 65%, 63%, and 55% black population, respectively. Still, the second plan was objected to by the Justice Department which cited recent annexations by the City of Americus which reduced the black population in one of the districts. "We have regrettably been afforded no information regarding the impact of these annexations on the proposed plan, nor has it been explained why the school board refrained from sharing such information with us," the department wrote. "Nor are we able to conclude, in light of the continuing exclusion of effective

participation by black citizens and their representatives in the redistricting process, that this discriminatory result was unintended."[721]

By April 1984, fully 81% of Sumter County schools were black as a result of white flight to private, segregated academies. Yet the county schools remained controlled by an all white school board, a white school superintendent, and a white school board attorney, none of whom sent their children or grandchildren to the county public schools.[722]

Following the second objection by the Justice Department to the county's redistricting plan, defendants asked the court to adopt a court ordered plan which would not have to be precleared. On May 14, 1984, the court adopted such a plan reapportioning the board of education into seven single member districts, each of which contained a majority of white registered voters. According to plaintiff's expert, Jerry Wilson, the court's plan also protected incumbents, placed two of the most politically active black leaders in Sumter County in overwhelmingly white districts, and created a non-contiguous district. Plaintiffs appealed the court's order on June 13, 1984, on the grounds that it did not address and cure the objections of the Attorney General to the prior plans, and perpetuated the effects of past

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[720] Id., p. 2.

[721] William Bradford Reynolds, Assistant Attorney General, to Henry L. Crisp, September 6, 1983, p. 2.

[722] Rick Atkinson, "Segregation Rises Again in Many Southern Schools," Washington Post, p. A1.

discrimination. The Department of Justice, reversing its prior position, filed a brief with the court of appeals arguing that the effect of the various objections from the Attorney General was to return membership selection of the board of education to appointment by the grand jury. The court of appeals, however, rejected that argument and vacated the trial court's order on the grounds that it had "misapplied legal standards," in fashioning its plan.[723] The court also held that the plan was retrogressive, failed to remedy or cure the specific Section 5 objections of the Attorney General, and did not adequately maintain the integrity of the school board's second plan, which contained two majority black registered voter districts.

On remand the parties agreed on a new plan for the board using six single member districts and one at-large seat. Three of the six districts were majority black, with 66.57%, 64.49% and 57.26% black populations, respectively.[724]

Foust v. Unger

Special, non-partisan elections for the school board were held in November 1986, but the candidate of choice of black voters, Ronald J. Foust, who was one of the plaintiffs in the 1980 lawsuit, was defeated by four votes in his bid to represent District 4, which was 64.49% black. The winner, Douglas Unger, received 248 votes

[723] Edge v. Sumter County School District, 775 F. 2d 1509, 1511 (11th Cir. 1985).

[724] Id., Order of October 9, 1986, p. 2.

to Foust's 244.

The ACLU filed an election challenge on Foust's behalf in Superior Court contending that persons not eligible to vote in District 4 had been allowed to vote, while those who were eligible to vote had been turned away.[725] Following a trial, the court ruled in Foust's favor, concluding that "irregularities had occurred . . . or that illegal votes were received or legal votes rejected sufficient to change or place in doubt the result," and ordered a new election.[726] The election was held in April 1987, but as so often happens when candidates manage successfully challenge the outcome of an election in which they lost, Foust was defeated, although again by a very narrow margin.

Hoston v. Board of Commissioners of Sumter County

A separate lawsuit was brought in 1984 by the ACLU on behalf of Sumter County residents charging that the five member board of county commissioners, which had a total deviation among districts of 50.32%, was malapportioned in violation of the Constitution and Section 2.[727] A subsequent analysis prepared by the Reapportionment Services Unit of the Georgia General Assembly found a total

[725] Foust v. Unger, No. Civ. 86V-794 (Sumter Superior Court).

[726] Id., Order of March 11, 1987, p. 2.

[727] Hoston v. Board of Commissioners of Sumter County, Georgia, Civ., No. 84-77-AMER (M.D. Ga.).

deviation of 82.4%.[728] At the time the suit was filed, only one district was majority black, and there was only one black person on the five member board, despite the fact that 44.21% of Sumter County's 29,360 residents were black. The suit also charged defendants with failing to secure preclearance of a valid reapportionment plan under Section 5.[729]

After plaintiffs moved for a preliminary injunction to block the 1984 board of commissioners election, a consent order was issued acknowledging that the districts were malapportioned, and instructing both parties to submit reapportionment plans to the court. Defendants submitted a proposed plan, but plaintiff's objected on the grounds that the total deviation was too high (11.9%), the plan was retrogressive, and it packed one district with an 86% black population, "thereby insuring that the remaining districts will be safe, majority white districts and diluting voting strength of minority voters."[730]

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[728] Id., Affidavit of Laughlin McDonald, January 31, 1985.

[729] Black residents of the county, represented by the ACLU, had also filed suit years earlier, in 1977, against the Sumter County Board of Commissioners and the Americus City Council alleging that at-large elections diluted minority voting strength. Wilkerson v. Ferguson, Civ. No. 77-30-AMER (M.D. Ga.). The case was settled, and according to the consent decree, plaintiffs "established a prima facie case that the present method of electing the Chairman and members of the Board of Commissioners of Sumter County unconstitutionally dilutes minority voting strength, in violation of the Fifteenth Amendment of the Constitution." Id., April 7, 1980. An identical finding was made with regard to the method of electing the mayor and city council of Americus. As a result of the litigation, at-large elections for the board of commissioners and city council were abolished in favor of single member districts, and redistricting plans were adopted based upon the 1970 census.

[730] Hoston v. Board of Commissioners, Plaintiffs' Objections to Defendants' Proposed Redistricting Plan, October 19, 1984.

On February 27, 1985, after trial on the merits, the court ruled the challenged plan unconstitutional and directed the defendants to adopt a new plan and seek preclearance under Section 5 within 30 days. The parties subsequently agreed on a reapportionment plan creating two majority black districts of approximately 68% and 66% black population.[731] Special elections were held under the new plan in October 1985, and two black candidates were elected. The second black person elected, O.L. Bryant, was one of the plaintiffs and became the second black person ever elected to the commission in the history of Sumter County.

Cooper v. Sumter County Board of Commissioners

After release of the 1990 census, it became clear that Sumter County's commission districts were again malapportioned with a total deviation of 27.79%. The ACLU brought another suit in federal court on behalf of black plaintiffs charging the districts violated one person, one vote.[732] On July 17, 1992, the district court entered a consent order finding "malapportionment in excess of the legally acceptable standard."[733] Because the general assembly was in recess and was not scheduled to convene until January 1993, the order also adopted a new, interim

[731] Id., Final Judgment and Decree, July 1, 1985.

[732] Cooper v. Sumter County Board of Commissioners, Civ. No. 1:92-cv-00105-DF (M.D. Ga.).

[733] Id., Consent Order and Decree, July 17, 1992, p. 2.

redistricting plan for the 1992 elections. The consent decree preserved the two majority black districts, and further provided that the defendants would have the agreed upon plan enacted during the 1993 general assembly session and submit it to the Department of Justice for preclearance. The plan was enacted by the general assembly and subsequently precleared.

The critical role played by Section 5 since its extension in 1982 in reapportionment in Sumter County is abundantly evident. Although there has been extensive litigation in the county to enforce the Constitution and the Voting Rights Act, in the absence of Section 5 that litigation would doubtlessly be ongoing.

Nance v. Department of Human Resources

In 1996, James Nance, a black man from Crisp County, was elected to a six year term on the Crisp County Board of Commissioners. Two years later, he was hired as a case manager by the Department of Family and Children Services (DFCS) in neighboring Sumter County. The program in which he worked was funded in part with federal money, and as a consequence, employees in the program are subject to limitations on partisan political activity specified by the Hatch Act.[734]

After he had been on the job for several months, Nance was informed by his supervisor that because of his prior election to the board of commissioners in Crisp

[734] 5 U.S.C. 1501 et seq.

County, he was engaged in "partisan politics" in violation of the Hatch Act. He was told that he could continue either as a DFCS employee or a Crisp County Commissioner, but that he could not hold both positions at the same time.

While the Hatch Act prohibits a covered state employee from being a candidate for public office in a partisan election, it does not by its terms prohibit a state employee from merely being an office holder. And even though he was an office holder, Nance was not a candidate for the Crisp County Board of Commissioners or any other partisan office within the meaning of the statute during his employment with DFCS.[735]

Nance, represented by the ACLU, filed suit in federal court in 1998 to enjoin DFCS from making him either quit his job or resign from the board of commissioners.[736] He argued that DFCS had no authority under state or federal law to expand the definition of political activities prohibited by the Hatch Act. He also contended the DFCS policy was a voting practice or procedure for which preclearance under Section 5 had neither been sought nor received, and was therefore unenforceable.

After the complaint was filed, DFCS reversed itself and agreed that Nance was not in violation of the Hatch Act. It rescinded its interpretation of the statute

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[735] 5 U.S.C. 1502(a)(3).

[736] Nance v. Georgia Department of Human Resources, No. 1:98-CV-128-2 (WLS) (M.D. Ga.).

and allowed Nance to continue his employment while serving as a member of the Crisp County Commission. The complaint was dismissed as moot in June 1998, but again, Section 5 played an important role in allowing a minority elected official to continue in office and represent the constituency that had put him there.

Tattnall County

Carter v. Tootle

Historically, the board of commissioner of Tattnall County consisted of five members, four of whom were elected from districts, with the chair elected at-large. Although blacks were nearly 30% of the population, no black person had ever been elected to county office. In 1968, after passage of the Voting Rights Act and the prospect that one or more of the districts would have a majority of black voters, the county abandoned its district system and changed the method of electing the board of commissioners to four at-large seats, with the elected commissioners appointing a chairman. In 1972, the chair was made an elected at-large position. The 1968 and 1972 changes were subject to Section 5, but the county failed to submit them for preclearance.

In June 1984, a group of black residents represented by the ACLU sued the county for failure to comply with Section 5.[737] The plaintiffs also contended that the

[737] Carter v. Tootle, Civ. No. 484-219 (S. D. Ga.).

pre-1968 plan, the only legally enforceable plan, was malapportioned in violation of one person, one vote.

In October 1984, the parties entered into a consent decree providing for a six member board, with five members elected from districts and the chair elected at-large. One of the districts was 66% black. Although the district court allowed the November 1984 elections to be held under the existing system, it ordered that, upon preclearance, the new plan would go into effect at a special primary held in February 1985.

Williams v. Tattnall County Board of Commissioners

The 1990 census showed that the plan for the Tattnall County Board of Commissioners and Board of Education was malapportioned, with a total deviation of 51.7%. The general assembly failed to enact a remedial plan and black residents of the county, represented by the ACLU, brought suit in 1992 to enjoin use of the unconstitutional plan and request that the court implement a new plan for the 1992 elections.[738]

On July 7, 1992, the district court, finding that the existing plan was malapportioned, enjoined the July 1992, primary elections for the board of commissioners and board of education until such time as an election could be held

[738] Williams v. Tattnall County Board of Commissioners, Civ. No. CV692-084 (S.D. Ga.).

under a court ordered or a precleared plan. When the parties were unable to agree on a plan, the court directed defendants to submit for preclearance a plan they had proposed, which contained five single member districts, one of which was 68.53% black. The district with the next highest black population was 27.44% black. Plaintiffs objected to the defendants' plan because an alternative plan they had prepared created one majority African American district as well as a district that was 40% black. The Department of Justice precleared the defendants' plan, and on February 9, 1993, the district court entered a consent order adopting the precleared plan and scheduling a June 1993 special election to be conducted under the plan.

Windgate v. Tattnall County Board of Commissioners

Shortly before the 2000 census was released, white residents of Tattnall County filed a law suit in which they claimed the 1993 court approved plan was a racial gerrymander in violation of the Shaw/Miller line of cases.[739] Black voters, represented by the ACLU, were granted leave to intervene to defend the challenged plan. However, the plaintiffs and the defendants entered into a consent order on November 21, 2000, invalidating the 1993 plan and providing that the county would adopt a new plan in light of the 2000 census to be implemented at a special election coinciding with judicial elections scheduled for July 2002.

[739] Windgate v. Tattnall County, Georgia, Civ. No. CV600-070 (S.D. Ga.)..

Following release of the 2000 census, the county prepared a number of plans, none of which contained a majority black district. The ACLU intervenors prepared several alternative plans that complied with traditional districting principles and submitted them to the county for its consideration, but the plans were rejected. Although the county's plan was plainly retrogressive compared to the 1984 benchmark plan, the Attorney General precleared it and it went into effect.

The lengthy and divisive litigation over redistricting in Tattnall County puts to rest any doubts that race continues to drive the political process there.

Taylor County and the City of Butler

Chatman v. Spillers

In 1972, the city of Butler, which was 46% black, abandoned its plurality method of electing the mayor, which had been in effect since 1919, and adopted a majority vote requirement. Like the other more than 50 cities in Georgia that adopted majority vote requirements after passage of the Voting Rights Act, Butler ignored preclearance under Section 5.[740]

Butler also elected its five member city council at-large. Given the prevalence of bloc voting by the white majority, no black person had ever been elected to the council or as mayor.

[740] McDonald, (2003), pp. 135, 143-44.

In May 1986, black residents of the city, represented by the ACLU, filed suit alleging that the majority vote requirement and the at-large method of elections for the council violated Sections 2 and 5 of the Voting Rights Act.[741] At the request of the plaintiffs, in December 1986, the court enjoined elections for the mayor and council under the challenged system. But due to abortive attempts by the legislature to enact a remedial plan, the refusal of the city to conduct mayoral elections under the preexisting plurality system, and the refusal of the district court to order a special election, no municipal elections were held in Butler until 1995, and only then because they were ordered by the court of appeals.

After the legislature twice failed to enact a remedial plan, the parties agreed to reapportion the city council into two districts. One district was majority black and contained two numbered posts, and the other was majority white and contained three numbered posts. Terms of office were staggered and elections were by majority vote. The settlement agreement was approved by the district court in June 1992.

Since the plan adopted by the district court was a legislative plan, i.e., one proposed by the defendants, the order required that it be submitted for preclearance under Section 5. The order further provided that a special election be called within 30 days after preclearance, and as soon as practicable under state law. In the event

[741] Chatman v. Spillers, Civ. No. 86-91-COL (M.D. Ga.).

preclearance were denied, the parties could apply to the court for additional relief.

The Attorney General precleared the submission, except the majority vote requirement for mayor, concluding:

> the city has not demonstrated that the adoption of a majority vote requirement for mayoral elections will not 'lead to a retrogression in the position of . . . minorities with respect to their effective exercise of the electoral franchise. . .under Section 5, the city may implement the multimember district method of electing city councilmembers and districting plan that were precleared in August, 1992, with the mayor elected at large pursuant to the plurality vote requirement of the 1919 city charter.[742]

The city, however, refused to conduct any elections, while the court denied plaintiffs' request for court ordered relief. It held that the court:

> does not feel impelled to enter an order imposing upon the parties a plan gratuitously suggested by the Justice Department. The Plaintiffs' motion for court ordered elections is therefore denied in the hope that the parties will again be able to agree.[743]

The plaintiffs appealed and the court of appeals held that the district court "abused its discretion by refusing to order elections under the terms suggested by the plaintiffs," and directed that elections be held within 30 days.[744] Elections that complied with the Voting Rights Act were finally held in Butler in May 1995, some nine years after the complaint was filed. Two black candidates were elected to city

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[742] James P. Turner, Assistant Attorney General, to Alex Davis, August 25, 1992, and June 25, 1993.

[743] Chatman v. Spillers, Order of May 10, 1994.

[744] Chatman v. Spillers, 44 F.3d 923, 925 (11th Cir. 1995).

council, the first in the city's history.

Telfair County and the Town of Lumber City

Spaulding v. Telfair County

Clark v. Telfair County

In September 1986, the ACLU filed suit in federal court on behalf of five black voters in Telfair County alleging that the county board of education was malapportioned.[745] Located in rural south central Georgia, Telfair County was home to the father-son dynasty of two of the state's most well known governors, Eugene and Herman Talmadge. Both were staunch segregationists whose harsh views on race directly reflected the ideas and values of the white communities in which they lived. After the Supreme Court outlawed segregation in public schools in 1954, Herman Talmadge predicted "blood will run in Atlanta's streets." As a member of the U.S. Senate from 1956 to 1980, Herman Talmadge voted against the landmark 1964 Civil Rights Act and the 1965 Voting Rights Act.

At the time the ACLU filed its suit in 1986, race relations in Telfair County still remained sharply polarized. In 1986, the Telfair County School Board, which contained one majority black district, was last apportioned using 1970 census data. By 1980, the county population was 11,445, and 31.19% black. Based on the new

[745] Spaulding v. Telfair County, Civ. No 386-061 (M.D. Ga.)

census, the total deviation was 47.09%. Blacks also were heavily packed into a single district, where they constituted 89.12% of the population. Had the districts been unpacked and properly apportioned, blacks would have constituted a majority in two of the seven school board districts with a greater opportunity to elect candidates of their choice.

The ACLU lawsuit also charged the defendants with violating Section 5 of the Voting Rights Act because of their refusal to call a special election as required by state law after the only two candidates running in the primary from District One were disqualified. One of the candidates did not reside in the district and the other had served as a deputy registrar. Because nobody else was nominated, there was no candidate for county school board on the ballot in the general election from District One, which was majority black. The plaintiffs contended that the refusal to call a special election required by state law constituted a voting change requiring Section 5 preclearance. The plaintiffs also asked the court to invalidate the old districting plan and require the board to adopt a new apportionment.

On October 31, 1986, less than a week before the November general election, the court entered a consent order staying the elections, ordering a new apportionment plan, and providing for a special election. The court found that "Plaintiffs have established a prima facie case that the current apportionment of the Board of Education is in violation of the Fourteenth Amendment," and required the defendants to develop and implement a new apportionment for the school board

within 60 days. The order also required that the new apportionment plan "shall fairly represent black residents of Telfair County and contain at least two majority black districts, one of which shall contain a black population of at least 65%."[746] After negotiations, the parties agreed on a plan which was implemented by final court order in April 1987. The new plan created two majority black school board districts with African American populations of 77.52% and 53.02% respectively, and set a special election for June 30.

Approximately three weeks after the final order was issued, and eight months after the lawsuit was originally filed, seven white citizens of the county and Lumber City, a town located in Telfair County, moved to intervene to oppose the settlement. The would-be intervenors asserted their rights on various grounds, including a claim that the court ordered redistricting plan diluted their voting strength, was an "unconstitutional gerrymander," and commingled the interests of Lumber City residents with residents of the rural portion of the county. The court denied the motion to intervene on the grounds that it was not timely.[747]

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[746] Id., Order of October 31, 1986, pp. 1-2.

[747] The ACLU also brought suit in 1987 on behalf of black plaintiffs challenging Telfair County's sole commissioner form of government. The action resulted in a settlement order providing for a board of commissioners elected from districts. See Clark v. Telfair County, Civ. No. 287-25 (S.D.Ga. October 26, 1988), and the discussion of sole commissions supra pp. 145-155.

Woodard v. Mayor and Town Council of Lumber City

Black voters in Lumber City represented by the ACLU also filed suit in federal court in 1987, challenging at-large city elections as diluting minority voting strength in violation of Section 2 of the Voting Rights Act and the Constitution. The law suit also charged that the majority vote requirement and numbered post provisions for city elections had never been precleared, as required by Section 5.[748] According to the 1980 census, 55% of Lumber City's 1,426 residents were white and 45% were black, yet no black person had ever been elected to the six member council, and the only black person to win a plurality of votes was defeated in a run off in 1985.

Six months after the suit was filed the district court granted the plaintiffs' motion for summary judgment and enjoined city elections on the grounds that preclearance had not been secured for the majority vote and numbered post provisions.[749] The city then submitted a number of voting changes to the Department of Justice for preclearance, including the majority vote and numbered post requirements, but the Attorney General objected to both in a July 1988 letter noting the presence of racially polarized voting in city elections.

> The reality of the potential for discrimination becomes readily apparent from the results of the 1985 election where, by virtue

[748] Woodard v. Mayor and Town Council of Lumber City, Civ. No. 387-027 (S.D. Ga.).

[749] Woodard v. Mayor and City Council of Lumber City, Ga., 676 F. Supp. 255 (S.D. Ga. 1987).

> of the majority vote requirement, the black candidate failed to become the first black elected to the city council, although she appeared to have been the clear choice of minority voters.[750]

The Department further noted that a 1988 ordinance containing the majority vote and numbered post requirement was adopted at a time when blacks were becoming politically active in city elections and were challenging the legality of the at-large system. In objecting to the change, the department found that it was "tainted, at least in part, by a proscribed purpose," and that "[w]here, as in Lumber City, racial bloc voting exists in the context of an at-large system, the use of certain election features, such as a majority vote requirement, serves but to enhance the opportunity for discrimination against minority voters."[751]

On October 7, 1988, at the request of the city, the attorney general declined to withdraw the objections to the majority vote and numbered post requirements, explaining that the department's decision was based on "concerns that racial bloc voting exists in Lumber City elections, and that black persons do not constitute a majority of the voters in the city such as would mitigate the racially discriminatory impact of those electoral features."[752]

The court entered another order on January 5, 1989, with the consent of the

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[750] William Bradford Reynolds, Assistant Attorney General, to Ken W. Smith, Esq., July 8, 1988.

[751] Id., p. 2.

[752] William Bradford Reynolds, Assistant Attorney General, to Ken W. Smith, Esq., November 13, 1989.

parties, finding that at-large elections for Lumber City "are in violation of Section 2 of the Voting Rights Act, 42 U.S.C. §1973." The next month, on February 16, 1989, the court approved a new election plan, and required the defendants to submit it for Section 5 preclearance. The plan provided for two districts, one 86% white and the other 74% black, each of which would elect two members of the council. However, the remaining two members and the mayor continued to be elected at-large. The plan also retained the majority vote and numbered post requirements, which the Attorney General had previously objected to. On November 13, 1989, once again at the request of the city, the department again refused to preclear the plan saying:

> The history of the city's earlier efforts to impose similar requirements on the electoral process make it difficult to conclude now that black persons could elect a candidate of choice to an at-large seat in Lumber City.
>
> While we note, at the outset, that the submitted changes result from a settlement in Woodard v. Mayor of Lumber City, CV 387-027 (S.D. Ga.), we are faced with unanswered concerns that the city may have sought here to limit the opportunity of blacks to elect candidates of their choice to the city council. In that regard, our information is that the city rejected a number of alternatives that contained fairly drawn districting plans and provided minority voters with an opportunity to participate equally in the electoral process and, instead, insisted on features such as the use of a majority vote requirement, numbered posts and staggered terms for at-large seats.[753]

In April 1990, the court directed the parties to make a "fresh start towards resolving the pending litigation," and to independently submit new remedial

plans.[754] The plaintiffs proposed the elimination of all at-large seats, other than the mayor, and called for the creation of two districts, one 75% black, the other 86% white, which would elect three members each. The city defendants proposed a plan that was virtually identical to the one previously rejected by the Attorney General - including the majority vote requirement - and called for two members to be elected from a majority black district, two from a majority white district and two elected at-large.

After hearing evidence and witnesses, the court concluded in an August 3 ruling that 56% of the 1,486 residents of Lumber City were black, not the 45% that had been indicated by the 1980 census. "Despite the increase in black population and the percent of black registered voters, other factors remain which continue to abridge black political participation," said the court. As evidence, the court noted that "Voting tends to be on racial lines . . . no black has ever been elected to office . . . there have been very few black candidates for office; the first black to win a plurality of votes was defeated in a runoff."[755]

Given the existence of racially polarized voting and the history of discrimination, the court ruled that use of a majority vote requirement in Lumber

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[753] Id., p. 2.

[754] Woodard, Order of August 3, 1990.

[755] Id., p. 3.

City could "enhance the opportunity for racial discrimination and submerge black voting strength."[756] The court imposed a plurality vote requirement in its place, but in all other respects adopted the plan proposed by the defendants and ordered the city divided into two districts, one majority black, and the other majority white, each containing two numbered posts. The order called for two additional council positions, as well as the mayor, to be elected at-large.

Unlike the court's order of February 16, 1989, the August 3, 1990, order did not require the defendants to obtain Section 5 preclearance. Plaintiffs, however, appealed on the theory that the court ordered plan incorporated policy choices of the defendants and was thus subject to Section 5. Elections were held under the new plan on October 2, 1990, and although blacks won both seats from the majority black district, the one black candidate who ran for one of the at-large seats received only 30% of the vote. Another black candidate ran for one of the two seats in the majority white district, which was 21% black, and received only 22.7% of the vote.

Prior to oral argument in the court of appeals, 1990 census data was released for Georgia which showed that the population figures relied upon by the district court inflated the percentage of blacks residents, casting further doubt on the validity of using any at-large seats for the city council. The plaintiffs moved to supplement the record on appeal by adding the 1990 census data. The motion was

[756] Id., p. 4.

granted and the court reversed in May 1991, remanding the case to the district court for further consideration of the question of remedy in light of the new census.

On October 2, 1992, the district court entered an order adopting a new districting plan prepared by the defendants based upon the 1990 census, and continuing the two at-large seats for the city council. The court later ruled that the redistricting plan was court ordered and need not be submitted for Section 5 preclearance. Although plaintiffs continued to object to the use of at-large seats for the city council, they decided against further appeals.

Crisp v. Telfair County

Ten years after the conclusion of Woodard v. Mayor of Lumber City, the ACLU again brought suit in Telfair County on behalf of black voters, this time challenging county commission lines as malapportioned and violating Section 2 and the Constitution. The lawsuit was filed in August 2002 and was the fourth voting rights lawsuit brought by the ACLU in Telfair County since 1986.[757]

The 2000 census showed that the five county commission election districts had a total deviation of 56% (or 34% if the population of Telfair State Prison was not considered). The Telfair County Commission had adopted a reapportionment plan in February 2002, that had been drafted by the Georgia Reapportionment Office

[757] Crisp v. Telfair County, CV 302-040 (S.D. Ga.).

containing one majority black (67.76%) district, and another with 45.73% black population, but the plan had not been introduced by the local legislative delegation for enactment by the general assembly. Although 38.73% of the county population was black, no more than one African American had ever served on the five seat commission.

After plaintiffs filed suit, the county stipulated that its commission districts were malapportioned, and that "It is possible...to draw a five single member district plan with at least one majority black district in Telfair County."[758] The plaintiffs then filed for summary judgment and asked the court to hold the existing plan unconstitutional and order a new plan into effect.

With the parties in agreement on the five single member district plan, the Telfair County Commission again called on the local legislative delegation to introduce the plan in the 2003 general assembly session as a remedy to the malapportioned districts.[759] The plan was adopted on the last day of the legislative session and signed into law on June 3, 2003.[760]

Ruling that the existing plan was malapportioned and "violates the one person, one vote standard of the equal protection clause of the Fourteenth

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[758] Id., Joint Stipulation of the Parties, November 25, 2002.

[759] Telfair County, Georgia, Reapportionment Resolution, January 9, 2003.

[760] Id., Order, July 8, 2003.

Amendment," the court noted that the plan had been submitted for Section 5 preclearance and ruled the motion for summary judgment was "largely moot."[761] The court granted plaintiffs' motion for attorney's fees, but awarded less than 50% of the amount claimed. Plaintiffs' attorneys appealed, and through mediation with the Eleventh Circuit mediator in 2004, increased the recovery from approximately $5,400 to $9,000.

Terrell County

Holloway v. Terrell County Board of Commissioners

In June 1992, the ACLU filed suit on behalf of black voters challenging the malapportionment of the Terrell County Board of Commissioners under the Constitution and Section 2.[762] A small county northwest of Albany, Terrell was 60% black, and its board of commissioners consisted of five members, four of whom were elected from single member districts and one at-large. The challenged plan, based on the 1980 census, had three majority black districts by population, but one was packed with African Americans at the level of 85%, while in the other two blacks were less than a majority of the voting age population. Despite the black population majority in the county, only one African American had ever been elected to the

[761] Id. Order, July 24, 2003.

[762] Holloway v. Terrell County Board of Commissioners, CA-92-89-ALB/AMER(DF) (M.D. Ga.).

board of commissioners.

Terrell County, which earned the sobriquet "Terrible Terrell" during the Civil Rights Movement, had a long history of racial discrimination and voting rights litigation. In litigation brought by the ACLU, the board of commissioners was sued over its use of at-large elections in 1976, which resulted in a consent decree adopting the 4-1 plan.[763] The five member county board of education was sued the same year because it had adopted at-large elections in 1965, without preclearing the change under Section 5, and had held illegal elections from 1968 through 1978.[764] And no blacks had been elected under the at-large system, even though 90% of the public school pupils in the county were black.

After the 1976 law suit was filed, the county submitted its at-large plan for the board of education for preclearance, but the Attorney General objected, finding that:

> No black has been elected to the Board of Education or to any other office in the County. Prior to 1966 blacks were not permitted to serve on the County Grand Jury, which prior to the adoption of this Local Amendment appointed members of the Board of Education; a court order was required to desegregate the Grand Jury. In 1967 Terrell County was designated by the Attorney General, pursuant to Section 6 of the Voting Rights Act, 42 U.S.C. 1973d, for the appointment of Federal Examiners. Public schools in Terrell County were not desegregated until the 1970-71 school year, and a court order was required for such desegregation. An analysis of precinct election returns for elections in which there were black candidates supports an inference that white voters in the County are generally reluctant to vote for black candidates. The voting changes resulting from the Local Amendment have been enforced in violation of

[763] Holloway v. Faust, Civ. No. 76-28-AMER (M.D. Ga.).

[764] Merritt v. Faust, Civ. No. 76-28-AMER (M.D. Ga.).

Section 5 of the Voting Rights Act.[765]

In light of this objection, the court ordered the county to return to the preexisting grand jury method of appointments and a grand jury from which blacks were not excluded subsequently appointed five new members to the board of education, two of whom were black.[766]

The City of Dawson, the county seat, was also sued in 1977 over its use of at-large elections, which were alleged to dilute minority voting strength. The suit was settled by agreement of the parties, providing for a six member council elected from single member districts, and a mayor elected at-large.[767]

After the reapportionment suit was brought in 1992, defendants admitted the plan was malapportioned, but the parties agreed not to delay the regularly scheduled July 1992, election. On July 16, the district court entered a consent order in which the plaintiffs agreed to dismiss their motion for injunctive relief and to stay proceedings on their complaint based on the parties' agreement to negotiate and secure preclearance under Section 5 of a redistricting plan which remedied the malapportionment, and which would be agreeable to all parties for use in the 1994 elections. The consent order further provided that commission members elected in 1992 under the malapportioned plan would only serve two year terms, and that

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[765] Drew S. Days II, Assistant Attorney General, to W.L. Ferguson, December 16, 1977.

[766] Merritt v. Faust, Order of July 21, 1978.

[767] Holloway v. Raines, Civ. No. 77-27-AMER (M.D. Ga.), Order, February 1, 1979.

their successors would be elected pursuant to the new districting plan in 1994. The parties negotiated a new redistricting plan, corrected the malapportionment, and created two effective majority black districts. Despite this agreement, the county proposed, and had the 1993 Georgia General Assembly adopt, a redistricting plan which plaintiffs did not support. On October 14, 1993, the county submitted its plan for preclearance. Plaintiffs objected to the county's proposed plan in a comment letter to the Department of Justice, because the plan created three majority black districts by population, at 77%, 64%, and 52% respectively, but only one of these had a black voting age population sufficient to create an effective majority black district.

In February 1994, the Department of Justice precleared the county's redistricting plan over the objections of the black community and the plan was implemented during the regularly scheduled 1994 elections.

Toombs County and the City of Lyons

Maxwell v. Aiken

The City of Lyons is the county seat of Toombs County. In 1986, its five member council was elected at-large, with numbered posts, staggered terms, and a majority vote requirement. Although blacks constituted 32.4 % of the city's 4,203 residents, they were totally excluded from city government. In fact, up until 1968, the Lyons City Charter had actually limited eligibility for elective office to white males who were freeholders of real estate within the city. The white males provision

was repealed in 1968, but the city retained the requirement that candidates be freeholders of real estate until 1980. Several black residents ran for council seats after the repeal of the white males provision, but all were defeated. No black person had ever been appointed to serve an unexpired term on the council, or serve as a voter registrar, election superintendent, election manager, assistant election manager, election clerk, or poll worker.

Blacks were also severely marginalized in housing, public services, employment, education, and economics. As of 1986, the city fire department had no black members and the city owned and maintained a cemetery in which only white persons were buried. Per capita annual income for blacks was less than half that of whites, with nearly two-thirds (63.7%) of black families living below the poverty level, compared to 15.7% for whites. Black unemployment was more than double (12.4%) that of whites and 15.8% of black housing units lacked complete bathrooms, compared to none of the housing units occupied by whites.

In 1983, the local NAACP chapter proposed that the city charter be amended to provide for single member districts. The city council responded with a plan of its own, and in 1985 changed the method of electing council members by abandoning at-large elections from four residency districts and adopting elections from four single member districts and one at-large seat. However, the city's districting plan packed 90.2% of the black population into a single district, leaving none of the four others with a black population of more than 23.7%. The plan was submitted for

preclearance, but the Attorney General predictably objected in November 1985, because of the "excessive concentration of blacks in a single district and no potential for meaningful voter participation of blacks in any other."[768] The Attorney General also noted:

> In selecting this election method and the districting plan to implement it, our analysis shows that a number of other readily discernible district configurations, both with and without an at-large seat, were available to the city which would have more accurately reflected the black voting strength in the City of Lyons than does the submitted plan.

In response to the denial of preclearance, the mayor and council, at their January 1986 meeting, voted to return to the prior at-large system of city government.

In February 1986, the ACLU filed suit on behalf of six black residents of Lyons, challenging the city's at-large method of electing council members on the grounds that it diluted black voting strength in violation of the Constitution and Section 2.[769] The case was settled in August with the adoption of a single member district plan, with two districts having black populations in excess of 60%. The settlement also required the defendants to appoint black residents to fill vacancies on the city development authority, planning and zoning board, board of voter registrars, city housing authority, and regional library board. The first elections

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[768] William Bradford Reynolds, Assistant Attorney General, to Alvin L. Layne, November 29, 1985.

[769] Maxwell v. Aiken, No. CV-686-024 (S.D. Ga.).

were held under the new system in 1988.

Treutlen County and the City of Soperton

Smith v. Gillis

Flanders v. Soperton

The City of Soperton, located about 70 miles southeast of Macon, is the county seat of Treutlen County, one of the 15 smallest counties in the state. In September 1985, the ACLU filed suit in on behalf of more than a dozen black voters against the Soperton City Council, the Treutlen County Board of Commissioners, and the Board of Education on the grounds that the at-large method of electing all three bodies diluted the voting strength of minority voters in violation of Section 2 and the Constitution.[770]

In April 1986, the parties agreed on new plans involving five single member districts for the board of commissioners and the board of education. The board of commissioners was increased from three to five, while the board of education remained at five members. Two majority black districts were created, with black populations of 51.82% and 70.73%, respectively. The plan was adopted in the 1986 general assembly session, elections were held in December 1986, and blacks were elected to both bodies. The City of Soperton, which was almost 50% black, also

[770] Smith v. Gillis, Civ. No. 385-042 (S.D. Ga.)

agreed to five single members districts, two of which were majority black and were majority white. The fifth district had a slight white majority.

Eight years later, in November 1994, the ACLU again brought suit on behalf of black voters in Soperton, challenging the five member city council as malapportioned in violation of one person, one vote. According to the 1990 census, Soperton's population was 2,797, of whom 49.23% were black, and the total deviation among city election districts was 46.15%.[771]

Elections had already been held under the malapportioned plan in November 1993, but the lawsuit sought to enjoin use of the plan in the next regularly scheduled city election in November 1995. A consent order was filed August 7, 1995, in which both parties agreed the city election districts were malapportioned, and adopted a districting plan with a total deviation of 6.8% that contained two majority black districts of 75.34% and 72.92% black voting age population, respectively.

A decade later in Treutlen County, African Americans still held two seats on the county school board, including the post of chairman, and in 2004, the two-thirds majority white county elected a black probate judge. Nevertheless, significant evidence of racial division remains. Although a black student was selected as the Treutlen High School homecoming queen in 2005, black and white students still attended segregated, privately sponsored high school proms, and the majority white

[771] Flanders v. City of Soperton, Civ. No. 394-067 (S.D. Ga.).

school board declined to end the practice.[772]

Troup County

Cofield v. City of LaGrange

In October 1993, the ACLU filed suit on behalf of black voters, who were members of the NAACP and the Troup County Coalition, challenging at-large elections for the mayor and six member city council of LaGrange, the Troup County seat.[773] Located in the Piedmont foothills about 60 miles southwest of Atlanta, LaGrange was 42% black, but only one black person had ever been elected to the city council. The plaintiffs also sought to enjoin, for failure to comply with Section 5, the implementation of a 4-2-1 plan, which the city had adopted to replace its existing at-large system.

The effects of past discrimination in LaGrange were starkly apparent. A minority (44%) of black residents had high school diplomas while 65% of whites were high school graduates. White residents had more than 2.5 times the per capita income of blacks ($16,000 as compared to $6,000 annually), and 35% of African Americans lived below the poverty line, compared to 10% of whites.

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[772] Don Schanche, Jr., "Prom Night in Black and White: Treutlen community still divided over concept of unified prom," Macon Telegraph, April 26, 2005.

[773] Cofield v. City of LaGrange, Civ. No. 3:93-CV-97-JYC (N.D. Ga.).

Unemployment was three times higher for African Americans.[774] As a direct consequence of their depressed socio-economic status, blacks were only 25% of the city's registered voters.

In 1992, prior to the filing of the lawsuit, black residents of LaGrange proposed a plan to city officials utilizing six single member districts for the council, three of which were majority black, to replace the existing at-large system, with the mayor continuing to be elected at-large. In response, and at the city' request, the general assembly enacted legislation providing for a referendum in LaGrange in 1993, on whether to adopt a districting plan with six single member districts for the council (only two of which were majority black) or a plan with four single member seats and two seats plus the mayor elected at-large (the 4-2-1 plan). The latter plan would have effectively guaranteed white control of a majority of the city council.[775] The plan proposed by black voters was not included as one of the referendum options. The referendum also called for an election to be held in November 1993, using whichever plan was adopted.

The voters selected the 4-2-1 plan, and the city submitted it for preclearance. The Department of Justice requested more information, and on motion of the plaintiffs, the three-judge district court enjoined the pending election under the 4-2-1

[774] Cofield v. LaGrange, 969 F. Supp. 749, 757 (N.D. Ga. 1997).

[775] Ga. Laws 1993, Act 57.

plan for failure to secure preclearance under Section 5.[776] The Attorney General subsequently objected to the plan because the city had not shown that the retention of two at-large seats for the council would not cause dilution of minority voting strength:

> Our analysis reveals that the present-day effects of the history of racial discrimination in LaGrange and in Troup County result in the disparities that exist in the socio-economic status between black and white citizens and lower black registration rates. Moreover, the electoral history in the city and county suggest the existence of a pattern of racially polarized voting in the city.[777]

The city also failed to show that the 4-2-1 plan did not protect incumbents at the expense of black voters. "While we recognize that the desire to protect incumbents may not in and of itself be an inappropriate consideration," the Attorney General wrote, "it may not be accomplished at the expense of minority voting potential." The city asked for reconsideration, but it was denied by the Department of Justice:

> As explained in the December 13, 1993, letter, our Section 5 objection was based on the process that led to the adoption of

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[776] Cofield, 969 F. Supp. at 756.

[777] James P. Turner, Acting Assistant Attorney General, to James R. Lewis, December 13, 1993, p. 3. This was not the first objection to voting change in Troup County. In 1973, the Department of Justice Department had objected to majority vote and numbered post requirements adopted by Hogansville, another Troup County town, after a black candidate was first elected to office: "Our analysis has shown that where, as in Hogansville, there is increasing participation in the political process by the black community, a majority and designated post requirement have the practical effects of eliminating the potential for minority voters to elect candidates of their choice through the use of single-shot voting. Furthermore, the imposition of a majority requirement on a pre-existing designated post system similarly reduces the potential voting strength of minority groups. These changes occurred after the first black to be elected to the city council was elected under the plurality system." J. Stanley Pottinger, Assistant Attorney General, to James T. Hunnicutt, August 2, 1973.

> the new electoral plan, including the reasons provided for the rejection of alternative electoral plans favored by the black community. We also assessed the new plan in light of the apparent pattern of racial bloc voting in the city and the lower rates of electoral participation for black persons compared to white persons. These circumstances would serve to limit the ability of black voters to elect candidates of their choice to the two black-majority single-member districts. In light of these factors and the others mentioned in our objection letter, we concluded that the city had failed to demonstrate that the proposed plan was not adopted, at least in part, in order to minimize black voting strength.[778]

In an attempt to adopt a plan that would meet the Section 5 objections, the city council set up a biracial committee to study substitute plans. The committee was unable to agree on a plan, but the council adopted one of the plans the committee had considered, but which was objected to by the black community. The plan kept four single member districts, two of which were majority black, and changed the two at-large seats to two "super district" seats. Each of these super districts was created by combining two of the single member districts, making one super district majority black and the other majority white. Each super district would elect one member. The plan also added a seventh council member, plus the mayor, elected at-large. The seven seat (4-2-1-1) plan was then adopted by the general assembly in 1994.

The plan was submitted for preclearance, but the Attorney General objected, noting the minority community's opposition to the addition of the seventh seat:

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[778] Deval L. Patrick, Assistant Attorney General, Civil Rights Division, to James R. Lewis, April 1, 1994, pp. 1-2.

> At the outset, we note that the city has made significant improvements to the objected-to plan by changing at-large seats to "super district" seats and in so doing, took action that would have addressed fully our concerns with the earlier plan.
>
> The city has gone further, however, and has added an at-large position to the governing body in an apparent effort to limit black representation. Based on the city's actions and decisions during the process to adopt a plan to overcome our objection, it seems that the proposed plan was selected more to maintain the existing white control over the council than to provide black voters with an equal opportunity to enjoy their voting potential.[779]

Following the objection by the Department of Justice, the city abandoned its efforts to adopt a districting plan and implemented the at-large system at the 1995 elections, during which two black candidates were elected - one ran unopposed, and the other had been appointed to fill an unexpired term, and thus ran as an incumbent.

The ACLU litigation challenging the at-large system as violating Section 2 proceeded to trial in April 1996. The court entered a detailed opinion finding that the challenged system, with numbered posts and a majority vote requirement, diluted minority voting strength. Among the court's findings were:

> *During segregation, black schools had significantly fewer resources than white schools, and were "run down, overcrowded, and only went through the eleventh grade."
>
> *"The present effects of this discrimination are real," and "continue to translate into diminished political influence and opportunity for LaGrange's African-American citizens."
>
> *The black population of the city "is largely segregated."

[779] Deval L. Patrick, Assistant Attorney General, to James R. Lewis, October 11, 1994, p. 1.

> *"[D]e facto segregation remains in local organizations and churches. The Shriners and Masons have separate white and black lodges. Neither the Rotary Club nor the Highland Country Club have black members."
>
> *"LaGrange City-Council elections exhibit racially segregated voting."
>
> *Minority candidates for public office had experienced "extremely limited success."
>
> *"[T]he vestiges of LaGrange's history of discrimination continue to impact the ability of LaGrange's African-American citizens to elect their chosen candidates."[780]

After the court's decision, the parties reached an agreement on an election plan using two three-member districts, one majority white (83.5%) and one majority black (68.5%). The plan was subsequently approved by the Department of Justice for the November 4, 1997, election.

As events in LaGrange clearly show, it took four years of litigation and repeated rounds of Justice Department objections, but Section 5 ultimately proved essential to securing a plan that provided black voters an equal opportunity to elect candidates of their choice.

Upson County and the City of Thomaston

Beginning in 1979, the ACLU initiated litigation on behalf of black voters in Upson County under the Constitution and the Voting Rights Act, challenging

[780] Cofield, 969 F. Supp. 749, 756-57, 769, 776-777.

discrimination in city and county government, including governance of the public schools. The first lawsuit was filed against the Thomaston School Board in 1979 and continued until 1983.[781] Subsequent litigation involved the ACLU's defense of a black city council candidate, William Hughley, to whom the city refused to administer the oath of office after he won the election.[782] A separate lawsuit also was filed by the ACLU on Hughley's behalf against the mayor and council charging them with violations of the Voting Rights Act and the Constitution.[783]

Searcy v. Hightower

With a population of approximately 26,000 in 1980, Upson County, located in west central Georgia, was 27% black, yet 55% of the more than 3,000 people living below the poverty line were African American. Of the 4,058 students that completed high school in 1980, only 16% were black. The demographics of Thomaston, the county seat, were similar to that of the county. With a population of slightly less than 10,000, the City of Thomaston was approximately 24% black, yet no black person in living memory had ever been elected to the city council.

While some Georgia counties chose the members of their school boards by

[781] Searcy v. Hightower, Civ. No. 79-67-MAC (M.D. Ga.).

[782] City of Thomaston, Georgia v. William D. Hughley, File No. 11643 (Superior Court of Upson County, Georgia) and Hughley v. City of Thomaston, 180 Ga. App. 207 (1986).

[783] Hughley v. Kersey, No. CIV-85-445-1-MAC (M.D. Ga.).

racially exclusive grand juries, the Thomaston School Board was appointed by an institution that was, if anything, even more elite and racially exclusive than the grand jury. Under a unique self-perpetuating scheme, the Thomaston school board appointed its own members. Terms of office were staggered and each year the members selected a new person to replace the member whose term was expiring.

Education was traditionally provided to whites in Thomaston by the R. E. Lee Institute, a private school incorporated in 1906 for the exclusive benefit of "white pupils and patrons," and named after the famous Confederate general. The institute eventually fell upon hard financial times, and in 1915 the general assembly created a public school system from the R. E. Lee Institute. The trustees of the institute, who were all white, were named as the new members of the public school board, and the self-perpetuating method of membership selection was installed.[784] For a period of 61 years the board never appointed a black person to serve on the school board. The board also operated a segregated school system until 1970, when it was forced to comply with the Brown decision. Even when the R.E. Lee Institute finally desegregated, the school kept many of the traditions of its all white predecessor, including the confederate name.

Not only was the school board racially exclusive, but its membership was dominated by a handful of prominent local families. The Hightower family, owners

[784] Searcy v. Williams, 656 F.2d 1003, 1005 (5th Cir. 1981).

of a textile mill, placed six members on the board, the Adams family five, and the Hinson, Varner, and Thurston families placed two each.[785] With the assistance of the ACLU, George Searcy and several other black Thomaston residents, including the Upson County Chapter of the NAACP, filed suit in March 1979, alleging that the method of selecting the school board violated the Constitution and Section 2.[786] In response to the suit, the school board finally appointed a black person, the Rev. Willis Williams, to the board and adopted a policy that it would not discriminate in filling future vacancies.

The district court dismissed the lawsuit on the grounds that the selection system was not unconstitutional and that the Voting Rights Act did not apply to the appointment method of choosing school board members. The court of appeals, however, reversed. It found the system for selecting school board members "was tainted with a segregative origin." The evidence of discriminatory administration was "overwhelming," and the system had "clearly operated purposefully to further discrimination." Rather than accept the defendants' representations that they would no longer discriminate, the court invalidated the selection scheme itself. Citing the isolation of the board from "public pressure," it held there was "no assurance that the

[785] Id. at 1006 n.1.

[786] Searcy v. Hightower, Civ. No. 79-67-MAC (M.D. Ga.).

pattern of past discrimination is forever broken."[787] The court further ordered the district court to retain jurisdiction until the legislature adopted a new plan for selecting the school board members. The school board sought review in the Supreme Court, but it summarily affirmed the decision of the court of appeals.[788]

The general assembly enacted a statute in 1983, providing for appointments to the school board by the mayor and city council and requiring "that all segments of the community which it serves are adequately and properly represented on said board without discrimination as to any segment."[789] Under the new system, the board nominates three candidates for each vacant school board position, one of whom is appointed by the city council. The action of the legislature was no doubt influenced by the continuing federal commitment to civil rights enforcement evidenced by the extension and amendment of the Voting Rights Act the preceding year.

The board subsequently adopted a resolution that two of the seven members of the board were to be racial minorities. The board, however, refused to consent to entry of an order by the court adopting the new remedy and making it binding on the defendants. The plaintiffs objected to the new plan because: (1) the resolution

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[787]656 F.2d at 1010-11 and n.9.

[788] Hightower v. Searcy, 455 U.S. 984 (1982).

[789] Ga. Laws 1983, p. 3506.

was a promise revocable at will by the board; (2) by retaining total control over nominations, the board had failed to establish a new plan as required by the court; and (3) the city government, which was exclusively white, had itself discriminated against blacks in making appointments to local boards and commissions. The district court indicted that it would not approve the new legislation over the plaintiffs' objections, whereupon the defendants agreed to entry of an order on June 29, 1983, requiring them to insure the membership of two blacks on the school board (more or less depending on the black percentage of the city's population). The Thomaston case may be the only one in which a federal court has approved proportional representation as a remedy for a voting rights violation.

In November 1983, the ACLU notified the legislative representatives of Upson County that it had been retained by local citizens to challenge the at-large method of electing county commissioners, members of the Thomaston City Council, and members of the Upson County Board of Education. Although approximately one quarter of the population of Thomaston was black, the mayor and five council members, who were elected at-large, were all white.

Several years earlier, both the city and county had been sued for employment discrimination and lost, and both were ordered to pay damages and attorneys fees.[790] Faced with the prospect of more litigation, the Upson County Commission

[790] Bentley v. City of Thomaston, No. CIV-79-235-MAC (M.D. Ga).

asked state legislators to introduce legislation in 1984, to increase the number of county commissioners from three to five, with four of the commissioners being elected by district and the fifth – the commission chairman - running at-large.

Two legislators balked at introducing a bill calling for single member districts without including a requirement that the change be submitted to voters in a referendum. Since everyone believed a referendum would likely fail, an agreement was reached to have the county take out a newspaper advertisement explaining that a federal lawsuit to require single member districts was likely to succeed and would cost the county a considerable amount of money. In the published advertisement the commissioners explained why they felt compelled to dismantle at-large voting:

> After long and careful consideration, we decided that the commandment from Washington was 'crisp and clear,' and if we were to avoid expensive Civil Rights' (sic) litigation in Federal Court, it would be necessary that a plan be prepared and submitted to the 1984 General Assembly which would comply with the Federal Law and Court decisions.[791]

The legislation was approved and then submitted to Upson County voters for a referendum in April 1984, who also approved the measure. Of the four districts that were created, one was 66% African American, while the three others were 10%, 16%, and 18% black, respectively. A special election was then held in conjunction with the August 1984 primary to fill four of the five commission positions. Three African Americans qualified for District One, and after a run off, one of them

[791] "Important Notice to the People of Upson County," Hometown Journal, February 20, 1984, p. 11A.

received the nomination and ran unopposed in the general election.

The county school board, which had one black member out of seven, introduced a redistricting bill but refused to hold any discussions with the ACLU regarding its proposed new plan which created six districts and retained one at-large seat. One district was projected at 71% African American, but the next highest black population district would only have been 48%. Additionally, the legislation called for no election to be held for another two years, until 1986. The statute was submitted to the Department of Justice pursuant to Section 5 and precleared.

The City of Thomaston adopted legislation calling for four districts, retaining a mayor and an at-large seat. The plan was acceptable to the ACLU clients and was implemented in the 1985 election.

City of Thomaston, Georgia v. William D. Hughley

Hughley v. City of Thomaston

Hughley v. Kersey

During the 1985 elections in the City of Thomaston, an African American candidate, William Hughley, was elected. However, no sooner had Hughley won than the city refused to administer him the oath of office and filed suit against him in state court, alleging that he was ineligible to serve because of a conflict of interest based upon his employment by the Thomaston-Upson County Recreation

Commission.[792] Notably, Hughley had been recruited for the position of assistant director of athletic programs to comply with the remedial provisions of the earlier employment discrimination lawsuit.

The state trial court agreed with the city that Hughley was ineligible to serve, but was reversed on appeal on the grounds that even if there had been a conflict of interest the remedy was not disqualification from office.[793] The ACLU represented Hughley in that action and filed a separate lawsuit on his behalf against the mayor and the city council in federal court under the Constitution and Sections 2 and 5 of the Voting Rights Act.[794] In the federal case Hughley contended, among other things, that the conflict of interest rule was a new voting practice or procedure that had never been precleared under Section 5. Hughley also sought back pay and damages for the city's refusal to permit him to serve as a council member.

The city persisted in its efforts to keep Hughley off the council despite the fact that whites who had similar "conflicts of interest" had been elected to the city government and were allowed to serve. At the hearing on Hughley's motion for injunctive relief held in the federal lawsuit, a witness for the city testified that while serving on the city council he was advised that if he took a job with the Thomaston-

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[792] City of Thomaston, Georgia v. William D. Hughley, File No. 11643 (Superior Court of Upson County, Georgia).

[793] Hughley v. City of Thomaston, 180 Ga. App. 207 (1986).

[794] Hughley v. Kersey, No. CIV-85-445-1-MAC (M.D. Ga.).

Upson County Recreation Commission a conflict of interest would result, and that as a result he did not take a job that had been offered to him. Subsequently, the same witness executed an affidavit impeaching his prior testimony and admitting that while serving on the city council he was in fact employed by the recreation commission.

Ultimately, the city agreed to settle the federal case and pay Hughley $14,500 in back pay, damages and attorney's fees. He was finally sworn in on November 18, 1986.

There is little doubt that the "crisp and clear" message from Congress in 1982 that equal voting rights continue to be protected by federal law played a critical role in the adoption of election procedures in Upson County providing minority voters an equal opportunity to elect candidates of their choice.

Warren County

Warren County Branch of the NAACP v. Haywood

Warrenton, the county seat of Warren County, is located in Georgia's coastal plain. Based on the 1980 census, Warrenton was majority (61%) black. Its five member council and mayor were elected at-large, and prior to 1987, black candidates had run for the council 11 times, but were successful only once. Due in part to lower socioeconomic status, black political participation was depressed, and

white voters always constituted a substantial majority of those actually voting in city elections.

The city was also characterized by deep racial polarization. Church membership was segregated along racial lines, membership in the Warrenton Kiwanis Club was all white, housing was segregated, and only white persons were buried in the cemetery operated and maintained by the city. When schools were desegregated by court order a private school, the Briarwood Academy, was established in Warren County. No black child attended school there. In 1986, when Charles Logan, the only black candidate ever to win a contested at-large election in Warrenton, ran for mayor, the white incumbent was quoted in the newspaper as referring to Logan as a "nigger."[795] Black candidates declined to campaign door-to-door in the white community because the reception they received was generally hostile.

Like the City of Warrenton, Warren County was also majority (60%) black. It was not until 1984, when the method of electing the three member county commission was changed from at-large voting to the use of two single member districts and one commissioner elected at-large, that the first black person was elected to the commission. No black person had ever been elected sheriff, clerk of

[795] The Warren County Branch of the NAACP v. Haywood, No. CV 187-167 (S.D. Ga.), Plaintiffs' Proposed Findings of Fact and Conclusions of Law in Support of Their Motion to Adopt Their District Voting Plan, May 9, 1989, pp. 2-8.

court, probate judge, superintendent of schools, or to the general assembly from a district lying in whole or in part in Warren County. And the twelve member Warren County Democratic Executive Committee, which was elected from six voting districts, remained all white until 1982 or 1983, when two black members were first elected.

Black voters of Warrenton and the Warren County Branch of the NAACP, represented by the ACLU, filed suit in 1989, challenging at-large elections for the City of Warrenton.[796] The court conducted a hearing and provided the parties an opportunity to settle the case and present proposed remedial plans. Plaintiffs proposed a plan creating two districts, one majority black electing three council positions, the other majority white electing two council positions, and a mayor elected at-large. Defendants' proposed plan provided for two districts, each electing two council members, and the mayor elected at-large. One district was majority black (80.46%), the other majority white (58.97%).

Despite its acknowledgment of racial polarization, depressed black socioeconomic status, and low black voter turnout, the court adopted the defendants' plan. It noted that "[h]istorical patterns and present-day reality indicate that socially and economically depressed elements of the black population in Warrenton continue to endure racial discrimination in political and other processes."

[796] The Warren County Branch of the NAACP v. Haywood.

Nevertheless, the court rejected plaintiffs' proposal on the grounds that it "may cause rancor, further racial polarization, and reduced incentive [on the part of black voters], because of the abnormally high level of participation in city government which would be had by the voice of the black electorate from the 'super district' of the plaintiffs' plan." In the court's view, and despite the fact that Warrenton was majority black, the creation of a majority black district electing three members of the council "would give the appearance of the imposition of a penalty against one racial group or an undue reward to another."[797] The plaintiffs elected not to appeal the adoption of the city's 2-2-1 plan.

Washington County

Washington County Branch of the NAACP v. Washington County

In 1992, the Washington County Branch of the NAACP, represented by the ACLU, challenged the malapportionment of the Washington County Board of Commissioners and Board of Education.[798] The district court enjoined the July 21, 1992, primary election for the governing boards, and the county agreed to seek redistricting from the Georgia General Assembly in its 1994 session. The general assembly enacted a plan which had four single member districts and one at-large

[797] Id., Order of July 13, 1999.

[798] Washington County Branch of the NAACP v. Washington County, Civ. No. 92-256-3-MAC (M.D. Ga.).

seat, with two majority African American districts. The Department of Justice precleared the plan, and the county implemented it in July 1994.

Wayne County

Freeze v. City of Jesup

Black residents of Jesup, the seat of Wayne County, have long been known for their political activism. One of the many Georgia divisions of the Universal Negro Improvement Association was located in Jesup, where the groups' members promoted the ideals of Marcus Garvey, such as pride in blackness and a reliance on self-defense rather than purely legal protection.

Beginning in 1955, the board of commissioners of Jesup was composed of six members elected at-large by plurality vote to staggered terms, with one of the members designated to serve a one year term as mayor. In 1968, the size of the board was reduced to four commissioners and a mayor elected at-large, with numbered post and majority vote requirements. Although the 1968 changes were subject to Section 5, the city did not submit them for preclearance.

In 1985, the city again changed its method of elections to a two district system. One of the districts was 97% black and elected one member to the commission, the other was 94% white and elected three members to the commission. A fifth member, the mayor, was elected at-large. All members were elected by

majority vote. The city was 30.5% black, and the first black person ever elected to the commission was elected from the 97% black district.

After conversations and correspondence with the Department of Justice, the city sought preclearance of the 1968 and 1985 changes. The Attorney General objected to the numbered post and majority vote requirements adopted in 1968 because "racial bloc voting . . . appears to exist in the city," and "the addition of numbered posts and a majority vote requirement eliminates the ability of black voters to single-shot vote for candidates of their choice and, therefore, is retrogressive, thereby having the prohibited racial effect."[799]

As for the changes adopted in 1985, the Department of Justice concluded "most of the county's black population is overconcentrated in the single-member district," while the three member district "is geographically large and essentially retains features of the at-large election system." In addition, "the material submitted concerning the county commissioners' deliberations shows that they were well aware of these limiting aspects of the submitted plan and supports an inference that the plan was designed and intended to limit the number of commissioners black voters would be able to elect."[800]

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[799] William Bradford Reynolds, Assistant Attorney General, to Robert B. Smith, Attorney for the City of Jesup, March 28, 1986.

[800] Id.

Rather than submit a plan that was responsive to the department's objections, not to mention the needs and interests of minority voters, the commission voted on July 8, 1986, to return to the pre-1968 method of electing a six member commission at-large and by plurality vote.

In response, black residents, represented by the ACLU, filed suit against the city, asserting that its voting system was purposefully discriminatory and diluted minority voting strength in violation of the Constitution and Section 2.[801] After several rounds of negotiations, the parties entered into a consent decree on October 15, 1986, which provided for the creation of six single member districts, two of which were majority black, and an at-large, no-vote, no-veto, mayor. The defendants also agreed to appoint city residents to boards, authorities and commissions in proportion to the racial percentages of the population.

Wilcox County

Dantley v. Sutton

Rochelle, the largest city in rural Wilcox County, had a black population of 44% based on the 1980 census. No black person, however, had ever been elected to the city council, which consisted of six council members and a mayor, all elected at-large. Wilcox County also had a substantial (32%) black population, yet no black

[801] Freeze v. Jesup, Civ. No. 286-128 (S.D. Ga.).

person had ever been elected to the five member county government, which was also elected at-large.

Wilcox County had a long history of racial discrimination and racially polarized voting. According to census data, the unemployment rate for non-whites in this agricultural county was twice as high as the rate for whites, and non-whites were three times as likely to have incomes below the federal poverty level. The City of Rochelle had an ordinance maintaining segregated burial grounds.[802] As a result of a law passed in 1962, the city was required to designate the race of voters on its voters' lists, and to be eligible to be mayor or alderman a person had to be "the owner of real property in the corporate limits" of Rochelle and "have paid all taxes and licenses."[803]

In 1984, the ACLU filed suit in federal court on behalf of black voters of Rochelle challenging at-large voting for the city council as violating the Constitution and Section 2.[804] The lawsuit also charged the city with violating Section 5 for failing to preclear various annexations made in 1967. In addition, in 1984, there was a vacancy on the city council. Under the city charter the council had the power to

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[802] City of Rochelle Ordinances, Cemeteries, Section 5, adopted August 10, 1909: "All interment of whites within the corporate limits of the city shall be in Pine View, and all interments of colored citizens shall be in Oak Grove, and any person or persons violating this ordinance shall be punished as prescribed in Section 95 of this Code."

[803] Ga. Laws 1962, pp. 2791-2814.

[804] Dantley v. Sutton, Civ. No. 84-165-ALB-AMER (M.D. Ga.).

appoint a person to fill a vacancy until the end of the term, the council could not find a white who was willing to serve, and rather than appoint a black person to fill the vacancy, the council simply allowed the spot to go unfilled. Plaintiffs alleged that the failure to fill the vacancy was another voting change subject to Section 5, which the city had failed to submit for preclearance.

Prior to filing suit, the ACLU, on behalf of black voters, attempted to negotiate a new city election plan. Local officials, however, were only willing to agree upon a district voting plan that reduced the number of council members from six to five. Because such a reduction would have limited black voters to only two majority black districts, rather than the three majority black districts possible under a six member plan, the negotiations failed.

In September 1985, a three-judge court enjoined further use of the unprecleared annexations absent compliance with Section 5.[805] Four days later, with the consent of the parties, the single-judge court invalidated the existing at-large system and directed plaintiffs and defendants to submit proposed redistricting plans within 30 days.

Local officials and plaintiffs submitted plans and on April 18, 1986, the court adopted a plan proposed by defendants that divided the city into two districts. One district was majority black and elected two council members. The other district was

[805] Id., Order of September 13, 1985.

majority white and elected three council members. Under the defendant's plan, the mayor would continue to be elected at-large. The Department of Justice precleared the new plan on July 21, 1986, but local officials failed to schedule new elections. After the court again ordered new elections, two African Americans were elected to the council in May 1987.

Teague v. Wilcox County Board of Commissioners

The ACLU also filed suit in federal court on behalf of black voters and the NAACP in Wilcox County, charging that the at-large method of electing the five member county board of commissioners violated the Constitution and Section 2.[806] As with the city of Rochelle, the plaintiffs had negotiated with the county in an effort to replace at-large voting with single member districts. Although an agreement had been reached on a redistricting plan in February 1987, the local legislative delegation refused to introduce a bill in the general assembly adopting the plan, unless the legislation included a referendum on the change that would be submitted to the voters in Wilcox County. After the law suit was filed, the parties agreed to submit a consent order to the court providing that the plaintiffs had established a prima facie case that at-large elections for the board of commissioners violated Section 2, and adopting the previously agreed upon single member district plan.

[806] Teague v. Wilcox, No. CV-87-80-ALB-AMER (M.D. Ga.).

At a hearing in July 1987, the court observed, "[t]here's evidence that it was suggested it would be best to let a suit be filed and have the federal courts settle the matter, thereby avoiding the decision by the elected officials of Wilcox County." Commenting further on the case, the court said:

> On occasion, the federal courts have gotten involved in matters that, quite frankly were none of their business. On other occasions, however, the rights of citizens, guaranteed under the Bill of Rights and later amendments to the United States Constitution, can only be upheld by the federal courts. And this is one of those cases . . . The rights of citizens are guaranteed by the Constitution. . . They are not approved by referendum or mass meetings. Quite frankly . . . the social history of the south would have been far different if over the past 33 years there had been more concern by state legislators for the rights of all the people rather than for the best interest of the majority.[807]

The court approved the consent order which called for the board of commissioners to be elected from five districts, with two of them majority black at 62.1% and 53.8%, respectively. When the parties were unable to agree on a schedule of elections or on plaintiffs' attorneys' fees and costs, they returned to court where elections were ordered and attorneys' fees awarded.

When the general assembly passed local legislation in 1988 to implement the redistricting plan stipulated in the 1987 consent order, the legislation contained an unintentional drafting error that mistakenly called for implementation of the redistricting plan at the 1988 general election. In point of fact, the redistricting plan already had been implemented at a special election in September 1987, as the court

[807] Id., Transcript of Order of July 30, 1987, pp. 1-2, 4-5.

order had originally required.[808] As a result, the court enjoined county officials from implementing the faulty special election provisions of the 1988 law.

Wilkes County and the City of Washington

Avery v. Mayor and Council of the City of Washington

The City of Washington (population 4,279) is the county seat of Wilkes County, which is located in east Georgia. In 1990, the city was majority (60%) black, yet no more than one black person had ever served on the six member city council at any given time. Voting was at-large, and black voter registration, due to socio-economic disparities and the longstanding effects of discrimination, lagged behind that of whites. The combination of at-large voting and depressed black voter registration allowed whites to control the outcome of city elections.

The county, by contrast, elected its county commission from districts. Although the county was 46% black, no black candidates had ever been elected to the county government. In 1972, after the extension of the Voting Rights Act and an increase in black registration, the county adopted at-large elections for both its county commission and board of education. The changes were not submitted for preclearance until 1976, when the Attorney General objected to the new measures:

> According to information provided us no black has ever been elected to office in Wilkes County and there are indications that

[808] Sewell R. Brumby, Legislative Counsel to Hon. Duross Fitzpatrick, May 3, 1988.

> a pattern of racial bloc voting sufficient to preclude election of any minority member under the at-large system of electing may exist. Our examination also reveals evidence of residential patterns in the City of Washington, the principal city in the county, sufficient to offer under a system of fairly drawn single member districts a reasonable opportunity for minority political representation.
>
> Under these circumstances we are unable to conclude, as we must under the Voting Rights Act, that the use of the at-large system of election in Wilkes County does not have the effect of discriminating on account of race or color.[809]

The county then brought a declaratory judgment action, but the District of Columbia Court denied preclearance. It held the use of at-large elections in Wilkes County "has the effect of abridging the right to vote of blacks," and the plaintiffs "failed to meet their burden of demonstrating that the adoption of the voting changes at issue was done without a discriminatory racial purpose."[810] The Supreme Court summarily affirmed.[811] Even though single member district elections were retained for both county commission and board of education elections, none of the districts were majority black. After the 1980 census, the districts were redrawn, and two of the four single member districts were majority black at 66.8% and 52.5%, respectively, but racial polarization, lower rates of black voter registration and turnout, and other factors prevented the election of blacks to the county commission. One African American was able to win election to the board of education, however.

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[809]J. Stanley Pottinger, Assistant Attorney General, to Wilbur A. Orr, June 4, 1976.

[810] Wilkes County v. United States, 450 F. Supp. 1171, 1178 (D.D.C. 1978).

[811] Wilkes County v. United States, 439 U.S. 999 (1978).

In 1988, the local NAACP requested the City of Washington to change to single member district elections.[812] The council voted unanimously to proceed with districts in 1989, however, no action was taken over the next three years. With city council elections scheduled for November 1992, the ACLU contacted the city attorney in August on behalf of its clients, who included local leaders of the NAACP, to explore the possibility of adopting a racially fair election scheme.[813] The parties agreed to establish two three-member districts for city council elections, one 91.83% black and the other 71.66% white, with the mayor elected at-large. By agreement, the ACLU filed suit on August 20, charging that the at-large method of electing the city council violated Section 2, and the case was settled the next day.[814] The voting change was submitted to the Department of Justice for expedited review and was precleared on September 15, 1992.[815]

Evidence of racial polarization among voters in Wilkes County continues to the present day. In March 2000, the Department of Justice denied preclearance to a voting change proposed by the City of Tignall (population 653), the second largest

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[812] Rev. G. L. Avery, President, Wilkes County N.A.A.C.P. to E.B. Pope, Mayor, City of Washington, May 31, 1988.

[813] Kathleen L. Wilde, ACLU Staff Counsel, to Virginia Ledbetter, City Clerk, City of Washington, August 4, 1992. See, also, Minutes of the Regular Meeting of the Washington City Council, August 17, 1992.

[814] Avery v. Mayor and Council of the City of Washington, Georgia, Civ. No. 192-169 (S.D. Ga.).

[815] John R. Dunne, Assistant Attorney General, to Pete Kopecky, Esq., September 15, 1992.

municipality in the county.[816] Although Tignall was 43% black, the city's five member council was elected at-large, and prior to 1999, only one council member was black. In 1999, the city amended its charter to change the method of election to include numbered posts and staggered terms, and to abandon its plurality vote system in favor of a majority vote requirement. The Department of Justice outlined its concerns in a lengthy letter interposing objections to the changes:

> Based on our analysis of the available information, it appears that voting in Tignall is racially polarized and that minority voters under the existing system have achieved some success by limiting the number of votes that they cast for city council seats in order to elect their candidate of choice. This technique is referred to as single-shot voting. Under the proposed system, each seat on the council that is up for election will be identified as a separate post and candidates will compete against one another for that specific post. This will eliminate the opportunity minority voters have had under the existing system to boost the effectiveness of their vote for their preferred candidate through single-shot voting.
>
> The imposition of numbered posts and a majority vote requirement, in addition, are more likely to result in head-to-head contests between minority and white candidates for the city council. Minority candidates who are forced into head-to-head contests with white candidates in this racially polarized voting environment are more likely to lose than would be the case under the existing system with concurrent terms and a plurality vote requirement.
>
> We have also examined the implications for minority voters of staggering the terms of council members, so that only two members are elected in one election cycle and three members are elected the next. In this context, it appears that staggering council terms will reduce the opportunity of minority voters to elect their candidate of choice through single-shot voting by reducing the number of positions to be voted upon and, thereby, limiting the effectiveness of this vote-withholding technique. The 1991 and 1995 election results appear to support this conclusion because the minority-preferred candidate won,

[816] Bill Lann Lee, Acting Assistant Attorney General, to Melvin P. Kopecky, Esq., March 17, 2000.

but placed fifth and third, respectively, in contests in which only a few votes separated the winning and losing candidates.

It appears, therefore, that the city's proposed addition to its at-large election system of numbered posts, a majority vote requirement and staggered terms will lead to a worsening of minority electoral opportunity, which is prohibited by Section 5.[817]

[817] Id.

KANSAS

Kansas Voter Registration

League of Women Voters of Kansas v. Graves

In an effort to counter the deleterious effect on minority voter participation that many registration systems had caused, Congress passed The National Voter Registration Act (NVRA) in 1993, requiring states to make voter registration available by mail and in person at state agencies, such as the department of motor vehicles and offices that provide services to the poor or the disabled. The NVRA required the State of Kansas to enact legislation by January 1, 1995, implementing the act's provisions to make voter registration more widely available, but the state failed to pass the necessary legislation by the compliance deadline.

With no implementing legislation in place well past the deadline, the League of Women Voters of Kansas, the Kansas AFL-CIO, and other organizations and citizens filed suit with the assistance of the ACLU on August 8, 1995, to require the state to comply with and implement the NVRA.[818] Three months later, on November 30, 1995, the district court ordered the state to comply with the act, including making available to plaintiffs all information relating to the state's implementation plan, and reinstating all voters who had been purged from the rolls in violation of the NVRA. The court gave the legislature until June 15, 1996, to adopt

[818] League of Women Voters of Kansas v. Graves, Civ. No. 95-2350-KHV (D. Kan.).

implementing legislation.

In March 1996, the legislature adopted NVRA enabling legislation, and on June 28, 1996, the court dismissed the case with the agreement of all the parties.

LOUISIANA

STATEWIDE ISSUES

Congressional Redistricting

Hays v. Louisiana

In the aftermath of Shaw v. Reno, a three-judge court invalidated Louisiana's Fourth Congressional District as an instance of unconstitutional "race-conscious" redistricting.[819] The Supreme Court agreed to review the case, and the ACLU filed an amicus brief supporting the appellants (defendants below) and the constitutionality of the challenged district. The ACLU argued in its brief that affirmance would radically alter the application of the Voting Rights Act and result in a purge of minorities from elected offices at all levels.

Amicus furthered argued that the consideration of race in redistricting was not per se suspect and was different from the consideration of race in the allocation of scarce employment or contractual opportunities where an independent claim of entitlement existed. Any racial group may complain if its voting strength has been abridged, but a non-dilutive, race-conscious redistricting plan injures no one. Congress has also sanctioned the use of majority minority districts and concluded that they do not isolate voters or increase racial tension.

[819] Hays v. Louisiana, 862 F. Supp. 119 (W.D.La. 1994).

The court did not reach the merits of the case, but dismissed the action in June 1995, on the grounds that none of the plaintiffs were residents of the challenged district and therefore lacked standing.[820]

NVRA Enforcement

ACORN v. Fowler

Following passage of the National Voter Registration Act (NVRA) by Congress in 1993, Louisiana enacted implementing legislation on June 29, 1994, which it then submitted to the Department of Justice for preclearance.[821] While the department approved most of the plan on November 21, it objected to a provision of the law which required first time voters who had registered by mail to present photo identification at the polls. As of 1990, the population of Louisiana was 30.6% black, and, according to the Justice Department, the ID provision would "eliminate certain of the gains to minority voters mandated by Congress in enacting the NVRA" and would weigh heaviest on "the very group of voters whose political participation in federal elections the NVRA seeks to encourage through increased access to voter registration opportunities."[822]

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[820] Louisiana v. Hays, 515 U.S. 737 (1995).

[821] Third Extraordinary Session of the 1994 Louisiana Legislature, Act 10 (HB 209).

[822] Deval L. Patrick, Assistant Attorney General, to Sheri Marcus Morris, Assistant Attorney General of Louisiana, November 21, 1994, p. 2.

After the Louisiana Attorney General issued an opinion that the objected to provisions could be severed from the enabling legislation, the state issued emergency regulations to implement the NVRA, but they fell far short of the federal mandate, and by January 1, 1995, the state had failed to meet the NVRA implementation deadline. For example, although the NVRA required state officials to offer assistance to potential registrants, Louisiana did not instruct its employees to volunteer their help. Moreover, the state's emergency regulations did not provide for the distribution of voter registration forms with each application for food stamps or Aid to Families with Dependant Children, as required by the NVRA. When members of the Association of Community Organizations for Reform Now (ACORN), a nonprofit advocacy group for low income citizens, tried to register to vote at the New Orleans branches of the Office of Family Support and Department of Motor Vehicles early in 1995, state employees said no registration forms were available.

In January 1995, state Senator M. J. "Mike" Foster brought suit in state court arguing that the objected to portions of the state's NVRA enabling legislation could not be severed.[823] The next month, ACORN and individual black voters, represented by the ACLU, the New Orleans Legal Assistance Corporation, and the NAACP Legal Defense and Educational Fund, Inc., filed suit in federal court to

[823] Foster v. Fowler, 652 So.2d 993 (La. 1995).

compel Louisiana to comply with the NVRA. The lawsuit cited, among other things, the state's "egregious history of erecting barriers to the right to vote, many of which have been aimed particularly and discriminatorily at African-Americans," including the state's 1898 "grandfather clause," as well as educational and property qualifications for registration.[824]

The state also persisted in its efforts to get federal approval of its restrictive photo identification requirement for voting. In February, it asked the Justice Department to reconsider its earlier denial but the department declined. In addition to noting that the state's request for reconsideration did "not contain any new relevant factual information or legal arguments," the Justice Department reaffirmed its objection to the plan on the grounds that blacks were four to five times less likely than whites to have driver's licenses or other photo identification. Moreover, the department said, the state had created two standards for voter identification: registrants by mail had to produce a picture ID, while those who registered in person could utilize a wider range of documents. The department further advised that a proposed Louisiana funding initiative aimed at providing mail registrants with photo ID would need to be precleared "with a view towards the impact of such a project on mail registration under the NVRA, as well as the state's objected-to

[824] ACORN v. Fowler, Civ. No. 95-0614 (E.D. La.).

picture identification requirement."[825]

On March 27, while other state defendants in the ACORN suit were engaged in settlement negotiations and the state was beginning to implement the NVRA, Louisiana Secretary of State Fox McKeithen answered the complaint by asserting, among other things, that the NVRA was unconstitutional in violation of the Tenth Amendment. Three days later, the state supreme court issued a ruling in the case brought by Senator Foster, holding Louisiana's voter identification provision could be severed from the rest of the enabling legislation and the precleared sections could be implemented.[826] As a result of these developments, Louisiana was compelled to comply with the NVRA and did so within the year. Plaintiffs then moved to dismiss the case voluntarily and without prejudice, which the court ordered on September 19, 1995.

Louisiana continued to struggle, however, to develop a voter identification measure that would not have a retrogressive effect on minority voters, and it was not until 1997 that the state finally submitted a voter identification plan that satisfied the Voting Rights Act. The 1997 plan allowed voters without a photo ID to vote if they signed an affidavit attesting to their identity, and supplied either a current voter registration certificate or their date of birth or other information. With this

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[825] Loretta King, Acting Assistant Attorney General, to Sheri Marcus Morris, Assistant Attorney General of Louisiana, February 21, 1995.

[826] Foster v. Fowler, 652 So. 2d at 993.

affidavit of identity provision in place, the Justice Department approved Louisiana's voting changes.[827]

COUNTY AND MUNICIPAL LITIGATION IN LOUISIANA

Bossier Parish

Reno v. Bossier Parish

Bossier Parish, Louisiana, adopted a redistricting plan for its 12 member school board in 1992 and submitted it for preclearance to the Department of Justice. The Attorney General objected, noting that while the parish was 20% black, none of the proposed districts was majority black, despite the fact that a proposed plan submitted by the local NAACP had demonstrated that a 12 member plan could be drawn containing two majority black districts. No black person had ever been elected to the school board, and it was undisputed that the plan adopted by the parish split black communities to avoid creating a majority black district. One board member said that while he favored black representation on the board, "a number of other board members opposed the idea." Another board member said "the Board was hostile to the creation of a majority-black district." The Attorney General

[827] Isabelle Katz Pinzler, Acting Assistant Attorney General, to Angie Rogers LaPlace, Assistant Attorney General of Louisiana September 29, 1997.

concluded that she was "not free to adopt a plan that unnecessarily limits the opportunity for minority voters to elect their candidates of choice."[828]

The parish filed a declaratory judgment action in the District of Columbia court which granted preclearance. It held that it could not deny preclearance of a proposed voting change under Section 5 even though the change violated Section 2. The Attorney General appealed and the ACLU, together with the NAACP Legal Defense and Educational Fund, filed an amicus brief in support of the United States and the private intervenors.

Amicus argued that the legislative history of the 1982 amendments of the Voting Rights Act showed that Congress intended for the results standard of Section 2 to apply to Section 5 preclearance. The Senate Report that accompanied the amendments provides that "[i]n light of the amendment to section 2, it is intended that a Section 5 objection also follow if a new voting procedure so discriminates as to violate section 2."[829] The principal cosponsors of the 1982 amendments, Representative James Sensenbrenner (R. WI) and Senator Ted Kennedy (D. MA), reiterated on the floors of the House and Senate during the legislative debates that "where there is a section 5 submission which is not retrogressive, it would be

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[828] This history is set out in Reno v. Bossier Parish School Bd., 528 U.S. 320, 324, 348 (2000) ("Bossier II").

[829] S.Rep. No. 417, 97th Cong., 2d Sess. 12 n.31 (1982).

objected to only if the new practice itself violated the Constitution or amended section 2."[830]

The Supreme Court affirmed. It held that a violation of Section 2 could not be a basis for an objection under Section 5. As for the legislative history cited by amicus, the court said Section 5 was not itself amended in 1982, and the language in the Senate Report that Section 2 was to apply in Section 5 preclearance was merely a "footnote."[831] The court did, however, remand the case for consideration whether the dilutive impact of the parish's plan supported a finding that the plan had been enacted with a discriminatory purpose.

On remand the district court again granted preclearance, concluding that the 1992 plan was no worse than the preexisting plan, in that neither contained any majority black districts, and that the evidence failed to establish "retrogressive intent."[832] The Supreme Court again affirmed. In doing so, and in an extraordinarily obtuse opinion, it held that "§ 5 does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose."[833] Thus, an admittedly discriminatory plan, that was the product of intentional discrimination

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[830] 128 Cong. Rec. H3841 (daily ed. June 23, 1982) (remarks of Rep. Sensenbrenner); 128 Cong. Rec. S7095 (daily ed. June 16, 1982) (remarks of Sen. Kennedy).

[831] Reno v. Bossier Parish School Bd., 520 U.S. 471, 484 (1997) ("Bossier I")

[832] Reno v. Bossier Parish School Bd., 7 F. Supp. 2d 29, 31-2 (D.D.C. 1998).

[833] Bossier II, 528 U.S. at 341.

and had an undeniable discriminatory affect, was nonetheless precleared under Section 5.

West Feliciana Parish and the Town of St. Francisville

Wilson v. Mayor and Board of Aldermen of St. Francisville

St. Francisville is the parish seat of West Feliciana Parish, Louisiana. Located on the banks of the Mississippi River between New Orleans and Natchez, the land yielded unparalleled crops of cotton, sugar cane, indigo, and tobacco. According to local accounts, in the 1850s the parish was home to more than half of America's millionaires, the beneficiaries of an economy built upon the institution of slavery.

The parish today is home to numerous grand antebellum plantation homes, which escaped the ravages of the Civil War, including The Myrtles Plantation (circa 1796), Rosedown Plantation (1835), and Oakley House (1806), where James Audubon tutored the daughter of plantation owners James and Lucy Pirrie and painted 80 of his famous American bird pictures. The parish is also home to Angola, the state prison. As late as 1963, the parish, which was nearly 70% black, and faithful to its ante-bellum heritage, had not a single black registered voter.[834]

[834] The story of Rev. Joseph Carter, the first black citizen to register in the parish in modern times, is told in chilling detail in "Birth of a Voter," Ebony Magazine, February 1964.

Based on the 1990 census, St. Francisville had a population of 1,700 people, 31% of whom were black. Its mayor and five member board of aldermen were elected at-large, and as of 1992, no black person had ever been elected to a city office.

At the request of black residents, the city adopted a districting plan in 1992, creating one single member district that was majority black, and one four member district that was majority white. The plan was submitted for preclearance. However, the city made plans to conduct the October 1992, election under the preexisting at-large plan with the incumbents to remain in office until January 1997. Black residents of the town, represented by the ACLU, filed suit in federal court in September 1992, and asked the court to enjoin the pending at-large elections.[835] The court denied the motion but agreed to consider holding a special election based upon the preclearance determination of the Attorney General or further order of the court.

Plaintiffs' expert, Dr. Stephen Cole, analyzed election returns for 25 parish, state, and federal elections from 1979 to 1992, involving contests between African American and white candidates in which voters in St. Francisville and West Feliciana Parish participated. His analysis showed significant levels of racial bloc voting in St. Francisville. The average cohesion for black voters in the 25 contests

[835] Wilson v. Mayor and Board of Aldermen of St. Francisville, Louisiana, No. CV 92-765-B-1 (M.D. La.).

was 78%. The average percentage of white voters voting for white candidates was 93%, which Dr. Cole characterized as "extreme racial polarization."

In addition to the interracial contests, Dr. Cole analyzed four contests involving only white candidates in which David Duke was a candidate. Duke was a former leader of the Ku Klux Klan and was widely perceived as a white supremacist. Three of the four contests demonstrated racially polarized voting. In the 1990 primary election for U.S. Senator, in a field of four white candidates, Duke received a whopping majority (75%) of the white vote in West Feliciana Parish. In the 1992 primary for Governor, in a field of 11 white candidates, Duke also received a majority (54%) of the white vote in West Feliciana Parish and made it into the run off where he increased his share of white votes in the parish to 62%.

It was not until October 1992, that an African American was elected to the board of aldermen, the first in the history of St. Francisville.

The Attorney General, however, denied preclearance to the city's proposed districting plan on May 18, 1993, because it unnecessarily limited "the opportunity for minority voters to elect candidates of their choice."[836]

After the Section 5 objection, the city indicated that it would be willing to settle the pending litigation. Following negotiations, the parties agreed on a redistricting plan creating one majority black district and a second district with a

[836] James P. Turner, Acting Assistant Attorney General, to William D'Aquilla, May 18, 1993.

substantial black population. The plan was precleared by the Department of Justice and adopted by consent judgment by the district court on June 26, 1995.

In October 1995, however, the city filed a motion to vacate the consent judgment in light of the Shaw/Miller cases, arguing that the plan creating a majority black district "might be unconstitutional." Plaintiffs opposed the motion on the ground, among others, that the Shaw/Miller cases did not apply to vote dilution challenges brought under Section 2 of the Voting Rights Act. The court held a trial in August 1996, on the issue whether the consent decree was constitutional, after which it ruled that the district in the agreed upon plan was not compact. However, the court further ruled that a majority black district was required by Section 2 and adopted one of the plans that had been proposed by the plaintiffs as a court ordered remedy. The city did not appeal.[837]

[837] Although the court held that Section 2 required the creation of a majority black district and adopted plaintiffs' proposed districting plan, it denied the plaintiffs' request for cost and fees in connection with the Shaw/Miller aspect of the case on the grounds that they were not prevailing parties. Wilson v. Mayor and Board of Aldermen of St. Francisville, Louisiana, 964 F. Supp. 217 (M.D.La. 1997), aff'd 135 F.3d 996 (5th Cir. 1998).

MARYLAND

STATEWIDE ISSUES

Exclusion of Unaffiliated Voters from Maryland Judicial Nominations

Suessmann v. Lamone

Maryland nominates candidates for circuit court judgeships by a process that can only be described as bizarre and complex. Under state law, candidates run in primary elections, but without any party label or other distinguishing mark which might indicate their party affiliation. Not only are they not required to be affiliated with the party in whose primary they run, they can run in both major party primaries (cross-file) at the same time. If nominated, a candidate appears on the general election ballot without any party designation. Both major parties, Democrat and Republican, have adopted rules prohibiting any person from voting in their primaries who is not a party member.

In 2004, plaintiffs represented by the ACLU, who were not affiliated with either the Republican or Democratic Party, challenged their exclusion from voting in the primaries which nominated circuit court judges as a violation of the Fourteenth Amendment and the Maryland Declaration of Rights.[838] Plaintiffs did not challenge the authority of the state to make judicial elections partisan or nonpartisan, and they recognized the right of a political party — when nominating candidates for partisan

[838] Suessmann v. Lamone, 383 Md. 697 (2004).

office — to exclude voters who are not affiliated with that party.[839] Plaintiffs did not seek to vote for any partisan office that would be on the ballot of a political party. The Maryland scheme, however, worked at cross purposes. Though state law limited partisanship in judicial elections, the state allowed political parties to control who could vote in the judicial nomination process.

A special trial court of three judges rejected plaintiffs' claims. On appeal, the Court of Appeals of Maryland affirmed with two judges dissenting. The majority characterized plaintiffs' claim as being deprived "of the right to vote in the primary elections of a party to which they do not belong."[840] That, of course, would have been a frivolous claim, and not one that plaintiffs made. In a tautology the court held the primary was not nonpartisan:

> The inescapable conclusion is that when the State truly establishes a nonpartisan primary, the primary is characterized by the fact that unaffiliated voters are eligible to vote in it. . . If this be so, then the political primaries nominating circuit court judges cannot, by definition, be nonpartisan since unaffiliated voters are ineligible to vote in them.[841]

It was irrelevant to the court that candidates who were unaffiliated with a party could run in its primaries and win nomination, that candidates could file with two parties at the same time, and could not have a party designation on the general

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[839] See Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986).

[840] Suessmann, 383 Md. at 732.

[841] Id. at 16-17.

election ballot. In the court's view, "the procedure for electing judges remains a partisan one in form and in substance."[842]

COUNTY AND MUNICIPAL LITIGATION IN MARYLAND

Cecil County and the Town of Port Deposit

Dooling v. Town of Port Deposit

Michael Dooling, a retired mill wright, spent most of his life in and around Port Deposit, Maryland, a small town on the shores of the Susquehanna River. In the 1990s he moved around the country, but he maintained ties to Port Deposit and voted there. In 1999, he returned to Port Deposit and bought a houseboat moored on the river. He took an interest in town council meetings, attending almost every one, and in 2001 decided to run for town council. He needed 25 petition signatures to get on the ballot, and collected 33.

Under clear Maryland law, the houseboat was located within the town limits, and Dooling had been in the houseboat long enough to meet the residency requirement for running for city office. Nonetheless, after he submitted his petition he was told by an election supervisor to submit more documentation about his residency. The election supervisor resigned the same day and qualified to run for city council, a potential opponent to Dooling if Dooling were on the ballot. Dooling

[842] Id. at 22.

was given one day to produce documentation, which he did. He went to a town council hearing on his candidacy, and the council, after asking him if he had any more evidence, went into closed session. It considered allegations that were not disclosed to Dooling, and barred him from appearing on the ballot.

Dooling's name did not appear on the ballot in 2001, and the town did not change its view that he was not a resident which barred him from running for office at the next election. With the assistance of the ACLU, the ACLU of Maryland filed suit in federal court on Dooling's behalf, seeking a judgment that he was, in fact, qualified to run for town council.[843] The suit alleged that barring him from running for public office violated the First and Fourteenth Amendments and Maryland state law.

The court denied the city's motion to dismiss. After discovery, both sides moved for summary judgment. On the Sunday before a scheduled hearing on the summary judgment motions, the trial judge wrote a memorandum to counsel stating his view that the plaintiff had established legal residence in the town, that the town had been provided "an unfortunate piece of advice" by the town attorney, and that absent evidence that Dooling had claimed a domicile elsewhere, issues such as where his houseboat was located were "red herrings."[844] In view of the court's

[843] Dooling v. Town of Port Deposit, Civil No. 1:02-cv-00650-AMD (D. Md.).

[844] Id., Memorandum to Counsel, June 8, 2003, docket entry No. 48.

memorandum, the parties resolved the litigation with an agreement that the plaintiff was a resident of the town and entitled to vote and run for office.

Worcester County

Cane v. Worcester County

Worcester County, founded in 1742, is Maryland's only seaside county. In November 1992, black residents of the county, represented by the ACLU and the ACLU of Maryland, filed suit challenging at-large elections for the county commission.[845] The commission consisted of five members, four of whom were required to live in residency districts, with the fifth member residing anywhere in the county. African Americans were 21% of the population, but never in the 253 year history of the county had an African American been elected to any county office.

Following a trial, the district court invalidated the at-large system. Among its findings were:

> *[W]hites vote as a bloc.
>
> *Even under the best of circumstances, the at-large system debases the value of the minority's political strength.
>
> *[A]n African-American candidate will lose in county-wide elections.

[845] Cane v. Worcester County, Md., Civ. No. 1:92-cv-03226-JHY (D. Md.).

> *[N]o African-American has won a county office in a county-wide head-to-head contest against a white candidate.
>
> *[T]he current system . . . interacts with past and present discrimination to deprive African-Americans of Worcester County the same 'opportunity [as] other members of the electorate to participate in the political process and to elect representatives of their choice.'[846]

At the remedy stage, the county submitted a plan using five residency districts, but retaining at-large voting. Plaintiffs submitted plans using single member districts, or in the alternative, cumulative voting. The court ordered into effect a plan which used cumulative voting, concluding that it would remedy the Section 2 violation, as well as retain the county's preference for at-large voting.[847]

The county appealed and the court of appeals affirmed the finding of a violation, but remanded as to the remedy imposed by the district court.[848] It did not reject cumulative voting per se, but held the district court should give the county an additional opportunity to propose a remedial plan and consider the county's argument that cumulative voting would not protect its interest in geographic diversity. The county filed a petition for a writ of certiorari, but it was denied.[849]

On remand to the district court, both parties submitted plans. The court adopted the county's proposed single member district plan for the primary, a plan

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[846] Cane v. Worcester County, Md., 840 F. Supp. 1081, 1090-91 (D. Md. 1994).

[847] Id., 847 F. Supp. 369 (D. Md. 1994).

[848] Cane v. Worcester County, Md., 35 F. 3d 921 (4th Cir. 1994).

[849] Worcester County, Md. v. Cane, 513 U.S. 1148 (1995).

which did not have a majority African American district, but a cumulative plan for the general election.[850] Both sides appealed and the court of appeals held the district court's plan did not provide an adequate remedy for the Section 2 violation, and ordered "immediate implementation of Plaintiffs' alternative plan."[851] The county filed another petition for a writ of certiorari, but it was denied.[852]

The deeply contested litigation in Worcester County demonstrates the critical role the Voting Rights Act continues to play in ensuring equal access to the political process. It also shows how divisive and contentious race remains in the modern era, and how some jurisdictions are still intent on resisting efforts to ensure equal political access.

[850] Cane v. Worcester County, Md., 874 F. Supp. 687 (D. Md. 1995).

[851] Cane v. Worcester County, Md., 59 F. 3d 165 (4th Cir. 1995).

[852] Worcester County, Md. v. Cane, 518 U.S. 1016 (1996).

MICHIGAN

Allegan and Saginaw Counties – Enforcing the Language Minority Provisions of the Voting Rights Act

Hernandez v. Thomas

Buena Vista Township in Saginaw County and Clyde Township in Allegan County are the only two jurisdictions in Michigan covered by the preclearance provisions of the Voting Rights Act because of the presence of language minorities, primarily Spanish speaking citizens.[853] The two townships are also required by the Voting Rights Act to provide ballots and other election materials in Spanish. The townships, however, had conducted elections since the date of their coverage in 1976, without providing the required bilingual election material.

The ACLU, with the ACLU of Michigan, brought suit on behalf of Spanish speaking plaintiffs in 1992, prior to the presidential primary to compel election authorities to provide ballots and other election materials in Spanish.[854] On March 12, 1992, the three-judge district court ordered that ballots and ballot instructions be provided in Spanish for the March 17, 1992, presidential primary, along with

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[853] In 1975, the original definition of "test or device" under the Voting Rights Act was expanded to include the practice of providing any election information, including ballots, only in English in states or local jurisdictions where members of certain language minorities - defined as American Indian, Asian American, Alaskan Natives or those of Spanish heritage - constituted more than five percent of the voting age citizens. This change to the act expanded Section 5 coverage to Alaska, Arizona, and Texas in their entirety, and parts of California, Florida, New York, North Carolina, South Dakota, and the two Michigan townships of Buena Vista and Clyde.

[854] Hernandez v. Thomas, No. 1:92-CV-173 (W.D. Mich.).

bilingual interpreters to assist Spanish speaking voters in the two townships. The state also agreed to provide Spanish voter information throughout the state, whether or not required by the Voting Rights Act.

The plaintiffs further contended that the state had implemented a 1988 law without receiving preclearance that required voters, including those in the two covered townships, to declare a party preference in order to vote in a presidential primary election. The three-judge court concluded that the new law was a covered change and enjoined its application in Buena Vista and Clyde Townships absent preclearance.[855]

The state subsequently submitted the 1988 law to the Department of Justice and it was precleared. The Michigan Democratic Party however refused to count, for delegate selection purposes, the ballots cast in the presidential primary by voters in the two townships who, because of the ruling of the three-judge court, were not required to declare a party preference. Plaintiffs sought to enjoin the party from failing to count those votes, but the district court found that insofar as delegate selection was concerned, the party was not a state actor covered by the Fourteenth Amendment or Section 5, and dismissed plaintiffs' claim.

[855] Id., Order of March 12, 1992.

MISSISSIPPI

STATEWIDE ISSUES

Mississippi Voter Registration

Young v. Fordice

Mississippi traditionally operated a dual system of voter registration requiring citizens to register twice, first for state and federal elections, and again for municipal elections. In 1987, a federal district court found the original version of the dual registration requirement "was enacted as part of the 'Mississippi plan' to deny blacks the right to vote following the Constitutional Convention of 1890," and that a revised version of the registration system, adopted in 1984, violated Section 2 because it "result[ed] in a denial or abridgement of the right of black citizens in Mississippi to vote and participate in the electoral process."[856] The court found the registration rate among blacks was significantly lower than for whites (54% compared to 79%).

The district court also took judicial notice of recent federal court decisions finding that:

> *[R]acially polarized voting has prevailed in Mississippi elections, resulting in the defeat of black preferred candidates by white bloc voting and in black voters being unable to elect candidates of their choice.
>
> *[T]here continue to exist socio-economic disparities between

[856] Operation PUSH v. Allain, 674 F. Supp. 1245, 1251, 1253, 1268 (N.D. Miss. 1987).

> whites and blacks in Mississippi that impair equal access to the political process in Mississippi.
>
> *[T]here is evidence of racial campaign tactics still being used in Mississippi.
>
> *[T]he percentage of elected officials who are black remains disproportionately low.
>
> *Since 1984 the dual registration requirement has continued to have a discriminatory impact on blacks.[857]

After the decision of the district court, the legislature adopted legislation remedying the Section 2 violation, which was approved by the district court and affirmed on appeal.[858] The new system was "unitary," meaning registration at any office entitled a person to vote in all elections. But Mississippi resurrected dual registration in 1995.

The NVRA, also known as the Motor Voter Act, greatly expanded the opportunities for registration for federal elections, including mail-in registration and registration at state motor vehicle and social service offices. Mississippi adopted procedures to implement the NVRA in 1995, but it did so without complying with Section 5. Under the new system, voters who registered under the NVRA were allowed to vote only in federal elections. To vote in state and local elections, NVRA registrants had to register a second time through state registration procedures. As a

[857] Id. at 1252, 1255.

[858] Operation PUSH v. Allain, 717 F. Supp. 1189 (N.D. Miss. 1989), aff'd 932 F. 2d 400 (5th Cir. 1991).

result, thousands of voters who had registered under the NVRA, a majority of whom were black, would be ineligible to participate in state elections.

On April 20, 1995, the Lawyers' Committee for Civil Rights Under Law, assisted by the ACLU, filed suit on behalf of a class of registered and unregistered voters in Mississippi.[859] They asked the court to require Mississippi to comply with the NVRA, and to enjoin the state from implementing separate voter registration procedures for federal and state elections without receiving preclearance under Section 5. A similar lawsuit was filed by the Attorney General on behalf of the United States, and the two cases were consolidated. On July 24, 1995, the district court ruled that preclearance was not required, because the state's NVRA plan "did not effect a change subject to Section 5 preclearance." Plaintiffs appealed the district court's order to the Supreme Court. The United States also filed a notice of appeal which it subsequently decided not to pursue.

The Supreme Court agreed to hear the appeal, and on March 31, 1997, in a unanimous opinion, ruled the state's regulations requiring separate registration for state and federal elections were unenforceable unless precleared under Section 5. While noting that the NVRA did not "categorically" forbid a dual system, the Court held the state must preclear the "discretionary elements of the new federal system."[860]

The state submitted its administrative rules for preclearance, and on September

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[859] Young v. Fordice, 3:95CV197 (S.D. Miss.).

[860] Young v. Fordice, 520 U.S. 273, 290 (1997).

22, 1997, the Attorney General objected to the dual registration system:

> [T]he State's federal-election-only implementation of the NVRA has a disproportionate impact on black citizens, preventing them, to a greater extent that white citizens, from voting in state and local elections. This had the overall impact of hampering the ability of black persons to participate in the political process.[861]

The Attorney General not only found dual registration would be retrogressive and likely result in the disfranchisement of numerous voters, but the reasons offered by some state officials for opposing public agency registration "appear to have been insubstantial, and in some cases have been couched in racially charged terms indicating antipathy towards 'welfare voters.'" Indeed, some 30,000 people, the Justice Department noted, more than half of the Motor Voter registrants, had not registered to vote a second time for state elections, apparently under the mistaken belief that the state had a unitary registration system. The Attorney General concluded "[t]he State has also administered this new dual registration requirement in such a way that discriminatory effects on black voters were not just foreseeable but almost certain to follow."[862]

In 1998, the legislature approved a bill that would have eliminated the dual registration system, but the measure was vetoed by Governor Kirk Fordice. The plaintiffs then filed a supplemental complaint, asking the court to postpone state and local elections set for November 1998, until Mississippi complied with the NVRA and

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[861] Isabelle Katz Pinzler, Acting Assistant Attorney General, to Sandra M. Shelson, Mississippi Special Assistant Attorney General, September 22, 1997, p. 5.

Section 5. Alternatively, plaintiffs asked the court to enter an interim order to permit all NVRA registrants to vote in all elections. On October 5, 1998, the district court granted the requested relief, and enjoined state and local officials from denying any NVRA registrants the right to vote in state and local elections. It further directed that its order remain in effect until the state obtained Section 5 preclearance of an alternative plan. The state did not appeal.

This case clearly illustrates how Section 5 played a pivotal role in blocking the implementation of discriminatory registration procedures in Mississippi.

COUNTY AND MUNICIPAL LITIGATION IN MISSISSIPPI

Perry County

McCarty v. Board of Supervisors of Perry County

Coleman v. Board of Supervisors of Perry County

Perry County is in southern Mississippi, near Hattiesburg and the Gulf Coast. The county's board of supervisors and election commission are elected from the same five single member districts. Despite the fact that the county was 22.5% black, the districts had always been majority white, and no black person had ever been elected to either board.

When the 1990 census showed the county's districts were malapportioned, and

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[862] Id.

the county proceeded to adopt a new districting plan, it again drew all majority white districts. The county submitted the plan to the Department of Justice for preclearance, which was denied. According to the Attorney General:

> There are significant concentrations of black population in the county that seem to have been fragmented, unnecessarily, among three of the five supervisor districts, namely Districts 1, 4, and 5.
>
> During the redistricting process, the county appears to have been aware of the interest on the part of black citizens to have their voting potential better recognized, especially by creating a district that combines concentrations of black population in one district, thus providing to black voters an opportunity to elect candidates of their choice to the board of supervisors.
>
> While we have noted the county's claim that it is impossible to draw a majority black district, the information provided does not support this conclusion. Although a bi-racial committee was involved in the redistricting process, it is not clear that the committee had independent and meaningful input into the process.[863]

In July 1992, the ACLU, on behalf of black voters, challenged the existing districting plan for the board of supervisors and election commission as malapportioned and as diluting minority voting strength in violation of Section 2 and the Constitution.[864] Given that the existing plan was malapportioned, and in light of the Attorney General's objection to its proposed plan, the county adopted a new plan, with the approval of the plaintiffs, that created a majority black district. The plan was precleared and on February 12, 1993, the court entered an order providing for a special

[863] John R. Dunne, Assistant Attorney General, to Jeffrey T. Hollimon, November 19, 1991.

[864] McCarty v. Board of Supervisors of Perry County, Mississippi, No. 2:92cv169 (S.D. Miss.).

election in November 1993, for the election commission and the majority black board of supervisors district.

Prior to the election, in September 1993, a group of mostly white residents of Perry County, including the incumbent supervisor who resided in the newly created majority black district, filed a Shaw/Miller action[865] seeking to enjoin the November election on the grounds that the majority black district was "bizarrely" shaped and denied them equal treatment. The plaintiffs in the first lawsuit represented by the ACLU intervened in the second action to defend the constitutionality of the challenged plan. The plaintiffs in the second case also sought to intervene in the first case to raise their Shaw/Miller objections to the county's plan.

The district court held a hearing in both cases on October 18, 1993, on the question whether it should enjoin the November special election, and refused to do so. The election was held, and for the first time in the county's history a black candidate was elected to the board of supervisors.

After the district court denied the request for an injunction, the parties entered into a consent order staying the litigation until six months after release of the 2000 census. In April 2001, the court dismissed the Shaw/Miller litigation brought by the white plaintiffs as "largely moot."[866]

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[865] Coleman v. Perry County, Civ. No. 2:93-CV-250 (S.D. Miss.).

[866] Id., Order of April 9, 2001.

In addition to showing the essential role of the Voting Rights Act in securing the equal opportunity for racial minorities in the political process, this case illustrates how white voters and incumbents continue to resist change by often filing fruitless challenges to fairly drawn election plans.

MISSOURI

The City of St. Louis

Moore v. Board of Election Commissioners

Thousands of voters in St. Louis, Missouri, were turned away at the polls on election day 2000 because of inaccurate voter lists and other irregularities. Many more voters did not even have the opportunity to vote because of understaffed polling places and inadequately trained election workers. So widespread were the problems, in fact, that voters sued to extend voting hours in the city because of substantial delays experienced earlier in the day.[867]

Once the dust from the election had settled, the ACLU brought suit in state court on behalf of African American voters challenging those systemic election practices and procedures that had contributed to the election day difficulties in St. Louis.[868] Among the problems targeted by the suit were: the city's use of flawed inactive voter lists, inadequately staffed polling places, inadequate and malfunctioning voting equipment, inadequate training of election judges, lack of sample balloting machines, and lack of available assistance to voters who need help completing a ballot. The plaintiffs alleged that these and other election practices had a disproportionate impact on African Americans and violated the state constitution.

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[867] Odom v. Board of Election Commissioners, No. 004-2379 (St. Louis City Circuit Court 2000).

[868] Moore v. Board of Election Commissioners, No. 014-01245, (St. Louis City Circuit Court 2001).

The parties engaged in settlement negotiations for more than a year and were on the verge of settlement when the Department of Justice filed a similar suit in federal court.[869] The Attorney General alleged on behalf of the United States that the city's inactive voter procedures had resulted in the improper removal of eligible voters from the registration rolls in violation of the National Voter Registration Act of 1993 (NVRA).

The city quickly settled with the Department of Justice. In a consent decree filed in August 2002, the city agreed to: conduct a media campaign designed to encourage city residents to verify whether their voter registration status remained active; appoint "specialist judges" to process inactive voters on election day; provide adequate staff and technology to each polling place; and maintain its list of inactive voters in conformity with the requirements of the NVRA.

The consent decree provided the ACLU plaintiffs substantially all the relief they had sought under state law, and rendered their state court case moot. Once the federal court approved the consent decree, the ACLU plaintiffs voluntarily dismissed their case.

[869] United States v. Board of Election Commissioners, Civ. No. 4:026CV001235 CEJ (E.D. Mo.).

NORTH CAROLINA

STATEWIDE ISSUES

State Redistricting

Thornburg v. Gingles

Black residents of North Carolina successfully challenged in district court six multi member house and senate districts in the state's 1982 legislative redistricting plan as diluting black voting strength in violation of Section 2.[870] The state appealed.

The ACLU and the League of Women Voters (LWV) filed an amicus brief in the Supreme Court in support of the plaintiffs. One of the arguments made by the state, which was supported by the Solicitor General as counsel for amicus curiae United States, was that the election of a token number of minorities to office in the disputed districts foreclosed a Section 2 vote dilution challenge. In its amicus brief, the ACLU and LWV argued that when Congress amended Section 2, it included express language requiring that the political processes be "equally open" to minorities, and that they not have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Given congressional policy in favor of strong enforcement of civil rights, the right protected by the statute was one of equal, not token or minimal, political participation.

[870] Gingles v. Edmisten, 590 F. Supp. 345 (E.D.N.C. 1984).

The Supreme Court, in its first opinion construing amended Section 2, affirmed the decision of the lower court, and in doing so rejected the argument that "some" black electoral success foreclosed a Section 2 challenge. Citing the legislative history and the language of Section 2, it held that if the election of a few minority candidates foreclosed the possibility of dilution of the black vote, the majority might evade Section 2 "by manipulating the election of a 'safe' minority candidate." The court concluded, where a districting plan "generally works to dilute the minority vote, it cannot be defended on the grounds that it sporadically and serendipitously benefits minority voters."[871]

Thornburg v. Gingles was a landmark case because the court set standards for adjudicating vote dilution claims, i.e., by proof of minority geographic compactness, minority political cohesion, and legally significant white bloc voting, known as the "Gingles factors," which greatly facilitated Section 2 challenges throughout the South and the nation as a whole.

Shaw/Miller Litigation and Congressional Redistricting in North Carolina

Shaw v. Hunt

Upon his departure from Congress in 1901, George White, a black Republican from Tarboro, North Carolina, announced that "[t]his is perhaps the Negro's temporary

[871] Thornburg v. Gingles, 478 U.S. 30, 75-6 (1986).

farewell to Congress."[872] He was right. It was not until 1992, when Melvin Watt and Eva Clayton were elected from two majority black districts in North Carolina, that Tarheel voters again sent an African American to Congress. Watt's 12th District was 57% black and was so persistently challenged by white voters that its boundaries were considered by the Supreme Court no less than four separate times.

In Shaw v. Reno the Court held that North Carolina's 1991 congressional plan was subject to challenge under the Fourteenth Amendment, saying the plan "bears an uncomfortable resemblance to political apartheid," and because Watt's majority black district was "bizarrely" shaped.[873] The ACLU, along with its involvement in other Shaw/Miller litigation, participated as an amicus in defending the constitutionality of District 12.

The court's ruling in Shaw v. Reno was made despite the fact that irregularly shaped districts had frequently been drawn to protect white incumbents, and despite the facts that the court had previously held that a regular district shape was not constitutionally required and that the white plaintiffs did not allege that they had been injured or that their voting strength had been diluted by the challenged plan. Furthermore, while blacks constituted 22% of North Carolina's population, just 2 of 12 districts - 17% - were predominantly minority. In addition, in its original configuration,

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[872] Michael Barone with Richard E. Cohen, eds., The Almanac of American Politics (Wash., D.C.: National Journal Group, 2003), p. 1225.

the 12th District was more integrated, or racially balanced, at 57% black and 43% white, than any congressional district previously drawn in the state.

On remand the three-judge district court again dismissed the complaint on the grounds that the state's plan promoted a compelling interest and was narrowly tailored, and the Supreme Court again agreed to hear the case on appeal. The ACLU, joined by the Lawyers' Committee for Civil Rights Under Law, filed an amicus brief in support of the appellees, who were the state defendants below, in support of the challenged plan. The ACLU argued in its brief that Congress had sanctioned the use of majority minority districts and that highly racially integrated districts such as those in North Carolina did not segregate or cause harm to voters. The Supreme Court reversed, however, on the grounds that race was the "predominant" factor in drawing the plan and the state had subordinated its traditional redistricting principles to race.[874]

In response to the decision of the Supreme Court, North Carolina enacted a new congressional plan in 1997. This time, District 12 was more regular in shape and was majority (53%) white. The state also claimed that it drew its plan primarily for political reasons; that is, to maintain the existing split of six Republican and six Democratic districts and that race was not a predominant consideration. The district court, without

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[873] 509 U.S. 630 (1993).

874Shaw v. Hunt, 517 U.S. 899 (1996).

benefit of a trial, brushed aside the state's explanations of how and why it had drawn the districts and summarily struck down the 1997 plan as "facially race driven."[875]

The state appealed, and the ACLU again filed an amicus brief in support of the challenged plan. The ACLU argued that the entire Shaw/Miller line of cases should be reconsidered by the court, and that it should return to the pre-existing rule that redistricting plans may be invalidated only if they cause actual harm to some identifiable group in the jurisdiction. The Shaw/Miller cases acknowledged that the white plaintiffs neither alleged nor suffered any personal injury, such as the dilution of their voting strength. Instead, the alleged injury was theoretical and consisted in being "stigmatized" by a racial classification, a claimed injury that has been previously rejected by the court as being insufficient to state a claim in cases brought by black plaintiffs. By requiring strict scrutiny of majority-minority districts, the Shaw cases singled out non-whites for special, discriminatory treatment in the redistricting process.

The Supreme Court reversed the decision of the three-judge court.[876] It held that the court improperly invalidated the state's plan without first holding a trial to resolve disputed issues of fact - whether the plan had been drawn "predominantly" on the basis of race or merely to preserve partisan balance in the state's congressional delegation. The case was again sent back to the district court for further proceedings.

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[875] Quoted in Hunt v. Cromartie, 526 U.S. 541, 545 (1999).

[876] Id. at 554.

On remand the three-judge court again invalidated the challenged plan and the Supreme Court again agreed to hear the state's appeal. The ACLU filed an amicus brief in which it reiterated its arguments that the Shaw/Miller line of cases should be reconsidered, and that the court should return to the pre-existing rule that redistricting plans may be invalidated only if they cause actual harm to some identifiable group in the jurisdiction. The Supreme Court did not set aside its Shaw jurisprudence, but it again reversed the lower court and held that its finding that the challenged district had been drawn primarily on racial lines was clearly erroneous, and that the district was not unconstitutional.[877]

By 1998, the black population in District 12 had shrunk to just 36%, but Watt won reelection with 56% of the vote, based on the power of incumbency and the support of many white liberals in this heavily urban district. "There are still whites who under no circumstances will vote for a black person," Watt said.[878] He has continued to represent the 12th District and in 2004 was unanimously elected as chair of the Congressional Black Caucus for the 109th Congress.

[877] Easley v. Cromartie, 532 U.S. 234 (2001).

[878] Barone (2003), p. 1227.

COUNTY AND MUNICIPAL LITIGATION IN NORTH CAROLINA

Alamance County

Lewis v. Alamance County

Alamance is one of 40 North Carolina counties covered by Section 5. In 1990, Alamance County elected its five member board of commissioners in at-large, partisan elections. In the primary, candidates had to receive at least 40% of the votes to be nominated without a run off, and the general election was decided by majority vote. According to the 1990 census, almost 20% of the county was black, but only one black person had ever been elected and he was initially appointed and ran as an incumbent.

In 1993, the ACLU filed suit of behalf of black voters challenging the at-large method of electing the board of commissioners as violating the Constitution and Section 2.[879] Although the district court found that blacks usually voted for the same candidates, and rejected arguments by the defendants that black voters were not cohesive ("The overwhelming evidence indicates that the Alamance County black community is cohesive."[880]), the court dismissed the complaint, concluding that black voters had "some success electing preferred white candidates," and therefore there was no evidence of racially polarized voting sufficient usually to defeat the minority community's candidates of choice.

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[879] Lewis v. Alamance County, No. 2:92CV00614 (M.D.N.C.).

[880] Id., Order of April 6, 1995.

On appeal, in a 2-1 opinion, the Fourth Circuit affirmed. It held that black voting strength was not diluted because blacks often voted for winning white candidates. The dissent, noting the lack of success of minority candidates, said "I believe that members of the black community in Alamance County would be truly surprised to learn that they enjoy the same opportunity as white voters to elect their preferred candidates as county commissioners."[881] The Supreme Court denied the plaintiffs' petition for review.[882]

Brunswick County

Gause v. Brunswick County

Located in the southeastern corner of North Carolina's, Brunswick County is one of the state's fastest growing communities. Once a favored destination of Confederate blockade runners, Brunswick County has since been discovered by a generation of retirees drawn to its temperate climate. The North Carolina board of elections registered 10,343 Brunswick County voters in 1970, but that number had nearly tripled to 29,921 by 1992, with white voters accounting for most of the growth. The population explosion did little to relieve historical housing segregation, however. As of 1994, the county's booming beach towns included only seven African American residents. The 1990 census also showed severe income disparity between Brunswick County's black

[881] Lewis v. Alamance County, N.C., 99 F.3d 600, 620 (4th Cir. 1996) (Michael, J., dissenting).

[882] Lewis v. Alamance County, N.C., 520 U.S. 1229 (1997).

and white residents, with black per capita income at $6,862 compared to $12,789 for whites.

The county council consisted of five members elected at-large, and though the black community constituted more than 18% of the county population, it was unable to elect its candidates of choice. Even black candidates who received between 80% and 100% of the black vote could not win.

Thurman Gause, a former candidate for county commissioner, filed suit in 1993, represented by the ACLU, challenging the county's at-large system as diluting minority voting strength in violation of Section 2.[883] Gause asked the court to enjoin future elections until Brunswick County reconfigured its five election districts to make one of them majority black. Plaintiff's redistricting expert showed it was possible to create a district with a population more than 60% African American.

Brunswick County moved for summary judgment, arguing that the black population was too dispersed to make a compact voting district, and that black preferred candidates had been elected to other offices in the county. The county objected to plaintiff's proposed majority black district and argued that it was based on "geographic extremes."

The district court granted the defendant's motion for summary judgment, noting the successes of black candidates in school board elections, and the difficulty of drawing

[883] Gause v. Brunswick County, No. 93-80-CIV-7-D (E.D.N.C.).

a compact, majority black district when only one of the county's 22 precincts was majority black. [884]

The plaintiff, represented by other counsel, appealed and the Fourth Circuit affirmed. In an unpublished opinion, it held the dispersion of the county's minority population prohibited the construction of a majority black district, which it held was a prerequisite to maintaining a vote dilution suit.[885]

Chatham County and Siler City

Patterson v. Siler City

Siler City is located in Chatham County, North Carolina. The city was governed by a mayor and five member town commission, elected at-large and by majority vote. As of 1988, the city was 28.8% black, but in its 101 year history only one black person, George Edwards, had ever been elected to the commission.[886]

For years, black residents of Siler City had requested the commission to change its voting system. Dan Patterson, an active resident of Siler City, along with other black citizens, sent numerous letters to the board arguing that at-large elections precluded minorities from electing representatives of their choice. In March 1988, the city created

[884] Id., Order of October 12, 1995.

[885] Gause v. Brunswick County, N.C., 92 F.3d 1178 (4th Cir. 1996).

[886] Bob Wachs, "Lawsuit Challenges Town Electoral Process," The Chatham News, July 14, 1988, p. 1A.

an Electoral System Committee, comprised of 5 whites and 4 blacks, to advise the board on possible alternatives to the existing method of electing commissioners, giving particular consideration to providing an equal opportunity for black citizens to elect candidates of their choice.[887] Even the city attorney admitted that "as long as we have 'at-large' elections with all voters being able to vote for all seats, it will be difficult to get a black elected."[888]

In July 1988, after years of waiting on the city to respond to the black community's requests, Patterson and other black residents, represented by the ACLU, challenged Siler City's use of at-large elections as violating the Constitution and Section 2.[889] The defendants moved to stay the proceedings on the grounds that the city had undertaken the development of a new election plan which would address the problems with the city's voting system. The proposed plan provided for a seven member board of commissioners - five elected from districts and two elected at-large. The new plan created two majority black districts, and would go into effect in the 1989 election. After the North Carolina General Assembly enacted the new election system for Siler City, the parties consented to a dismissal of the action.[890]

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[887] Earl B. Fitts, Mayor of Siler City, to Electoral System Committee Members, March 30, 1988.

[888] Minutes from Electoral System Committee meeting, April 20, 1988.

[889] Patterson v. Siler City, Civ. No. C-88-701-D (M.D.N.C.).

[890] Id., Order of March 30, 1989.

Soon after the suit was dismissed, the Chatham County Election Board met to consider consolidating its two town polling places into one for municipal elections. One of the polling places was located in a predominately minority community and it was estimated that between 20% - 30% of voters who used this location walked to the polling place to vote. The county, however, wanted to locate the new polling place in a predominately white community that had little parking and virtually no black poll workers or managers. Black residents protested the proposed new location, arguing that removing the polling place from the minority community would cause considerable economic hardship on those voters who would now have to go across town to vote.[891]

Edgecombe and Nash Counties and the City of Rocky Mount

Green v. City of Rocky Mount

The City of Rocky Mount lies on the Tar River in North Carolina with parts of the city divided between Edgecombe and Nash Counties. Based on the 1980 census, the city was 42% black.

Over several decades, the City of Rocky Mount engaged in numerous tactics that diluted black voting strength. Prior to 1961, the 13 member Rocky Mount City Council was elected by wards with two members elected from each of six wards and the

[891] Dan Patterson to Ben Shivar, Town Manager, June 11, 1989.

remaining council member elected from a seventh. In 1961, the city switched to at-large elections but retained seven residency wards. In 1973, the city reduced the size of the council to seven members, with two members appointed at large, and two members elected at-large from residency wards. In 1975, the city increased the terms for council members from two to four years.

In 1977, the city submitted 67 different annexations for preclearance, 36 of which the Department of Justice objected to because they would have diluted black voting strength. The department found that:

> [T]he information you have provided leads to the conclusion that the annexations have decreased the black population of Rocky Mount by between 2.4 and 3.1 percentage points. Our information regarding elections in Rocky Mount indicates that the city council is elected on an at-large basis and that racial bloc voting exists generally.
>
> Under these circumstances . . . we cannot conclude that the 36 annexations in question will not have a racially dilutive effect on voting in Rocky Mount.[892]

Under the at-large system, and given the prevalence of white bloc voting, only one black candidate had ever been elected to the city council. In 1983, undeterred by its previous unsuccessful efforts to annex areas that would dilute black voting strength, the city tried again to annex 11 new areas. The city prepared a ward map and redistricting plan that would accommodate the new areas but which was severely gerrymandered to limit black voting strength. Under that plan, approximately 42.1% of the city's black

[892] Drew S. Days, III, Assistant Attorney General, to Richard J. Rose, December 9, 1977

population was packed into Ward 2, resulting in a minority population of 87%. The remaining black population was spread evenly across Wards 3, 4, and 5, each having a majority white population. The city submitted the proposed annexation plan to the Justice Department in July 1983, and the proposed redistricting plan a month later. In a letter dated September 6, 1983, the department informed the city that it needed extensive additional information before it could approve the annexations.

On September 28, 1983, the ACLU, representing black residents of Rocky Mount, sued the city council and the boards of elections of Nash and Edgecombe Counties for violations of Sections 2 and 5 and the Constitution.[893] The complaint alleged that the city was preparing to implement the annexations and redistricting plan in municipal elections to be held in October without Section 5 preclearance, and the ACLU asked for an order enjoining the city from doing so. The court granted a temporary restraining order on October 7, 1983, four days before the elections were to take place. The city then consented to be permanently enjoined from implementing the annexations and redistricting plan until they were precleared. The Department of Justice objected to the proposed annexations, saying:

> [E]ven though blacks constitute over 42 percent of the city's population, at no time has more than one black been elected to the city council, which appears to be the result of a general pattern of racially polarized voting occurring in the context of Rocky Mount's at-large election system with its residency and majority vote requirements. While our analysis of available

[893] Green v. City of Rocky Mount, N.C., Civ. No. 83-81-CIV-8 (E.D.N.C.)

> data indicates that the proposed annexations will initially reduce the city's minority population by only 1.1 percent, the planned development of the areas to be annexed would over time most likely result in a substantially larger percentage dilution. In the context of the at-large election system that exists in Rocky Mount, we view this prospect as significantly enhancing the ability of the white majority to control the election of all councilmembers. The city must, in such circumstances, provide significant and credible nonracial justifications for these proposed annexations sufficient to offset the apparent discriminatory effect. This the city has failed to do, notwithstanding our request for further information.
>
> Our analysis of these annexations, along with the past history of annexations to the City of Rocky Mount, lead us to note, also, that annexing additional areas to the city in the future likely will be problematic when the projected population of such annexations will have an additional adverse impact on minority voting strength. However, should the city adopt an electoral system that would afford minorities a realistic opportunity to elect candidates of their choice in the expanded city, such a change would enhance the city's ability to obtain the required Section 5 preclearance of future annexations.[894]

The ACLU also challenged the 1983 redistricting plan for the council, with at-large elections and residential districts, as diluting black voting strength. The city stipulated that the black population in the city was sufficiently populous and concentrated so that, of seven wards, three could be drawn that were majority black.

In February 1985, the city adopted, and plaintiffs approved, a new electoral plan that provided for seven single member districts or wards. Three of the wards had a minimum of 64.9% black residents, while a fourth had a black population of 42.12%.

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[894] William Bradford Reynolds, Assistant Attorney General, to Richard J. Rose, February 21, 1984

The plan would remain in effect until 1990. Furthermore, for any plan adopted after 1989, the city agreed to:

> comply with its duty to construct an electoral system that does not result in any denial or abridgment of the right to vote on the basis of race, color, or previous conditions of servitude and shall not implement any change in voting procedure that would have the purpose or effect of denying or abridging the right to vote on account or race, color or membership in a language minority group.[895]

On May 9, 1985, the Attorney General approved the new electoral plan. Today four of the seven city council members are African American.

The Edgecombe County School District also drew an objection from the Department of Justice in 1984, when it sought to establish residency districts for the election of six of the seven school board members:

> [O]ur analysis indicates that in the context of an at-large election system such as exists in the Edgecombe County school district, the proposed residency districts would operate essentially as designated posts, separating what has been a single contest for several seats into several contests for single positions on the school board. In such a situation we note that when the black electorate is in the minority, as it is in the Edgecombe County school district, and racially polarized voting exists, as it seems to in the Edgecombe County School District, the opportunity to engage in single-shot voting offers minority voters a realistic chance to elect a candidate of their choice to office. Indeed, past success for the black electorate in Edgecombe County would seem to have occurred because several positions were open and the presence of a number of candidates caused the white vote to be split, thus allowing a candidate of the black voters' choice to win.

[895] Green v. Rocky Mount, First Set of Stipulations, September 20, 1985.

> However, in the context of an at-large election system and the racially polarized voting which seems to exist in Edgecomb [sic] County, the imposition of the proposed residency districts would appear to decrease significantly the opportunities for minority voters to elect a representative of their choice. Such a result would constitute impermissible "retrogression" for black voters in the Edgecombe County school district.[896]

Hartford County and the Town of Ahoskie

Hines v. Callis

Ahoskie is a small town located in northeastern North Carolina and the economic center of rural Hertford County. In the late 1980s and early 1990s, Ahoskie was the center of a conflict over annexations that left the town "reeling under a burden of racial tensions that has polarized voters and pitted neighbor against neighbor."[897] At the time, Ahoskie's population of approximately 5,000 people was almost evenly divided between blacks and whites.

In 1988, Ahoskie commissioned a study to determine the feasibility of annexing three surrounding areas. Although the study ultimately recommended approval, the white dominated town council voted in early 1989 to exclude two predominantly black neighborhoods from the proposed annexation. Many households in the excluded areas did not have water and sewer service, and the residents strongly supported annexation.

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[896] William Bradford Reynolds, Assistant Attorney General, to Joseph J. Harper, Jr., January 16, 1984

[897] Marcia Stutts, "Blacks, whites in Ahoskie seek common ground," The Virginian-Pilot, November 19, 1989, p. B1.

The remaining areas proposed for annexation consisted of several predominantly white neighborhoods, including one relatively affluent neighborhood whose residents spoke out against joining the town. The mayor sought to justify the exclusion of the black neighborhoods on the grounds of economic feasibility.

African American residents of Ahoskie objected to the revised annexation plan. Some publicly charged the town with racism, claiming that race, not economics, was behind the council's decision to exclude the black neighborhoods. Others suggested that the council wanted to add white voters to the city in order to maintain control over the town council.

Black residents held a rally at a local church to discuss the issue and later voiced their opposition at a meeting of the Ahoskie Town Council. Despite the black residents' opposition, the five member council voted 4 to 1 to proceed with the revised annexation plan. The council's only black member cast the lone dissenting vote.

The final hurdle for the annexation was Section 5 preclearance. Ahoskie submitted the town's new boundaries to the Attorney General in March 1989. The Justice Department's review turned up five prior annexations since 1964, for which the town had not obtained preclearance, and the Attorney General asked the town several times for more information. The ACLU submitted comments on behalf of black residents. Ahoskie's mayor expressed confidence that the Attorney General would ultimately preclear the plan despite objections from black residents, saying "I don't

anticipate any problems with this. We have a handful of malcontents who are raising a smokescreen and making unsubstantiated claims."[898]

When the Department of Justice subsequently advised Ahoskie in late October that the Attorney General would not be able to make a determination on the town's submission in time for the municipal elections scheduled for November 7, 1989, the town council voted unanimously to postpone the election until the Attorney General made his decision.

Leaders of the African American community opposed the delay. Two black candidates were running for vacancies on the town council, and many believed that the annexation of white neighborhoods would hurt their chances of success.

On November 1, 1989, the ACLU filed suit in federal district court on behalf of Edna Hines and other African American voters in Ahoskie.[899] The plaintiffs alleged that the town's failure to obtain preclearance for prior annexations and its decision to postpone the election violated Section 5. The plaintiffs further alleged that the town's at-large method of electing its five member town council violated Section 2 and the Constitution. Among other things, the plaintiffs sought a temporary restraining order requiring the town to proceed with the election and to exclude voters living in the annexed areas that had not yet been precleared.

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[898] Marcia Stutts, "Ahoskie annexation gets funding nod," The Virginian-Pilot, June 21, 1989, p. D1.

[899] Hines v. Callis, No. 89-62-CIV-2-BO (E.D.N.C)

The district court granted the plaintiffs' request on November 3, and the election went ahead as scheduled. According to the local media, the election was marked by an abnormally large voter turnout[900] and voting "appeared to be motivated almost entirely by race."[901] Both black candidates were defeated.

Shortly after the election, the Attorney General precleared Ahoskie's five prior annexations but objected to the proposed annexation of several predominantly white neighborhoods. The Attorney General observed that "even though the town is close to 50 percent black in total population, black candidates have had extremely limited success in winning seats on the five-member town council." According to the Justice Department, the black candidates' lack of success was due "largely to a pervasive pattern of racially polarized voting in town elections in combination with the existing at-large electoral structure for the town council." The Attorney General further indicated that the annexation may have been motivated by a discriminatory purpose, finding that the town's decision to annex the predominantly white neighborhoods and not to annex the predominantly black neighborhoods "cannot be reconciled on the basis of . . . [race] neutral considerations."[902]

Following the objection, Ahoskie abandoned efforts to extend its boundaries, and

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[900] "Surprising voter turn-out in Ahoskie," Roanoke-Chowan News-Herald, November 8, 1989, p. A1.

[901] Marcia Stutts, "Blacks, whites in Ahoskie seek common ground," The Virginian-Pilot, November 19, 1989, p. B1.

[902] James P. Turner, Acting Assistant Attorney General, to Larry S. Overton, December 19, 1989, p. 2.

the parties agreed that the plaintiffs' Section 5 claims had been resolved. Litigation then moved forward on the plaintiffs' challenge to the town's at-large method of elections.

Ahoskie eventually agreed not to contest the plaintiffs' claim that at-large elections violated Section 2, but the parties were unable to agree on a remedial plan. The town council proposed a plan that divided the town into two districts, one majority black and the other majority white. Two members of the town council would be elected by the voters of each district, with a fifth member elected at-large. The plaintiffs opposed the plan on the grounds that an at-large election for the fifth seat would give white voters an unfair advantage. Because of the town's history of racially polarized voting, they argued, white voters would be able to control three out of five seats under the town's proposed plan. The plaintiffs proposed that the fifth council member be elected from a "swing" district in which black and white voters would have a roughly equal opportunity for success. With the parties' negotiations at an impasse, the defendants asked the court to impose their plan over the plaintiffs' objections.

In January 1991, after the district court ruled that the town had to preclear the defendants' plan before the court could consider it, Ahoskie submitted the plan to the Attorney General for preclearance. The plaintiffs opposed preclearance, filing several objections with the Department of Justice, but the Attorney General precleared the plan on August 19, 1991.

Ahoskie then re-submitted its plan to the district court for approval in the form

of a motion for summary judgment. The plaintiffs opposed the motion, arguing that the at-large election for the fifth council seat violated Section 2. The court held a hearing on the motion in February 1992.

Six months later, after reviewing the evidence, the district court found that Ahoskie's plan "effectively provided [whites] with three 'safe' seats" and would therefore violate Section 2.[903] The court also rejected the plaintiffs' proposed plan because there was not enough data in the record to determine whether the proposed swing district would actually give black and white voters an equal opportunity to elect the fifth council member. The court instead adopted its own plan which eliminated the fifth seat altogether and retained a four member town council with two members to be elected from a majority black district and two from a majority white district.

Both sides appealed. The court of appeals reversed, holding that the district court should have adopted the defendants' plan.[904] The court of appeals acknowledged that its review of election results from Ahoskie and Hertford County "reveals a history of racially polarized voting."[905] It cited black and white cohesion levels above 90% and white crossover voting of only 16.2% for a recent black mayoral candidate. The court also found that seven African Americans had run for the Ahoskie town council but only

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[903] Hines v. Callis, Order of September 3, 1992, at 14.

[904] Hines v. Mayor and Town Council of Ahoskie, 998 F.2d 1266 (4th Cir. 1993).

[905] Id. at 1269.

two had ever been elected. There was clearly no dispute that the town's at-large election system violated Section 2.

The court of appeals nonetheless found that it was impossible to create a true swing district in Ahoskie and that the inability to do so required the district court to defer to the town's proposed plan as the best feasible remedy under the circumstances. The court also rejected the plaintiffs' proposed plan on the grounds that creating three majority black districts would dilute white voting strength because African Americans might be over represented on the town council.

The court of appeals also relied on the Supreme Court's ruling in Shaw v. Reno, decided just days before, in which the Court held for the first time that a "bizarrely shaped" voting district might violate the equal protection clause if it could only be understood as an effort to segregate voters on the basis of race and was not narrowly tailored to achieve a compelling governmental interest. Even though the defendants had not alleged that the plaintiffs' plan was unconstitutional, and the parties had not presented any evidence on that issue, the court of appeals nonetheless held that the plaintiffs' proposed plan "would violate the equal protection rights of white voters."[906]

Ahoskie held its first election under the new plan in November 1993. All five seats were up for election, and two black candidates were successful in the majority black district. Events in Ahoskie clearly show the role played by Section 5 in deterring

[906] Id. at 1274.

annexations likely to dilute black voting strength. This case also illustrates the often complex interplay among annexation decisions, election structure, and legal challenges brought by black voters under the Voting Rights Act to preserve their right to participate equally in the political process.

Martin County and the Cities of Williamston, Robersonville and Jamesville

Daniels v. Board of Commissioners of Martin County

In October 1989, black residents of Martin County, represented by the ACLU, filed suit challenging at-large elections for the county commission and the city commissions of Williamston, Robersonville, and Jamesville as diluting minority voting strength in violation of Section 2 and the Constitution.[907] The county, located in Eastern North Carolina, was 44.5% black, but only one black person had ever been elected to its five member commission. The town of Williamston was 47.52% black, but only one black person, William Honeyblue, had ever been elected to its six member commission. Robersonville was 47.3% black, but only one black person had ever been elected to its five member commission. Jamesville was 40% black, but only one black person, John Cabarrus, had ever been elected to its five member commission. Cabarrus died in office in 1987, and the town commission appointed a white person to fill the vacancy.

[907] Daniels v. Board of Commissioners of Martin County, Civ. No. 89-137-CIV-4-H (E.D. N.C.).

Plaintiffs further alleged that Jamesville, which along with Martin County is covered by Section 5, extended its corporate limits in 1967, and changed its method of elections after 1971, but failed to submit either change for preclearance.

Voting in Martin County was sharply polarized on racial lines. In 1967, the method of electing the county board of education was changed from appointments by the legislature to nonpartisan at-large elections with plurality voting and no residency districts. In 1971, the size of the board was increased from five to six members with five residency districts, including one two member district. Then in 1975, a seventh at-large seat was added to the board. Despite the fact that all of these changes were subject to Section 5, the board did not submit any of them for preclearance until 1986. The Attorney General objected to the adoption of residency districts, because they deprived black voters of "the opportunity to single-shot, or 'bullet,' vote for the candidate(s) of their choice from among the entire field of candidates that appeared on the ballot at each election." The Attorney General also noted:

> a prevailing pattern of racially polarized voting in county-wide elections involving black candidates in Martin County. Black candidates seem generally to be the choice of black voters, but only one black candidate has ever won election to the board, despite a significant number of black candidacies. . . . Our analysis further reveals that the black community apparently was not consulted about the adoption of residency districts until after that change effectively had become an accomplished fact. . . . [T]he school board's imposition of residency districts has had an unmistakable retrogressive effect on the ability of minority voters to elect

> candidates of their choice, particularly in light of the high degree of racial bloc voting that seems to exist.[908]

Following this objection, the school board adopted a plan in 1987, providing for elections from seven single member districts.

After extensive negotiations, the county agreed to adopt a system of limited voting for the county commission using two multi-member districts, an Eastern District, which included Williamston and Jamesville, and a Western District, which included Robersonville. The plan provided for the five commission members to be elected at-large by plurality vote in partisan elections, with three members elected from the Eastern District, with each voter casting two votes, and two members elected from the Western District, with each voter casting one vote. The decree also provided that "[i]t appears, after reasonable discovery, that the Plaintiffs can present a prima facie case that the method of electing the Board of Commissioners of Martin County is in violation of Section 2."[909]

The Attorney General precleared the plan on January 11, 1991, and it became effective in the 1992 elections when all five county commission seats were up for election.

The City of Robersonville

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[908] William Bradford Reynolds, Assistant Attorney General, to Daniel A. Manning, October 27, 1986.

[909] Daniels v. Board of Commissioners, Consent Order of October 16, 1990.

Approximately six months after the county settled its portion of the case, the city of Robersonville stipulated by consent decree that "the plaintiffs have presented a plausible claim under Section 2."[910] The decree provided for a five member commission, with one member elected at-large and the remaining four elected from two double member districts, one majority black and one majority white. Soon thereafter, the 1990 census showed Robersonville's black population had increased to 54.8%. The city, with the approval of the plaintiffs, revised the district boundaries in light of the new census. The plan was submitted to the Justice Department, which precleared it on July 19, 1991.[911]

The City of Williamston

In November 1989, Williamston had moved to stay the plaintiffs' suit, arguing that the town would eventually adopt a new voting system which would render the case moot. While the motion was pending, the town created a redistricting committee composed of three commissioners, two white and one black, and four citizens, two white and two black, to review alternative districting plans. The district court denied the city's motion for a stay on April 10, 1990, and the following week, the city renewed its motion for a stay representing that it was in the process of adopting a new method of elections based on the recommendations of its districting committee.

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[910] Id., Order of March 12, 1991.

[911] John R. Dunne, Assistant Attorney General, to Michael Crowell, Attorney for Martin County, July 19,

On April 19, 1990, the committee recommended that the city commission have five members, with three elected from single member districts, one majority black, two majority white, and two members elected at-large. The commission adopted the committee's recommendations, and without consulting the plaintiffs. Given the patterns of racial bloc voting that existed in the city, the plan ensured that black residents, despite the fact that they were almost 50% of the population, would be able to elect a candidate of their choice to only one of the five commission seats.

On April 27, 1990, plaintiffs renewed their objections to Williamston's motion for a stay, arguing that the proposed plan was inadequate because it continued the use of at-large elections and created only one majority black district. On May 25, 1990, the district court denied Williamston's motion, finding that even if the new redistricting plan was adopted and precleared, a controversy still existed between the parties as to the election scheme.

The plan was enacted by the state legislature, and the city submitted it to the Attorney General for preclearance. The Attorney General requested Williamston to submit additional information, but rather than comply with the request, the city reconvened the redistricting committee to consider alternative plans. The committee recommended a different plan, which plaintiffs and the majority of black citizens supported. The new plan provided for five commissioners, one elected at-large and the

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1991.

remaining four elected from two double member districts, one majority white and one majority black.

The city withdrew its initial plan, submitted the new one to the Justice Department, which precleared it on August 22, 1991. The parties then consented to a voluntary dismissal of the suit against Williamston.

The City of Jamesville

After the lawsuit was filed, Jamesville submitted its 1967 annexation, and the subsequent change from partisan to non-partisan elections, for preclearance. In comment letters to the Attorney General, plaintiffs noted that the annexation had excluded several black families who lived in the area.[912] The Attorney General precleared the change in the method of elections, but asked for additional information concerning the annexation.

In February 1992, the parties entered into a consent decree in which the city, which was 40% black, stipulated that "[i]f this lawsuit were to be tried, plaintiffs would be able to produce evidence to support their claim that the current method of electing town commissioners violates Section 2 of the Voting Rights Act."[913] Pursuant to the consent decree the five member commission would be elected at-large by plurality vote and by limited voting. Each voter could cast only two votes and vote for no more than two candidates. Any ballot containing more than two candidate names would be considered invalid. Jamesville submitted the new plan to the Department of Justice and it was precleared on April 10, 1992.

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[912] Kathleen Wilde, ACLU staff counsel, to Teresa Lynn, U.S. Department of Justice, February 7, 1991; April 17, 1991; August 20, 1991.

[913] Daniels v. Board of Commissioners, Order of February 5, 1992.

Moore County and the Town of Southern Pines

Person v. Moore County Board of Commissioners

Moore County is located in the Sandhills region of central North Carolina, approximately 50 miles southwest of Raleigh and 100 miles east of Charlotte. Over the last 20 years, Moore County has been one of the fastest growing counties in the state, with a large influx of retirees and affluent residents attracted to the county's many recreational amenities, including 43 golf courses, among them the famous Pinehurst Resort and Country Club.

In 1989, at the beginning of the population boom, the ACLU represented a group of black voters in a lawsuit against the Moore County Commission, the Moore County Board of Education, and the Town Council of Southern Pines, the county's largest municipality.[914] At the time, both the five member county commission and the eight member board of education were all white, even though African Americans made up 21.2% of the county population according to the 1980 census. In Southern Pines, where African Americans made up 37.8% of the population, four out of five members of the town council were white. The plaintiffs alleged that the at-large method of electing each governing body violated Section 2 and the Constitution.

Soon after the law suit was filed, the plaintiffs sought to enjoin the 1989 municipal elections in Southern Pines, but the district court denied the injunction on the

[914] Person v. Moore County Board of Commissioners, Civ. No. C-89-135-R (M.D.N.C.).

grounds that African Americans had been able to elect one black candidate to the town council in every election since the mid-1950s, through the use of single shot voting and white crossover voting for black candidates. Moreover, because the African American political community had never run more than one candidate for the town council in any election, the court found no basis on which to conclude that the at-large election system had limited black representation to a single seat.

In January 1991, the district court granted the town's motion for summary judgment on the same grounds. By then, however, the town had reduced the number of council members from five to four, and the court subsequently allowed the plaintiffs to amend their complaint to challenge the new election structure as a violation of Section 2 and the Constitution.

The case languished in the courts over the next three years while the parties conducted discovery. During that time, one of the original plaintiffs was elected to the board of education under the existing at-large system and the legal landscape changed with the Supreme Court's decision in Shaw v. Reno. In addition, the 1990 census showed significant increases in the white population of Moore County and Southern Pines, making it difficult to draw reasonably compact majority black districts. As a result, the plaintiffs voluntarily dismissed their claims in 1994.

Person County

Webster v. Board of Education of Person County

Located in the rolling hills of North Carolina's Central Piedmont region, and bordering Virginia to its north, Person County was 30.2% African American, according to the 1990 census. The Person County Board of Education consisted of five members elected at-large by majority vote to serve four year staggered terms. The elections were partisan, with nominations made in primary elections. Only one black person, Henry Eily, had ever been nominated or elected to the board since 1974.

In November 1991, James Webster, a black county resident represented by the ACLU, filed a federal lawsuit challenging at-large board of education elections as diluting black voting strength.[915] After negotiations, the parties agreed on a new system of elections. Although most vote dilution lawsuits have been settled on the basis of single member districts, the parties in Person County agreed upon a system that would retain at-large voting but remove the devices identified by the courts as "enhancing" the opportunities for discrimination. Thus, elections would be nonpartisan, terms of office would be concurrent, and election would be by plurality vote. Such a system would allow a cohesive minority to focus its votes on one or more candidates and elect them to office. The court approved the plan in a consent order, but also allowed the parties an opportunity after the 2000 election, and in the event the new system failed to provide

[915] Webster v. Board of Education of Person County, North Carolina, No. 1:91CV00554 (M.D.N.C.).

black voters with an equal opportunity to elect candidates of their choice, to reopen the litigation and request additional changes in the method of elections.[916]

Sampson County and the City of Clinton

Hall v. Kennedy

Sampson is a rural county in southeastern North Carolina, with the City of Clinton as its county seat. Based on the 1980 census, the county had a black population of 33.7%, and Clinton had a black population of 42.8%. Like many other counties in the state, Sampson had a history of discriminating against its black residents in the areas of education, employment, housing, and voting. Although more than 30 black candidates had run for countywide and city office, only a token number had ever been elected.

The county's board of commissioners and board of education each had five members elected at-large by majority vote to four year staggered terms. In a 1988 letter to the county attorney, commenting on the exclusion of African Americans from the county commission and board of education, the Department of Justice found that "black residents have been and are being denied an opportunity equal to that afforded other residents of Sampson County to participate in the political process and to elect candidates of their choice to these bodies." The department based its conclusions on several factors, including "the absence of any elected blacks on either board, the

[916] Id., Order of November 30, 1995.

minimal electoral success of black candidates in the past, the presence of racially polarized voting patterns, and a history of racial discrimination that is reflected in the continued socio-economic disparities between whites and blacks."[917]

The Clinton City Council consisted of a mayor, elected at-large by plurality vote to serve a two year term, and four council members elected at-large by plurality vote to serve four year staggered terms. Prior to 1973, no black candidate was known to have run for a council seat. Between 1973 and 1988, black candidates ran for council eight times, but were elected only twice. In both instances, the same person won, but was defeated for re-election.

The city board of education had five members whose chairperson was elected by the board. Three of the board members were elected at-large by plurality vote to four year terms, and the other two members were appointed by the elected board members. Between 1976 and 1988, black candidates ran in at least five of seven elections, but were only elected twice. A newspaper article reported that during the 1988-89 school year, 107 students had transferred from county schools to city schools, taking with them valuable tax dollars and causing racially mixed county schools to become predominately black.[918] The county school supervisor also disclosed that the county

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[917] William Bradford Reynolds, Assistant Attorney General, to Cyrus Faircloth, Esq. and Maurice Holland, Esq. , October 26, 1988.

[918] Julie King, "Leaders Don't Blame Racism for Heavily Black Schools,," The Sampson Independent, October 19, 1988.

schools were given an average of $12 less per student than city schools for the 1988-89 school year.[919] As a result, the school district had a deficit of more than $80,000.

In November 1988, black city residents, represented by the ACLU, filed a federal lawsuit challenging the method of elections for the city council and school board as racially discriminatory in violation of the Constitution and Section 2.[920] The plaintiffs requested a permanent injunction against further use of the challenged election schemes.

In December 1988, the Department of Justice filed a complaint in federal court against the county based on the department's earlier findings.[921] The department sought a restraining order prohibiting continued use of the at-large system. The department and the county later entered into a settlement agreement, in which the county agreed to adopt single member districts. However, several black residents were concerned the department would accept a plan with only one majority black district. In July 1989, those residents, represented by the ACLU, moved to intervene in the Department of Justice's lawsuit to ensure that racially fair districts would be drawn. The court granted the motion and in October 1989, the county adopted a plan providing for five single member districts, two of which were majority black.

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[919] Ruthie Matthews, "County May Face Discrimination Suit on At-large Election of School Board,," The Sampson County Review, November 3, 1988.

[920] Hall v. Kennedy, Civ. No. 88-117-CIV-3 (E.D. N.C.).

[921] United States v. Sampson County, North Carolina, Civ. No. 88-121-CIV-3, Compl. (E.D. N.C.).

As for the suit against the city council, the court determined that "[t]he present method of electing the Clinton City Council has the effect of denying black voters an equal opportunity to elect candidates of their choice, in violation of Section 2."[922] The parties agreed on a new council redistricting plan with five members elected from single member districts by plurality vote to four year staggered terms. Two of the five districts were majority black, and the mayor continued to be elected at-large by plurality vote.

The city's board of education also settled with plaintiffs, stipulating that "if this case were to be tried under Section 2 . . . the court would find from the evidence that the present at-large method of electing Clinton City Board of Education members has the effect of denying black voters an equal opportunity to elect candidates of their choice."[923] The new plan provided for a six-member council elected from single member districts, two of which were majority black, by plurality vote to serve four year staggered terms.

[922] Hall v. Kennedy, Order of July 13, 1989.

[923] Id., Order of August 14, 1989.

Scotland County and the City of Laurinburg

Speller v. City of Laurinburg

The City of Laurinburg is located in southeastern North Carolina, halfway between Charlotte and Wilmington, and just a few miles north of the South Carolina border. Although not incorporated until 1877, Laurinburg traces its origins back to 1785, and has been the Scotland County seat since the legislature created the county in 1899.

In 1993, the ACLU sued the city on behalf of five African American voters and the Scotland County Branch of the NAACP.[924] Although African Americans made up more than 45% of the city's population of approximately 11,500, there had never been more than one African American on the five member city council at any one time since 1969. The plaintiffs argued that the city's at-large method of electing the council violated Section 2.

While the lawsuit was pending, the city adopted an annexation ordinance which would have added approximately 4,100 people to the city's population, and thereby reduced the black share of the city's population by 6.5%. The city submitted the annexation to the Department of Justice for preclearance under Section 5. Noting "an apparent pattern of racially polarized voting that has limited the ability of black voters to elect their preferred candidates" in Laurinburg, the Attorney General objected to the

[924] Speller v. City of Laurinburg, No. 3:93 CV 365 (M.D.N.C.).

proposed change on April 25, 1994, concluding that the annexation "would further limit the opportunity of black voters to elect their candidates of choice to the city council."[925]

The parties settled the case shortly after the objection was issued. Under the terms of the settlement, four city council members were to be elected from two dual member districts to four year terms on a staggered basis, and the fifth was to be elected at-large to a two year term. One of the dual member districts had a black population of almost 63%. The new districts included the land contained in the city's proposed annexation, and the entire settlement agreement was contingent upon the Attorney General's preclearance of both the annexation and the settlement.

In a letter dated June 23, 1994, the Attorney General withdrew his prior objection to the proposed annexation and precleared the settlement agreement. In reaching that conclusion, he noted that the new districting plan "would fairly recognize black voting strength in the expanded city," and therefore resolved his prior concerns about the annexation.[926]

The court approved the settlement, and the new redistricting plan was first implemented in the city's 1995 elections. Today, more than 10 years later, the City of

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[925] Deval L. Patrick, Assistant Attorney General, Civil Rights Division, to Michael Crowell, Esq., April 25, 1994. This objection was not the first for Laurinburg. In 1978, the Attorney General blocked the city's attempt to implement a majority vote requirement and numbered post elections for the city council, concluding that "racial bloc voting appears to exist," and the proposed changes "could have the potential for abridging minority voting rights." Drew S. Days III, Assistant Attorney General, Civil Rights Division to Hon. Charles Barrett, December 12, 1978.

[926] Deval L. Patrick, Assistant Attorney General, to Michale Crowell, Esq., June 23, 1994.

Laurinburg is still using a similar election system, and there are three African Americans (including the Mayor Pro Tem) on the five member city council.

Tyrrell County

Rowsom v. Tyrrell County Board of Commissioners and Board of Education

Tyrrell County is located in coastal North Carolina on Albemarle Sound. In 1990, the county had a population of only 3,856 people, 40% of whom were black. Both the county commission and board of education had five members, but only one African American had ever been elected to the commission. And, although blacks had better success in school board elections, there had never been more than one African American to serve on that body at one time. Low black representation persisted, even though between 1982 and 1994, black candidates ran at least seven times for the board of commissioners and at least nine times for the board of education.

In 1993, black voters represented by the ACLU, filed suit challenging the at-large method of elections for both bodies as violating the Constitution and Section 2.[927] Given the sparse population of Tyrrell County, the parties settled the litigation by adopting limited voting. Under such a system, candidates are elected at-large but each voter has fewer votes than the number of seats up for election. Limited voting, like its

[927] Rowsom v. Tyrrell County Board of Commissioners and Board of Education, No. 93-33-CIV-Z-D (E.D.N.C.).

counterpart, cumulative voting, allows a cohesive minority to elect candidates of its choice no matter how the votes of the majority are cast. Under the agreed upon plan, members of both boards would continue to hold four year staggered terms, with two members elected in 1994 and three in 1996, but in each election voters would have only one vote. Both parties agreed that limited voting was preferable in Tyrrell to single member districts because:

> the use of such districts here would result in too small a pool of candidates for each seat, would divide communities with common interests, would limit the opportunities of some qualified candidates who might fare better countywide, would split precincts and thereby cause difficulties for election officials and voters, and would be too easily affected by small shifts in population.[928]

A consent order adopting the agreed upon plan was filed in March 1994, and two black candidates won in primary elections that spring.

Washington County

Wilkins v. Board of Commissioners

Rural Washington County lies on the south side of Albemarle Sound in northeastern North Carolina. In February 1993, the ACLU sued the county on behalf of five black voters, alleging that the county's election scheme for its five member county commission violated both Section 2 and the Constitution.[929]

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[928] Id., Order of March 28, 1994.

[929] Wilkins v. Board of Commissioners, No. 93-12-CIV-2-BO (E.D.N.C.).

The county's election scheme was highly unusual. Four members of the commission were nominated from single member districts in a partisan primary. The fifth member was nominated in an at-large primary in which all county voters could participate. Boundaries of the nomination districts followed township boundaries within the county, with one commissioner nominated from Lees Mill Township, two from Plymouth Township, and one from Scuppernong and Skinnersville Townships. In the general election, however, all five members of the commission were elected at-large. Terms of office were four years and were staggered with elections held every two years. Although African Americans made up 45% of the county's population of approximately 14,000, only one African American had ever been elected to the county commission at the time the plaintiffs filed suit.

In response to the law suit, the board of commissioners voted by a narrow margin to settle the case through negotiation. After several months of negotiations, the parties agreed on a revised election plan providing for four single member districts and one at-large seat, but the settlement stalled when the defendants insisted that the plaintiffs waive any claim to attorneys' fees, which had reached approximately $6,000.

The plaintiffs then moved for partial summary judgment on their claim that the county's nomination districts were malapportioned in violation of the one person, one vote principle of the Constitution, having a total deviation of 26%. The county defended the plan, however, on the basis that the at-large seat reduced the

malapportionment to 21.3%. The district court rejected defendants' argument and granted plaintiffs' motion finding that any reduction still left the nomination districts beyond constitutional limits. "Even if the court accepts the defendants' calculations, the 21.3% population deviation is unacceptable. . . Therefore the court finds that the present plan violates the Fourteenth Amendment 'one person, one vote' standard."[930]

While plaintiffs' motion for summary judgment was pending before the court, the chair of the county commission was defeated in the May 1994 primary. The chair then engineered a settlement proposal by the lame duck commission which called for a system of limited voting, and which would have also provided the chair with a second chance at retaining his seat. When the plaintiffs would not agree to this proposal, the county commission submitted its plan to the Department of Justice for preclearance and asked the district court to enjoin the general election on the grounds that the candidates had been nominated from malapportioned districts.

The plaintiffs opposed the motion, arguing that allowing the lame duck commission to determine the new election scheme would perpetuate rather than remedy the past discrimination. The court agreed and allowed the 1994 general election to go forward. That election resulted in a new county commission that took a markedly different approach to the litigation.

The new commission immediately withdrew the limited voting plan from

[930] Id. Order of June 23, 1984.

consideration by the Department of Justice and agreed to settle the case using the election plan on which the parties had previously agreed. Under the terms of the settlement, four members of the commission were to be nominated and elected from single member districts and one was to be nominated and elected at-large. Two of the new districts were majority black with black voting populations of 59% and 55%, respectively.

The Attorney General precleared the plan on October 23, 1995, and the district court ordered it into effect on December 1, 1995. Defendants agreed to pay plaintiffs' attorney's fees, the case was closed, and the new plan was implemented on a staggered basis over the 1996 and 1998 elections. Again, the critical role played by Section 5 is apparent.

Wayne County and the Town of Mt. Olive

Lewis v. Wayne County Board of Education

The Wayne County Board of Education consisted of seven members elected at-large. County residents living in the majority black City of Goldsboro had a separate school board and were not allowed to vote for members of the county's board of education. Based on the 1990 census, blacks were 24% of the population of the county school district, but for the prior two decades no black candidate had been elected to the board of education.

In 1992, black residents, represented by the ACLU, filed suit against the county

school board arguing that the method of elections diluted black voting strength and denied black residents the opportunity to elect candidates of choice in violation of Section 2.[931] During negotiations, the county agreed to merge the county board with Goldsboro's school board, and adopted a new election system under which black residents had an opportunity to elect their preferred candidates. The plaintiffs accepted the new plan and the case was voluntarily dismissed. Today, the Wayne County Board of Education consists of seven members elected from single member districts to four year terms. Two of the seven members are black.

Fussell v. Town of Mt. Olive

City government of Mt. Olive, located in Wayne County, consisted of a mayor and five member board of commissioners elected at-large by plurality vote. Despite the fact that blacks were 48% of the voting age population, and despite numerous black candidacies, there had never been more than one black elected to the board at any one time.

In 1993, black residents, represented by the ACLU, filed suit challenging the city's at-large method of elections as diluting minority voting strength in violation of Section 2.[932] The city agreed to settle the case in July 1993, by adopting a plan

[931] Lewis v. Wayne County Board of Education, Civ. No. 91-165-CIV-5-H (E.D.N.C.).

[932] Fussell v. Town of Mount Olive, Civ. No. 93-303-CIV-5-D (E.D. N.C.).

containing four single member districts and one at-large seat. However, following a public meeting in August at which whites expressed their opposition to a district system, the city adopted a plan that not only contained two at-large seats, but packed blacks in one district at the level of 97%. The plan was objected to by the plaintiffs and the black community in general.

Subsequently, in November 1993, when one of the black plaintiffs was elected to the board (as its only black member), the board petitioned the court to prohibit her from participating in board discussions or voting on issues raised in the lawsuit. The court denied the board's request.

The board's plan was submitted for preclearance, and the Attorney General entered an objection, concluding: "given the presence of polarized voting and the limited success that black voters have enjoyed when five at-large seats are elected, there is considerable doubt as to whether black voters would have a significant opportunity to elect any at-large member under the proposed election method."[933]

The rejection of the city's plan was not the first Section 5 objection in Wayne County. In 1965, the county had adopted staggered terms of office for its board of commissioners, but failed to submit the change for preclearance until 1986. In objecting to the change, the Attorney General found, based on the county's racially polarized

[933] Deval Patrick, Assistant Attorney General, Civil Rights Division, to William S. Byassee, Attorney for Wayne County, September 13, 1994.

voting pattern, that staggered terms "could well have a retrogressive effect on the ability of minority voters to participate meaningfully in the electoral process and to elect a candidate of their choice."[934]

Mt. Olive, in response to the Attorney General's objection, adopted a new plan which consisted of a five member board, four of whom were elected from single member districts, with one member elected at-large. Two of the single member districts were majority black, and the plan required that all members be elected by plurality vote to serve two year terms. The plan was acceptable to the plaintiffs, and the litigation was settled.

The salutary role played by Section 5 in the equitable resolution of this litigation is apparent.

[934] William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, to E. B. Borden Parker, Wayne County Attorney, November 4, 1986.

RHODE ISLAND

State Redistricting

Metts v. Murphy

Charles Walton, an African American, represented Rhode Island State Senate District 9 for many years. Prior to redistricting in 2002, the district was 26% African American in voting age population. The redistricting, which also reduced the number of legislative seats in accord with a state constitutional amendment, dropped the black population in the district to 21% and Walton was defeated in the 2002 primary.

Prior to his loss, a number of African American voters and related organizations had challenged the redistricting plan under Section 2.[935] Though it was not possible to draw a majority black district, plaintiffs contended that African American voters could win an election in which they were less than a majority, but not less than 26% of the voting age population. The Supreme Court has assumed, but not decided, that Section 2 reaches claims of vote dilution where the minority is not large enough to be a majority in a single member district.

The district court dismissed the complaint for failure to state a claim, concluding that the minority group must be large enough to constitute a majority in a single

[935] Metts v. Almond, 217 F. Supp. 2d 252, 254 (D. R.I. 2002). Plaintiffs were represented by the Lawyers' Committee for Civil Rights Under Law and the NAACP.

member district to establish a Section 2 violation.[936] Plaintiffs appealed and the ACLU filed an amicus brief in their support. A panel of the court of appeals for the First Circuit initially reversed the dismissal, but the case was then heard en banc by the full court. The ACLU submitted a supplemental brief.

Drawing on its lengthy experience bringing voting rights cases, the ACLU pointed out that prior to the adoption of the 1982 amendments of Section 2, vote dilution claims were mostly decided on Fourteenth Amendment grounds and those cases never required a majority minority district as a necessary element for a claim. The ACLU argued that because Section 2 was intended to reduce the burden of proof in vote dilution claims, the statute should not be interpreted to impose a higher burden of proof than applied under the Fourteenth Amendment. The brief also pointed out that to reject Section 2 claims when a remedy could be provided which relied on crossover voting, would remove an incentive for candidates and voters of all races to seek common ground.

The en banc court also reversed the dismissal sending the case back for development of a full record. The court noted that the geographic compactness standard of Thornburg v. Gingles was developed in the context of a challenge to multi-member districts. It refused to apply the standard mechanically, noting that Supreme Court opinions dealing with single member districts "have increasingly emphasized the

[936] Id., 217 F. Supp. 2d at 261.

open-ended, multi-factor inquiry that Congress intended for section 2 claims." The court held "plaintiffs are entitled to an opportunity to develop evidence before the merits are resolved."[937]

On remand, an agreement was reached and the legislature redrew the district returning the African American percentage to 26%, and the litigation was closed.

[937] Metts v. Murphy, 363 F. 3d 8, 11 (1st. Cir. 2004)(en banc).

SOUTH CAROLINA

STATEWIDE ISSUES

The Legislative Delegation System

Vander Linden v. Hodges

Residents of Dorchester, Berkeley, and Charleston Counties, represented by the ACLU, filed suit in 1991 challenging the county legislative delegation structure in South Carolina. They contended that it violated one person, one vote, and allowed persons who were neither residents nor voters of a county to elect members of another county's legislative delegation. They also contended that the system was adopted and was being maintained with a racially discriminatory purpose and had a racially discriminatory effect in violation of the Constitution and the Voting Rights Act. A trial was held in 1996, and two years later the district court dismissed the complaint on the grounds that neither the Constitution nor the Voting Rights Act applied to the method of electing county legislative delegations. However, the court of appeals reversed, making extensive findings of the discriminatory origins of the legislative delegation system and its present day unconstitutionality.[938]

Traditionally, the legislative delegation of each of the state's 46 counties consisted of a senator and one or more representatives elected from the county at-large. The house was composed of 124 members apportioned among the counties in accordance

[938] Vander Linden v. Hodges, 193 F. 3d 268 (4th Cir. 1999).

with their populations, with each county being treated as a separate election district. After 1893, the legislative delegation controlled virtually every aspect of local government, and its members were effectively the county legislature and governing board. According to a leading South Carolina historian writing in 1927, "the county is not guaranteed any freedom in managing its own local affairs, but is subject completely to the authority of the state legislature."[939]

The legislative delegation system, as the court of appeals found, took shape at the end of the 19th century as part of Southern Redemption, and after a constitutional amendment in 1890 removed local government from the hands of locally elected officials. The system of locally elected county government was rejected "partly because it had resulted in the election of large numbers of African-American officials." In turn, the replacement system of county government by the legislative delegation was "created out of fear of African-American voting power." It "arose against the backdrop of a white supremacist movement, led by Governor Ben Tillman, that sought to diminish African-American voting power."[940]

In 1973, the state amended its constitution to transfer some - but far from all - of

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[939] David Duncan Wallace, The South Carolina Constitution of 1895 (Bulletin of U.S.C., 1927), p. 91. As late as 1965, "[w]ith the exception of a few counties, the legislative authority in county affairs is still vested in the General Assembly." O'Shields v. McNair, 254 F. Supp. 708, 719 (D.S.C. 1966).

[940] Vander Linden, 193 F. 3d at 270. See also Columbus Andrews, Administrative County Government in South Carolina (Chapel Hill; U. of North Carolina Press, 1933), p. 33 (elected county government was abolished in part because of "the race problem, which cast all else into deep shadow").

the powers exercised by the legislative delegation to locally elected county government.[941] The catalyst for the change was the one person, one vote revolution of the 1960s and the fact that as the result of redistricting some counties were divided into numerous house and senate districts, and some counties were without a resident senator. Under state law and practice, each member of a county's legislative delegation had one vote as to matters determined by the delegation, regardless of the number of county residents the member represented. In some instances, a member represented no residents of the county, only vacant land.

The transfer of some powers of local rule did not solve the one person, one vote problem inherent in the legislative delegation system. The fact that one member of a county's delegation might represent thousands of county residents, and another only a handful, yet each member had equal voting power, was in serious conflict with the equal population standard of the Fourteenth Amendment. In one methodology relied upon by the court of appeals, 45 of the 46 legislative delegations deviated from the equal population standard by amounts that ranged from 75.15% to 330.56%. By another

[941] Among the many powers retained by county legislative delegations were: (1) making and/or recommending appointments to boards and commissions; (2) approving and/or recommending the expenditure of money allocated by the South Carolina General Assembly for highways, parks, recreation, tourism, and other matters; (3) approving the budgets of local school districts; (4) initiating referenda regarding the budgetary powers and the election of governing bodies of special purpose and public service districts; (5) approving the reimbursement of expenses for county planning commissioners; (6) approving county planning commission contracts with architects, engineers, and other consultants; (7) altering or dividing school districts of counties; (8) reducing existing special school levies in counties and school districts; and (9) submitting grant applications for planning, development, and renovating park and recreation facilities. Vander Linden, 193 F.3d at 271. For other powers exercised by country

measure, 44 of the 46 delegations deviated from the standard by amounts ranging from 34.86% to 418.47%.[942] In addition, in 29 (63%) of the legislative delegations, 50% or more of the seats were elected from districts in which more than half of the population resided outside the county.

Under the redistricting system for the house and senate, blacks were underrepresented based upon their percent of the population. African Americans were 30% of the population of the state, but only 20% of the members of the house were black. Only six (13%) of the members of the senate were black. Although there were 12 majority black counties in the state, blacks were a majority of the legislative delegation in only four (9%) counties.

In reversing the district court, the court of appeals found that the delegations were popularly elected bodies that exercised general governmental powers and were thus subject to one person, one vote. The court of appeals also found that the deviations from the equal population standard were unconstitutional. Given its ruling, the court found it unnecessary to reach the plaintiffs' alternative claims involving the racially discriminatory purpose and effect of the delegation system.

On remand, the district court gave the defendants an opportunity to propose a remedy for the one person, one vote violation, but they were unable to do so. As a

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delegations, see id. at 277 n.5.

[942] Id. at 272.

consequence, and at the suggestion of the plaintiffs, the district court in 2000 ordered into effect a system of weighted voting for county legislative delegations based upon the percent of the county's population represented by each delegation member. After more than 100 years, the discriminatory county legislative delegation system, a legacy from the days of Ben Tillman, was finally ameliorated, with increased powers of governance being transferred to county voters.

1980 Redistricting

Graham v. South Carolina

The Republican Party filed suit in federal court in South Carolina in 1984, to require the holding of elections for the state senate at the regularly scheduled time in November 1984.[943] Although a Section 5 declaratory judgment action had been filed by the state in the District of Columbia seeking preclearance of a legislatively enacted plan, the Republicans argued that even if preclearance were granted, it would be impossible to hold the primary and general elections as scheduled in November.[944] As a result, they asked the court to impose an interim plan of its own.

The state defendants in their answers requested the local court, inter alia, to implement the senate reapportionment plan enacted by the legislature or some other

[943] Graham v. South Carolina, Civ. No. 3:84-1430-15 (D. S.C.).

[944] South Carolina v. United States, Civ. No. 83-3626 (D.D.C.).

plan which embodied the policy choices of the legislature - but without requiring preclearance of any such plan under Section 5. The ACLU agreed to represent the state NAACP as a plaintiff intervenor to insure that any plan adopted by the court, interim or otherwise, that reflected the policy choices of the legislature, would be submitted for Section 5 review. Intervenors were concerned that unless such plans were deemed subject to Section 5, jurisdictions prone to discrimination would be encouraged not to reapportion themselves and seek preclearance from the Attorney General or the District of Columbia court. Instead, they would elect to wait until they were sued in local (arguably more sympathetic) courts, and then seek to have legislatively developed plans adopted under the guise of court ordered interim remedies free and clear of the Voting Rights Act. Intervention was allowed.

Following a trial on the merits, the local three-judge court entered an order on July 31, 1984, implementing an interim plan for the senate which had been prepared by the chairman of the House Judiciary Committee, the "Sheheen 1.98% Plan." The court expressly provided that the plan was not required to be precleared under Section 5. Intervenors filed a notice of appeal to the Supreme Court.

After the notice of appeal was filed, the state immediately enacted a second senate reapportionment plan which was precleared by the Attorney General on August 10, 1984. On August 14, 1984, the three-judge court vacated the Sheheen 1.98% Plan, but left in force the language in its order that court implemented interim plans were not

subject to Section 5 review. Intervenors filed a jurisdictional statement asking the Supreme Court to vacate the entire July order on mootness grounds so that it would have no value as a precedent in any other cases. The Court, however, dismissed the request on January 7, 1985, for want of jurisdiction.[945]

1990 Redistricting

Burton v. Sheehan

SRAC v. Theodore

Because of partisan deadlock - the house and senate were controlled by Democrats while the governor was a Republican – South Carolina was unable to redistrict its house, senate, and congressional delegation after the 1990 census, despite their being severely malapportioned. The legislature passed redistricting plans that were essentially incumbent protection plans and which created only a token number of additional majority black districts. The governor vetoed the plans in January 1992, saying "to do otherwise would be viewed as approval of a plan that violated principles established under Federal Constitutional and statutory law."[946]

Prior to the governor's veto in 1992, the Republican Party filed a law suit in federal court alleging that the general assembly and the governor were deadlocked and

[945] NAACP v. Daniel, 469 U.S. 1101 (1985).

[946] Governor Campbell's Veto Message, January 29, 1992, 7.

asked to court to implement interim court ordered redistricting. The ACLU and the NAACP filed a second law suit in October 1991, on behalf of the Statewide Reapportionment Advisory Committee (SRAC), asking the court to enjoin further use of the malapportioned plans and order into effect remedial plans which provided minority voters an equal opportunity to elect candidates of their choice. SRAC was an association of black and civil rights organizations which had participated in the legislative redistricting process by proposing and critiquing various redistricting plans. The two cases were subsequently consolidated for trial.[947]

A three-judge court heard the case and held that the existing plans violated one person, one vote. It considered and rejected plans submitted by SRAC and other parties, and drew court ordered plans for the house and senate that were virtual copies of the vetoed legislative plans. The court acknowledged that it should apply the non-retrogression principal of Section 5, but held it was not "obligated to completely import the standards and requirements of § 2" into its remedial plans. Notably, however, the court acknowledged "the parties' stipulation that since 1984 there is evidence of racially polarized voting in South Carolina."[948]

The SRAC plan for the senate contained 12 districts with majority black voting age populations, as opposed to 10 in the court ordered plan. The SRAC plan for the

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[947] Burton v. Sheheen, 793 F. Supp. 1329 (D.S.C. 1992).

[948] Id. at 1351, 1357-58.

house contained 32 majority black voting age districts, as opposed to 23 in the court ordered plan. The congressional plan adopted by the court was the exception. All parties to the consolidated litigation agreed that the Voting Rights Act required that one of the state's six congressional districts should be majority black. Accordingly, the court drew the sixth district with a 58% black voting age population. James Clyburn won the ensuing Democratic primary and the general election in the district, and became the first black member of Congress from South Carolina since Reconstruction.

The governor and SRAC appealed the decision of the three- judge court as to house and senate redistricting on the grounds that it did not comply with the racial fairness standards of Section 2. On June 14, 1993, the Supreme Court summarily reversed and vacated the judgment of the three-judge court. It remanded for further consideration in light of an amicus brief filed by the Solicitor General in which he argued, as did SRAC, that the district court had given inadequate consideration to, and made inadequate findings concerning, "allegations and evidence of violations of Section 2 of the Voting Rights Act."[949]

The three-judge district court held a hearing on remand but refused to take further action. Instead, it gave the state an opportunity to adopt and preclear permanent legislative plans. The state enacted a congressional plan patterned after the court ordered plan, and it was precleared in May 1994. The state also enacted a plan for

[949] SRAC v. Theodore, 508 U.S. 968 (1993), and Solicitor's Brief, p. 9.

the house, but it was objected to by the Attorney General under Section 5, who noted that:

> the House gave little or no consideration to Section 2 of the Voting Rights Act in formulating the submitted plan, and also did not identify any state redistricting policies that would guide its decisionmaking process. Instead, incumbency protection drove the process as the existing plan was altered only if all the affected representatives agreed. Thus, it was preordained that no change would be make that would increase the number of districts in which black voters would have the opportunity to elect their preferred candidates. Alternative plans that sought to make such changes were voted down with little debate…
>
> The proposed plan reduces from 25 to 22 the number of districts with black majorities in voting age population (excluding military populations) compared to the 1992 plan and fragments and packs black population concentrations to avoid drawing additional black-majority districts or enhancing the existing black majorities.[950]

A second plan, which increased the number of majority black house districts to 32, and which had the support of the SRAC plaintiffs, was enacted and was precleared by the Attorney General on May 31, 1994.

The legislature enacted a new redistricting plan for the senate in 1995. It was an improvement over the preexisting court ordered plan and added two additional majority black districts for a total of 12. The Attorney General precleared the plan, and the district court entered a final order dismissing the litigation in August 1995.

As a result of litigation brought under the Voting Rights Act, as well as the objections interposed by the Attorney General, black voters in South Carolina ended up

[950] Deval L. Patrick, Assistant Attorney General, to Hon. Robert J. Sheheen, Speaker of the House, May 2, 1994, pp. 4, 9.

with a total of 44 majority black districts, instead of the 33 that had originally been proposed. Additionally, the election of James Clyburn marked an historic advancement for the state's black voters that would not have been possible without the Voting Rights Act. In light of these notable advances for African Americans, white voters soon challenged the new redistricting plans as racial gerrymanders and asked that they be redrawn.

Shaw/Miller Litigation and State Redistricting in South Carolina

Smith v. Beasley

Leonard v. Beasley

McLeod v. Beasley

White voters filed suit in 1995 challenging three state senate districts. A year later, another group of white voters filed suit challenging nine house districts. In both cases, the plaintiffs claimed that the districts were drawn with race as the predominant factor in violation of the Shaw/Miller line of decisions. The cases were consolidated for trial, and black voters, represented by the ACLU, were allowed to intervene to defend the constitutionality of the challenged districts.[951]

Following a trial, the three-judge court issued an order in September 1996, finding three of the challenged senate districts and nine of the house districts

[951] Smith v. Beasley, 946 F. Supp. 1174 (D.S.C. 1996).

unconstitutional because they "were drawn with race as the predominant factor."[952] The court provided the state legislature an opportunity to adopt and preclear new legislative plans by April 1, 1997. The general assembly adopted a remedial plan for the house which preserved black population majorities in five of the six unconstitutional house districts. The legislature was unable to agree on a new plan for the senate, and accordingly the court implemented a court ordered plan. The court redrew one of the two senate districts into a near majority black district, with a black population of 49%.

A Shaw/Miller challenge was also filed in 1996, against the majority black Sixth Congressional District in South Carolina.[953] The plaintiffs were Republicans but their lawyer, John Chase, was a white Democrat who had been defeated in the 1992 Democratic primary by Jim Clyburn, the black incumbent. Clyburn was the first, and only, black elected to Congress from South Carolina since Reconstruction.

Chase's campaign was controversial and was based upon racial appeals to white voters. One of Chase's television ads was a take-off on American Express commercials running at the time. The ad showed a darkened, cartoon like picture of Clyburn's face in the center of a credit card with a motto beneath urging people to vote against the "welfare express card."

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[952] Id. at 1210.

[953] Leonard v. Beasley, 3:96 CV 3640 (D.S.C.).

Shortly before the trial was to begin, the plaintiffs requested the defendants and minority intervenors, represented by the ACLU, to enter into an agreement dismissing the complaint. An agreement was negotiated and the case was dismissed in August 1997. While the dismissal contained some face saving language for the plaintiffs, i.e., that race was a predominant factor in the construction of the Sixth District, it acknowledged that the Voting Rights Act required the creation of a majority black congressional district in South Carolina and barred the plaintiffs from refiling their complaint until after the 2000 census.

The following year, yet another Shaw/Miller challenge was filed against the Sixth District.[954] The plaintiff, Gary McLeod, a white Republican, was a perennial candidate who had been defeated by Clyburn in the general elections in 1992, 1994, and 1996. The ACLU again intervened on behalf of black voters to defend the constitutionality of the district. McLeod, however, let his suit languish and it too was finally dismissed in August 1998, for laches and failure to prosecute. As a foot note, McLeod ran as the Republican nominee from the Sixth District in the 1998 general election, and again was defeated by Clyburn.

The potential damage to minority voting in South Carolina and the Voting Rights Act from the Shaw/Miller litigation filed in the 1990s was thus significantly contained.

[954] McLeod v. Beasley, 3:98 CV 859 (D.S.C.).

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2000 Congressional and Legislative Redistricting

Marcharia v. Hodges

The South Carolina legislature, under the control of Republicans for the first time since Reconstruction, passed redistricting plans based on the 2000 census for the house and senate and the congressional delegation. The governor, however, who was a Democrat, vetoed all three plans. The legislature was unable to override the veto and adjourned without taking further action.

Three lawsuits were filed following the legislative impasse, two by members of the legislature and the third, Marcharia v. Hodges, by African American voters represented by the ACLU.[955] All of the law suits, which were consolidated, challenged the existing plans as being in violation of one person, one vote and requested the three-judge court to order into effect interim court ordered plans.

A four week trial was held beginning in January 2002, during which the parties presented evidence of racial bloc voting and proposed remedial plans. The trial showed conclusively that race was a significant factor in South Carolina politics. The court noted the:

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

[955] Marcharia v. Hodges, Civ. No. 01-3892 (D.S.C.).

in significant white-bloc voting.[956]

Black voters were also caught in the middle of a partisan fight. The litigation pitted Republicans against Democrats, each of whom sought to use black voters to advance their partisan interests. The Democrats sought to maximize the number of Democratic districts by reducing black majority districts to the 40% range. The Republicans, by contrast, sought to increase the black percentages in existing districts to limit the number of Democratic majority districts. The three-judge court took special note that the governor and the legislature "have proposed plans that are primarily driven by policy choices designed to effect their particular partisan goals." Those choices included protecting incumbents and assigning the minority population to maximize the parties' respective political opportunities. As the court explained:

> By increasing the BVAP percentage in Republican-held districts, the Governor increases the probability of a white Democrat ousting the Republican incumbent in the general election but at the expense of lowering the BVAP in a adjoining majority minority district and the concomitant ability for blacks to elect a black Democrat in that district over a white Democrat. By increasing the BVAP in current majority minority districts, the Senate Republicans avoid that result and make the adjoining 'superwhite' districts Republican strongholds.[957]

Minority voters were at risk of being either "packed" by Republicans or "cracked" by Democrats. The ACLU plaintiffs, as minority voters, viewed their role in the litigation as seeking to insure that any plans adopted by the court cured the one person,

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

[957] Id. at 628, 659.

one vote violation, complied with the non-retrogression standard of Section 5, and did not result in the dilution of minority voting strength under Section 2.

The court refused to adopt any of the plans proposed by the governor or the legislature, noting that "it is inappropriate for the court to engage in political gerrymandering."[958] The court concluded that it was obligated to comply with Sections 2 and 5 of the Voting Rights Act, and proceeded to draw plans that maintained the state's existing majority black congressional district and actually increased the number of majority black house and senate districts.[959]

The governor, who was a Democrat, had argued that districts with black populations as low as 44.61% provided black voters an equal opportunity to elect candidates of their choice within the meaning of the Voting Rights Act, but the court disagreed. Citing the "high level of racial polarization in the voting process in South Carolina," it concluded that "a majority-minority or very near majority-minority black voting age population in each district remains a minimum requirement."[960] Notably, none of the parties to the law suits appealed.

The litigation underscores once again the critical role that Section 5 plays in

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[958] Id. at 629.

[959] The court ordered plan increased the number of majority black house districts from 25 to 29. It also maintained the existing nine majority black senate districts, and created an additional district which contained a sufficient minority population to allow minority voters an equal opportunity to elect a candidate of their choice. 201 F. Supp. 2d at 655-56, 661, 666.

[960] Id. at 643 and n.22.

redistricting, including court ordered redistricting. Were the legislature given a free hand to redistrict in the absence of the retrogression standard, there is little doubt that minority voting strength would have been significantly diluted.

NVRA and Section 5 Enforcement in South Carolina

Grass Roots Leadership v. Beasley

On January 24, 1995, South Carolina sued the United States seeking to enjoin enforcement of the National Voter Registration Act (NVRA), which was designed to increase access to voter registration, particularly among the poor, the disabled, and minority groups. According to South Carolina, the NVRA was unconstitutional "as a federal regulation imposed on and interfering with a state function."[961] Charles Condon, the attorney general of the state, was reported as saying South Carolina will "take a hard stand" against enforcement of the NVRA, and will "fight it all the way."

The following month the United States sued the state to require it to implement the NVRA. Two days later, the ACLU filed a similar enforcement action on behalf of voter registration organizations and unregistered voters.[962] The three cases were consolidated, and the district court granted the ACLU plaintiffs' motion to certify a plaintiff class of all eligible but unregistered voters in South Carolina.

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[961] Condon v. Reno, 913 F. Supp. 946, 948 (D.S.C. 1995).

[962] Grass Roots Leadership v. Beasley, No. 3:95CV345 (D.S.C.).

A trial on the merits was held, and on November 20, 1995, the court held the NVRA was constitutional: "Congress' goals are legitimate, its means are appropriate and limited, and the NVRA fully meets all constitutional requirements."[963] The court cited the extensive history of discrimination in voting in South Carolina, and noted that as late as 1990, only 52% of the eligible population of the state was registered to vote. The court permanently enjoined the state from refusing to comply with the NVRA, and ordered it to submit a plan for implementation within 30 days. The state filed a notice of appeal and requested the district court to stay its judgment. After the district court refused to do so, the state withdrew its appeal.

In December 1995, South Carolina submitted to the court and the parties its proposal for implementing the NVRA. After reviewing the state's plan and deposing election officials charged with implementing it, the ACLU plaintiffs and the United States jointly filed a motion for the court to approve the plan, with certain modifications. On January 31, 1996, the court approved the state's plan with the requested modifications.

The ACLU plaintiffs and the United States subsequently moved the court to grant additional relief to citizens denied an opportunity to register under the NVRA in 1995, during the pendency of the litigation. After several hearings on the matter, on April 2, 1996, the district court ordered the state to: (1) provide individuals denied an

[963] Condon v. Reno. 913 F. Supp. at 949.

opportunity to register in 1995 a postage prepaid mail-in voter registration form; (2) inform individuals previously notified that they were purged from the registration books of their subsequent reinstatement; (3) provide voter registration at two additional agencies serving the disabled; and (4) provide the parties and the court monthly implementation and compliance reports until after the November election.

Despite the fact that the NVRA implementation plan was a voting change covered by Section 5, the state refused to submit it for preclearance. On March 18, 1996, the United States filed a motion to convene a three-judge panel to order the state to submit the plan under Section 5. At the end of the 1996 legislative session, the general assembly adopted NVRA enabling legislation which the governor signed into law. And in August 1996, the state submitted the legislation for preclearance. The Attorney General did not interpose an objection, thus bringing to a close the state's efforts to block implementation of a landmark federal law designed to expand opportunities for voter registration and political participation.

COUNTY AND MUNICIPAL LITIGATION IN SOUTH CAROLINA

Abbeville County

Robinson v. Abbeville

Abbeville, South Carolina, prides itself on being "both cradle and deathbed of the Confederacy." John C. Calhoun, twice Vice-President of the United States and author of the doctrine of "nullification," which formed the philosophical underpinning of

Southern secession, and who declared that slavery was "a positive good," practiced law in Abbeville in the early 1800s before beginning his political career as a state representative. On November 22, 1860, the first meeting to launch the state's secession from the Union was held in Abbeville; one month later South Carolina became the first state to secede.

After the defeat of the Confederate army and the fall of Richmond in April 1865, Jefferson Davis and his cabinet fled south and stopped in Abbeville at the home of Armistead Burt, a friend of Davis's. There, Davis convened what was to be the last meeting of the Confederate cabinet. On May 2, 1865, in the front parlor of Burt's home, which had been built with slave labor, he announced the dissolution of his government and the end of the Confederacy.

Ironically, the first president to serve after the Civil War and preside over Reconstruction also had ties to Abbeville. Andrew Johnson, who fled from an apprenticeship in Tennessee, worked for a tailor whose shop was just off the town square. The effects of past discrimination have persisted in the modern era in Abbeville.

Based on the 1980 census, blacks were 44% of the population of the City of Abbeville, and 33% of the population of the county. The city council consisted of a mayor and eight members elected at-large, and the county board of commissioners consisted of seven members also elected at-large. Only one black person had ever been

elected to the city council, and no blacks had been elected to the board of commissioners.

Black residents of the city and county, represented by the ACLU, filed suit in 1988, alleging that the at-large method of elections for both bodies violated the Constitution and Section 2.[964] In an effort to resolve the litigation, the parties agreed to a consent order postponing the pending elections. Settlement negotiations followed, and the parties agreed to single member district plans for both the city and county. The court entered a consent decree on January 23, 1989, providing that "black voters have been unable to elect candidates of their choice under the at-large system." The plan for the county called for seven single member districts, two of which were majority black. The plan for the city contained eight single member districts, four of which were majority black. Elections under both plans were held in July 1989.

NAACP v. Board of Trustees of Abbeville County School District No. 60

The Board of Trustees of Abbeville County School District 60 traditionally consisted on nine members, five of whom were elected from single member districts and two each from two multi-member districts. Blacks were 32% of the population of the school district, but all the districts were majority white and only one member of the board was African American. The election plan had been adopted in 1953 and was

[964] Robinson v. Abbeville, South Carolina, Civ. No. 9-88-0096-17 (D.S.C.).

severely malapportioned, with a total deviation of 149%.

Black residents of the school district, and the local NAACP chapter, represented by the ACLU, filed suit in 1993 challenging the method of electing the board of trustees as violating one person, one vote and diluting minority voting strength in violation of Section 2.[965] They also alleged that the board had adopted a designated post requirement for the two multi-member districts in 1987, but had failed to seek preclearance for the change under Section 5.

The parties agreed to allow the pending elections to go forward, and the court entered an order that the existing plan for the board "is an unconstitutionally malapportioned plan, and is in violation of Sections 2 and 5 of the Voting Rights Act."[966] The parties subsequently agreed upon a single member district plan for the nine member board containing three majority black districts. The plan was implemented pursuant to court order, and new elections were held in June 1994.[967]

Barnwell County

Houston v. Barnwell County

[965] NAACP v. Board of Trustees of Abbeville County School District No. 60, Civ. No. 8:93-1047-03 (D.S.C.).

[966] Id., Order of May 21, 1993.

[967] Id., Order of December 14, 1993.

In 1988, Barnwell County was 41% black, and the county council was comprised of five members, all elected at-large to staggered terms. A black candidate ran for the council the first time that year and was defeated. African Americans had run for other offices in the county on numerous occasions, including for school boards and city councils in Blackville, Williston, and Elko, and had been successful, but primarily in majority black districts. School board elections were at-large, but they were non-partisan, candidates were not required to run for a numbered post, and election was by plurality vote. Thus, even in majority white school districts, black candidates had achieved some success. Black voter registration rates were higher than white rates, though whites were a majority of registered voters and white turnout was higher than black turnout (69.4% vs. 57.9%).

The Barnwell County Voters League, a majority black organization, had previously written to the county council complaining of "[i]nadequate and/or lack of Black representation in Barnwell County Government at [the] Administrative level," the absence of blacks from appointed boards and commissions, inadequate distribution of county services, and discriminatory employment practices. The league specifically requested the county to adopt district elections for the county council to provide blacks an opportunity to elect candidates of their choice.[968]

[968] Barnwell County Voters League to Barnwell County Council, February 25, 1985.

In July 1987, the ACLU, in conjunction with the Voters League, began discussions with the county and proposed increasing the number of seats on the council from five to seven, with districts elections. The county refused to enter into an agreement, but instead called for a referendum to be held in November 1988, on whether to enlarge the council to seven members and adopt some form of districting. Believing the referendum would likely fail, the ACLU filed suit on behalf of black voters on May 20, 1988, challenging the at-large method of electing council members as violating the Constitution and Section 2.[969] A local newspaper reporting on the lawsuit noted that given the "racial mix" in Barnwell County, it was "highly unlikely that a black could get elected . . . in an 'at-large' voting method."[970]

The district court stayed formal discovery until after the referendum, which was defeated by a majority of the voters. Settlement discussions were resumed, and the parties agreed to resolve the case by increasing the size of the council to seven members elected from single member districts. Three of the districts were majority black. The parties also agreed that interim elections would be held in January 1990, at which all seven positions would be elected. The court entered a consent order that the new plan would provide "black voters of the county, a greater opportunity than previously

[969] Houston v. Barnwell County, South Carolina, Civ. No. 1-88-1321-8 (D.S.C.).

[970] "In Lawsuit Against County," The Banner, March 1, 1989.

existed to elect candidates of their choice."[971] The plan was precleared by the Department of Justice and, at the ensuing election three African American candidates ran unopposed and were elected.

Beaufort County

Shorr v. McBride and Campbell

William McBride and Morris Campbell were black members of the County Council of Beaufort County, South Carolina. McBride was also a public school teacher, as was Campbell's wife. The two men were charged in 1983, by several local whites with violating the state's Ethics Act by voting on teacher salaries and approving the school budget.[972] Under state law, the county governing body approves the budget of the public schools. The Ethics Act provided that no elected official could deliberate or vote on any matter as to which he or she had a substantial financial interest. Under procedures existing at the time the complaints were filed, the council was required to approve the school budget as a whole, as opposed to on a line item basis. Thus, the only way McBride and Campbell could have avoided voting on their own salaries or that of a spouse, would have been to abstain from voting on the entire school budget. But according to McBride and Campbell, refusing to vote on the school budget would

[971] Houston v. Barnwell County, Order of August 21, 1989.

[972] Shorr v. McBride and Campbell, C-83-018, 019, 037, 039, and C-84-001 (State Ethics Commission).

have violated their oath of office and disfranchised their constituents, most of whom were black.

"Disenfranchising any person, especially a public official, would be a real disservice to the people who worked for our campaigns because of our pro-education platforms," Campbell said.[973]

The complainants, most of whom were members of a group known as the Taxpayers Defense Fund, were adamantly opposed to public spending, particularly for the public schools in the wake of desegregation in the early 1970's. Beaufort County was also one of those places which had established a "white flight" academy, which was strongly supported by the white community. The Taxpayers Defense Fund, many of whose members were retirees with no children in the public schools, had engaged in numerous actions to block expenditures for public education: they had filed a law suit in 1979, to enjoin a school bond issue (the suit was dismissed); they had the members of the school board indicted in 1983, for allegedly overspending the school budget (the indictments were dismissed); they had sued the school board in state court for exceeding its budget (the suit was dismissed); and they had filed prior charges against McBride and Campbell for similar Ethics Act violations.

The first charges against McBride and Campbell were dismissed by the State Ethics Commission because a majority of members of the county council had similar

[973] "Budget votes," The Beaufort Gazette, June 16, 1981.

ties with the school district, and if all were disqualified from voting the school budget could not have been approved. The second round of complaints, according to Campbell, "was just another attempt by certain elements in the community who have no interest in public education - and I equate that with no real interest in the future of our county - to strangle the public schools with the rhetoric of saving taxpayers' dollars."

In their answers to the Ethics Act complaints, McBride and Campbell, represented by the ACLU, charged that the plaintiffs were conspiring to injure them in their reputations and deprive them of constitutionally protected rights. They sought damages and requested that the case be referred to the solicitor for prosecution under the criminal provisions of the act making it unlawful to file a frivolous Ethics Act charge.

A hearing on the merits of the complaints was scheduled for January 1984. Prior to the hearing, McBride and Campbell negotiated an agreement between the board of education and county council whereby a separate line item in the budget would be prepared for McBride's salary and that of Campbell's wife. As to those two items - but only those two - McBride and Campbell agreed to abstain from voting. In consideration of the agreement between the board and the council, the plaintiffs agreed to dismiss their complaint and the defendants agreed to dismiss their demands for damages and

criminal prosecution. The Ethics Commission approved the agreements and closed the cases.[974]

[974] Shorr v. McBride, Notice of Withdrawal of Complaints, January 24, 1984.

Charleston County

United States v. Charleston County

Moultrie v. Charleston County

Charleston, the premier tourist mecca in South Carolina, has long prided itself on its aristocratic traditions. As one northern visitor has gushed, Charleston "was not a stereotypical southern racist city" but has "an aristocratic respect for civility."[975] But the findings of the district court in a recent voting rights case show that racial division and polarization are today's political and social realities in Charleston County.

The United States and private plaintiffs, represented by the ACLU, brought suit in 2001 challenging the at-large method of electing the nine member Charleston County Council as diluting black voting strength in violation of Section 2. The two cases were consolidated, and after a lengthy trial the court issued an order invalidating the at-large system. The decision was affirmed on appeal, and the Supreme Court denied the county's petition for a writ of certiorari.[976]

The courts, applying the analysis in Thornburg v. Gingles, found that blacks in Charleston County were geographically compact and politically cohesive, and that whites voted sufficiently as a bloc usually to defeat the candidates preferred by black

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[975] Abigail M. Thernstrom, Whose Votes Count? Affirmative Action and Minority Voting Rights (Cambridge: Harvard University Press, 1987), p. 166.

[976] United States v. Charleston County and Moultrie v. Charleston County Council, 316 F. Supp. 2d 268 (D.S.C. 2003), aff'd 365 F.3d 341 (4th Cir. 2004), cert. den'd 125 S. Ct. 606 (2004).

voters. The defendants' own expert found "there was racially polarized voting in 25 of the 33 (75.8%) contested general elections for the County Council between 1988 and 2000." Moreover, in the 10 general elections that involved black candidates, he found that "white and minority voters were polarized 100% of the time." These conclusions were corroborated by the expert for the United States who found racially polarized voting in 94% of the elections between 1984 and 2000. There was also evidence that in school board elections, which are non-partisan, racial polarization was if anything more extreme, with white and black voters being polarized in every one of the ten contests that pitted white candidates against black candidates. Overall, the court of appeals found that "evidence presented by both parties supported the district court's conclusion 'that voting in Charleston County Council elections is severely and characteristically polarized along racial lines.'"[977]

Turning to the "totality of circumstances," the courts looked at minority electoral success, one of the "most important" factors identified in Gingles[978] in assessing a vote dilution claim. Of the 41 people elected to the county council since 1970, "only three have been minorities." The exclusion of blacks from elected office had been most

[977] 365 F. 3d at 350; U.S. Ex. 25. These findings of polarized voting are consistent with those of other courts in South Carolina. See Colleton County v. McConnell, 201 F. Supp. 2d 618, 641 (D.S.C. 2002) (three-judge court) ("[v]oting in South Carolina continues to be racially polarized to a very high degree, in all regions of the state and in both primary elections and general elections"); Burton v. Sheheen, 793 F. Supp. 1329, 1357-58 (D.S.C. 1992) (three-judge court) ("since 1984 there is evidence of racially polarized voting in South Carolina").

[978] 478 U.S. at 48 n.15.

pronounced during the recent decade. From 1992 to 2002, all nine black candidates supported cohesively by black voters were defeated in the general elections. Eighteen (86%) of the 21 candidates of whatever race supported cohesively by black voters were defeated. In 1998, two white Democrats supported cohesively by black voters were elected, but two black Democrats supported cohesively by blacks lost. As the court of appeals further noted, "the rarity with which minorities are elected is not unique to the County Council; disproportionately few minorities have ever won any of the at-large elections in Charleston County."[979]

Following the election of five black school board members to the nine member school board in 2000, the county legislative delegation, in what the district court described as an "episode of racial discrimination against African-American citizens attempting to participate in the local political process," tried to change the method of elections to the system used by the county council and to limit the board's fiscal authority. The measures were passed by the legislature, but were vetoed by the governor. After the 2002 elections, only one African American remained on the school board.[980]

Other factors contributing to minority vote dilution found by the lower courts included: "the County's sheer size;" the use of staggered terms and residency districts;

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[979] 365 F. 3d at 350.

[980] 316 F. Supp. 2d at 280, 286 n. 23.

"a de facto majority vote requirement;" "fewer financial resources" available to minority candidates to finance campaigns; "past discrimination that has hindered the present ability of minorities to vote or to participate equally in the political process;" "[t]he on-going racial separation that exists in Charleston County–socially, economically, religiously, in housing and business patterns–[which] makes it especially difficult for African-American candidates seeking county-wide office to reach out to and communicate with the predominantly white electorate;" "significant evidence of intimidation and harassment" of blacks "at the polls during the 1980s and 1990s and even as late as the 2000 general election;" and "incidents of subtle or overt racial appeals" in campaigns, such as white candidates distributing darkened photos of their black opponents to call attention to their race.[981]

The lower courts also "thoroughly examined all of the County's evidence" that racial polarization was caused by partisanship, and found it "insufficiently comprehensive or persuasive." The County's expert "acknowledged that he could not assess the extent to which racial bias has caused polarized voting in Charleston County and he agreed with other expert witnesses that partisanship and race as determinants of voting are 'inextricably intertwined.'" The court of appeals concluded that "even

[981] 365 F. 3d at 351-53; 316 F. Supp. 2d at 286 n.23, 294-95.

controlling for partisanship in Council elections, race still appears to play a role in the voting patterns of white and minority voters in Charleston County."[982]

Moreover, there was substantial evidence of partisanship being infused by race. The district court found that there was "significant 'white flight' from the Democratic Party in Charleston County since the 1970s," and that the "[r]easons for this flight include the Democratic Party's position on civil rights." Race has become a "wedge issue" used by the Republican Party, whose literature has identified the Democratic Party with the "black block vote" and the NAACP. As the district court found, in recent years the Democratic Party in Charleston County has been "referred to as the party of the African-Americans" or "'controlled' by African-Americans." The trial court concluded that "there is no evidence that anything other than race explains the severe polarization observed in Charleston County elections."[983]

The private plaintiffs further alleged that the County's at-large system, which was adopted in 1969 to replace an existing system of district elections, was invalid because it had been adopted with a discriminatory purpose. Charleston County is one of only three counties in South Carolina which continue to elect their county governments at-large.[984]

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[982] 365 F. 3d at 352-53.

[983] 316 F. Supp. 2d at 278 n.13, 296-97, 304; U.S. Ex. 16, pp. 18-19.

[984] 316 F. Supp. 2d at 275.

The historical background of the adoption of at-large elections in Charleston County in 1969 reveals a series of official actions at the local and state levels over an extended period of time taken for invidious purposes. At-large elections were adopted after passage of the Voting Rights Act of 1965 at a time when there were substantial increases in black voter registration in Charleston County and increased black political activity. At-large elections, with a majority vote requirement, were a well known and widely understood way of diluting minority voting strength, particularly in a place like Charleston County with its sprawling size, majority white electorate, and pervasive white bloc voting.[985]

The City of Charleston had earlier adopted at-large elections in 1954, to replace its system of single member districts following abolition of the white primary system in the state. Historians have acknowledged that this was done for the purpose of diluting the black vote and to keep African Americans from being elected to the city council.[986]

In 1956 and 1964, the general assembly, upon the recommendation of the county legislative delegation, abolished elections for school board members in predominantly black districts and made the positions appointive by the delegation. Elections for school board members were retained, however, in the majority white districts. Defendants'

[985] 316 F. Supp. 2d at 305; Pl. Ex. 1, pp. 35-36; Tr. Trans. 1151-55 (Testimony of O. Vernon Burton).

[986] 316 F. Supp. 2d at 305; Pl. Ex. 1, p. 36.

expert admitted that the appointed/elected system for the school board depending on the racial composition of the district was "very discriminatory."[987]

The City of Charleston began a series of annexations in 1960, the purpose of which was "to change the City from predominantly African-American to predominantly white," and to keep the city from being controlled by so-called "slum dwellers." The Department of Justice ultimately objected in 1974, to seven annexations by the city as "racially motivated."[988]

Charleston County School District 20 was one of the first school districts in the state ordered to desegregate after the Brown decision in 1954.[989] In response, whites fled the public schools in large numbers. Between 1963 and 1968, the number of white students enrolled in the public schools declined about 50%.[990]

In the 1964 elections, voters in heavily black Charleston precincts were systematically challenged. Blacks were subjected to literacy tests as a condition for registering to vote. On the eve of passage of the Voting Rights Act of 1965, only 37% of the black voting age population was registered, and there were no black elected officials

[987] 316 F. Supp. 2d at 305; Pl. Ex. 1, pp. 37, 44; Tr. Trans. 3015 (Testimony of William V. Moore).

[988] 316 F. Supp. 2d at 305; Pl. Ex. 1, pp. 34-5; Tr. Trans. 1146 (Burton).

[989] Brown v. Board of Education, 347 U.S. 483 (1954).

[990] United States v. Charleston County, U.S. Ex. 16, pp. 13-4; Tr. Trans. 936 (Testimony of Dan Carter).

in the entire state. As late as 1970, there was only one black elected official in Charleston County.[991]

In 1967, the state legislature, at the request of the county delegation, enacted a consolidation bill that created the Charleston County School District composed of the existing eight "Constituent" school districts. The bill blocked any transfers, and thus desegregation, across district lines. The consolidation bill also continued the discriminatory appointed/elected scheme for school board members. The legislative delegation that set up the appointed/elected system was the same delegation that had proposed at-large voting for the county council in 1967.[992]

The chief sponsors of the change to at-large voting for the county council had proven records of opposing equal voting and other rights for blacks. No supporter of at-large elections argued that it was a reform measure needed to promote or insure good government. To the extent that "good government" was discussed, it was in support of maintaining the existing district system. The county's argument that the at-large system was enacted because the Supreme Court had applied the one person, one vote rule to county level elections is rebutted by a letter from the state attorney general that the decision did not require the adoption of at-large elections.[993]

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[991] U.S. Ex. 16, p. 26; Tr. Trans. 633-34 (Testimony of Marjorie Amos-Frazier); Pl. Ex. 1, p. 10; Tr. Trans. 1186 (Burton).

[992] Pl. Ex. 1, p. 44-5; Tr. Trans. 3016 (Moore).

[993] Tr. Trans. 1147, 1161 (Burton); Pl. Ex, 1, pp. 30, 42; U.S. Ex. 74(D) ("[i]f the populations are fairly close,

Plaintiffs' expert, Dr. O. Vernon Burton, concluded that the change to at-large elections in 1969 had been made for a racially discriminatory purpose. The district court, while it held that "the timing of the General Assembly's adoption of the at-large system raises suspicions," ruled against the discriminatory purpose claim. The court of appeals held that "because we affirm the district court's finding that the County's at-large system violated § 2 by diluting minority voting strength, we do not need to reach the private plaintiffs' claim that the at-large system violated § 2 by intentionally discriminating against minority voters."[994]

Following the decision of the federal courts, a system of single member districts was adopted for the county council. At the ensuing elections, four blacks were elected from the four majority black districts.

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

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separate elections may be provided for from each district").

[994] 316 F .Supp. 2d at 306; 365 F.3d at 347 n2.

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

> every black member of the Charleston County delegation voted against the proposed change, some specifically citing the retrogressive nature of the change. Our investigation also reveals that the retrogressive nature of this change is not only recognized by black members of the delegation, but is recognized by other citizens in Charleston County, both elected and unelected.[995]

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

Cherokee County

NAACP v. Cherokee County School District No. 1

In 1991, the South Carolina legislature changed the method of electing the school board of Cherokee County School District No. 1 from at-large to single member districts. The plan was submitted for preclearance, but a few weeks before the election,

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

which was scheduled for November 3, 1992, the Department of Justice requested additional information. Despite the lack of preclearance, county officials proceeded to allow the election to go forward under the new plan.

Black residents of the county and the local NAACP, represented by the ACLU, filed suit seeking to enjoin implementation of the new plan absent preclearance.[996] They also charged that the plan had been adopted without input from the minority community, and diluted black voting strength in violation of Section 2. Based on the 1990 census, blacks were 21% of the county population, and while two majority black districts could be drawn, the school board's plan contained one majority black district and another that was only marginally so.

The plaintiffs and the county board of education agreed to a consent order which: provided that the submitted plan "results in a dilution of minority voting strength;" postponed the elections; and directed the parties to develop a "racially fair districting plan and implementation schedule" for new elections.[997] A new plan was subsequently agreed upon which created nine single member districts, two of which were majority black. The plan was adopted by the court in March 1993, precleared by the Department of Justice, and implemented at a special election held on May 25, 1993.

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[996] NAACP v. Cherokee County School District No. 1, C.A. No. 7:92-2948-3 (D.S.C.).

[997] Id., Order of October 27, 1992.

Section 5 played an obvious and critical role in blocking the implementation of an admittedly discriminatory plan for the school board, as well as the adoption of a new plan that complied with Section 2.

Chesterfield County

South Carolina State Conference of Branches of NAACP v. The District Board of Education of the Chesterfield County, South Carolina School District

The Chesterfield County Board of Education consisted of nine members, seven of whom were elected from single member districts, and two at-large. Based on the 1990 census, the county was 34% black, but all of the districts were majority white and only one member of the board was black. The districts were also malapportioned, with a total deviation of 23.4%

The state legislature, which has the duty to reapportion local school boards, failed to enact a constitutional redistricting plan for the board of education at its 1992 legislative session, and as a result the 1992 elections were scheduled to be held under the unconstitutional plan.

Black voters of the county and the NAACP, represented by the ACLU and the NAACP, filed suit in 1992, seeking to enjoin further use of the malapportioned plan and requested the court to supervise the implementation of a plan that complied with one

person, one vote and the Voting Rights Act.[998] The parties reached an agreement, which they submitted to the court in the form of a consent order, allowing the 1992 elections to go forward under the existing plan, but requiring a special election in 1993, under a new plan that complied with one person, one vote and the Voting Rights Act.[999] Subsequently, the court entered an order on May 10, 1993, noting that the parties had reached an agreement on a new plan containing nine single member districts, three of which were majority black, and that the plan had been adopted by the general assembly, precleared by the Department of Justice, and implemented at elections held in March 1993.

Edgefield County

Edgefield is a rural "upcountry" county with a substantial black population and a long and notorious racial past. Francis Hugh Wardlaw, a local attorney and newspaper editor, was one of the signers of the Ordinance of Secession of 1860, which led South Carolina and the rest of the South out of the Union in an effort to preserve the institution of slavery. After the Civil War, Confederate General Martin Witherspoon Gary, another Edgefield attorney, led a white insurrectionist movement, known as the Edgefield Plan, designed to keep the ballot out of the hands of newly enfranchised

[998] NAACP v. District Board of Education of Chesterfield County, C.A. No.: 4:92-2863-21 (D.S.C.).

[999] Id., Order of October 26, 1992.

blacks and defeat the Reconstruction experiment. The person who had the greatest impact on post-Reconstruction politics in South Carolina was an Edgefield native, former Governor and U.S. Senator B. R. "Pitchfork Ben" Tillman. In the 1890s, Tillman orchestrated the complete disfranchisement of blacks through a variety of devices, including literacy tests, a poll tax, and the abolition of locally elected county and township commissioners. Another Edgefield native, Strom Thurmond, was a leader of the Democratic Party's Dixiecrat movement of 1948, which opposed federal civil rights laws and embraced a platform of white supremacy. This history is well established, but what is less well known about Edgefield County is its continuing resistance to equal voting rights in the modern era. [1000]

McCain v. Lybrand

The most protracted voting rights litigation in Edgefield County involved a challenge to the at-large method of electing the five member county council, which was not finally resolved until 1984. In 1974, Tom McCain, Ernest Williams, and William Spenser, represented by the ACLU, filed suit alleging that the at-large system diluted black voting strength in violation of Section 2 and the Constitution. The plaintiffs also claimed that the residency districts used in county elections were malapportioned in

[1000] For more on the history of Edgefield County, see e.g., O. Vernon Burton, In My Father's House Are Many Mansions: Family and Community in Edgefield, South Carolina (Chapel Hill: University of North Carolina Press, 1985); Francis B. Simpkins, Pitchfork Ben Tillman: South Carolinian (Baton Rouge:

violation of the one person, one vote standard. The one person one vote issue was litigated initially and was ultimately resolved against the plaintiffs.[1001] Subsequently, after lengthy discovery and a trial, the district court issued an opinion on April 17, 1980, striking down the at-large system. In doing so, it made detailed findings of the long and extensive history of discrimination in virtually every aspect of county life:

> *[I]t was quite difficult, and often impossible, [for blacks] to register to vote until approximately 30 years ago.
>
> *At the time of the passage of the Voting Rights Act in 1965 less than 20% of the voting age blacks of Edgefield County were registered.
>
> *Blacks were excluded from participation in the Democratic primaries until Elmore v. Rice [was decided in 1947 invalidating the all white primary] . . . But even after this landmark decision blacks in Edgefield County found it very difficult to register and threats were made against some blacks who did register.
>
> *No black has ever received a Democratic nomination or been elected to public office in a contested election in Edgefield.
>
> *No black has been elected to County Council, the state legislature or any countywide office.
>
> *[T]he majority vote requirement, run-off elections and even staggered terms of the members of council tend to dilute the voting strength of the blacks.
>
> *There is bloc voting by the whites on a scale that this Court has never before observed.
>
> *[W]hites absolutely refuse to vote for a black.
>
> *[A]ll advances made by the blacks have been under some type of court order.

Louisiana State University Press, 1944).

[1001] McCain v. Lybrand, 509 F. 2d 1049, 1054 (4th Cir. 1974).

*Until 1970, no black had ever served as a precinct election official, and since that year the number of blacks appointed to serve has been negligible.

*Of the 17 precincts in Edgefield County, fully 8 have never had a black person serve at the polls.

*[T]here is still a long history of racial discrimination in all areas of life.

*Blacks were historically excluded from jury service in Edgefield County.

*The Edgefield County Council historically kept the county chain gang segregated by race.

*Blacks have been excluded from county employment by the County Council, even up to the present. No current black employee began service before 1971.

*Blacks have been excluded by the County Council in appointments to county boards and commissions.

*[The County Council consented to the formation of a Human Relations Committee, but only on condition]"that there be a white majority and white chairman.

*The public schools of Edgefield County were historically segregated by race.

*After formal desegregation began to take place there was an effort by school trustees to maintain the racially discriminatory character of the schools.

*Blacks in Edgefield County have a much lower socio-economic status than do blacks.

*[There was] stark proof of official neglect and unconcern on the part of the Edgefield County Council [to the needs of black citizens].[1002]

[1002] McCain v. Lybrand, slip. op. at 8-14, 18-9.

The court concluded that "the rights of the blacks to due process and equal protection of the laws in connection with their voting rights have been and continue to be constitutionally infringed and the present system must be changed."[1003]

But five days after the district court issued its opinion, the Supreme Court decided City of Mobile v. Bolden and held that a voting practice violated the Constitution and the Voting Rights Act only if it was adopted or was being maintained with a racially discriminatory purpose or intent.[1004] Since the district court's decision had been based on the result of the challenged at-large system, the court vacated its order and provided the parties an opportunity to submit additional evidence on whether the at-large system was conceived or operated as a purposeful device to further racial discrimination.[1005]

During the course of the litigation, plaintiffs had discovered that the 1966 state statute establishing the at-large system of elections for Edgefield County which replaced the Tillman era appointed system, had never been submitted for preclearance as required by Section 5. Fortunately, Congress extended Section 5 in 1982, in the absence of which the failure of the county to comply with the preclearance requirement

[1003] Id. at 20.

[1004] 446 U.S. 55 (1980).

[1005] McCain v. Lybrand, Order of August 11, 1980.

would have been academic.[1006] McCain and the others amended their complaint and asked the court to enjoin further use of the unprecleared at-large system pending compliance with federal law.

The three-judge court which heard the amended complaint dismissed it on the grounds that the Attorney General had, in 1971, precleared an increase in the size of the county council from three to five members elected at-large, which had the effect of preclearing the underlying 1966 change. The Supreme Court, in an opinion issued in 1984, disagreed. It held that the 1966 change had never been brought to the attention of the Attorney General in a clear and unambiguous manner, and that preclearance could not be inferred or implied from preclearance of the 1971 change.[1007]

On remand the county was given an opportunity to prepare and submit an election plan to the Attorney General for preclearance. Despite the extensive findings of the district court that at-large elections diluted minority voting strength, the county decided to submit the 1966 act providing for three at-large seats on the assumption that if the act were precleared all five council seats could continue to be elected at-large.

Included in the county's submission was a "To Whom It May Concern" letter written by Charles Coleman, the county attorney. He claimed that when at-large

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[1006] Congress, moreover, cited the McCain litigation as "the most drastic evidence" of the need to amend Section 2 to include a discriminatory "results" standard for violations. S.Rep. No. 97-417, 97th Cong., 2d Sess. 26(1982).

[1007] McCain v. Lybrand, 465 U.S. 236, 257 (1984).

elections were adopted in 1966, W. A. Reel and W. Hugh Clark, members of the general assembly, had appointed a committee to study the method of elections, and that two black citizens were appointed to the committee, Jerry Wilson and Jethro McCain. According to Coleman, "the Blacks were totally in favor of At-Large with resident requirements," and "[a]t no time that I can recall anyone was in favor of Single-Member Districts." Coleman added that it would be a waste of time to contact Wilson and McCain for verification because "these two individuals are somewhat senile and cannot discuss the matter intelligently."

Both Wilson and McCain wrote to the Attorney General and disputed Coleman's representations. According to McCain, "I have never talked to W. Hugh Clark in my life, nor have I ever been appointed by him or W. A. Reel to any committee." He had never attended a meeting to discuss the method of elections for the county. "Anyone familiar with Edgefield, as I am," he wrote, "would know that blacks and whites would never have met in 1966 to discuss governance of the County. Whites have always made those kind of decisions by themselves and without consulting and without regard for the wishes of the black community." The claim that blacks favored at-large elections was "totally false. Blacks know that at-large elections discriminate and make it just about impossible for blacks to elect a candidate of their choice." As for the charge that

he was senile, Wilson attached a statement from his doctor certifying that he was "oriented" and "of sound mind."[1008]

Jethro McCain wrote in a similar vein. Coleman's letter was a "complete fabrication," he said. He had never had a discussion of any kind with Clark and had never been appointed to any committee by Clark or Reel. Integrated meetings of blacks and whites in Edgefield County "did not take place." The claim that blacks favored at-large elections was "quite simply, absurd." It was "an affront to the black community to claim . . . that it has ever supported a system of elections that totally excludes it from effective participation in county politics." He took "personal offense" at Coleman's claim that he was "somewhat senile," and attached a statement from his doctor that he enjoys "good health and a clear mind."[1009]

The Attorney General objected to the county's submission. Citing the findings of the district court, he concluded that the proposed at-large elections have "the potential for impermissibly diluting minority voting strength."[1010] Joe Anderson, a member of the county legislative delegation, had by this time replaced Charles Coleman as the Edgefield county attorney. Following the Section 5 objection, Anderson took the lead in

[1008] Jerry Wilson to William Bradford Reynolds, Assistant Attorney General, May 14, 1984.

[1009] Jethro McCain to William Bradford Reynolds, Assistant Attorney General, May 17, 1984.

[1010] William Bradford Reynolds, Assistant Attorney General, to C. Havird Jones, Jr., June 11, 1984.

preparing a plan using all single member districts. The plan was acceptable to the plaintiffs and was approved by the court.

In the ensuing election held under the new plan in 1984, three African Americans were elected to the county council, the first in the county's modern history. In the absence of Section 5, it is impossible to assume that black voters in Edgefield County would have the opportunity to participate in the political process on an equal basis with whites and elect candidates of their choice.

Jackson v. Edgefield County School District

The suit against the Edgefield County Council was only the beginning of voting rights litigation in Edgefield County. In addition to the detailed findings of discrimination in the county council case, the amendment of Section 2 of the Voting Rights Act to incorporate a discriminatory "results" standard set the stage for further successful litigation.

In 1985, Nathaniel Jackson, Odell Glover, and George Smith filed suit, represented by the ACLU, challenging the at-large system for electing the board of school trustees, which had been adopted in 1968.[1011] Prior to that time the members of the board, like the county council, had been appointed by the governor under the Tillman era system.

[1011] Jackson v. Edgefield County, South Carolina School District, Civ. No. 9:85-709-3 (D.S.C.).

A trial was conducted in the summer of 1986, and a ruling issued in September that the at-large system violated the new results standard of Section 2. The court noted many of the factors found by the court in the previous case against the county council, finding:

> *There was a long and continuing history of "pervasive racial discrimination [which] has left the County's black citizens economically, socially, and politically disadvantaged."
>
> *State law enforced racial segregation in most areas of life, including marriage, public accommodations, business licensing, private and public employment, juries, and prisons, and the degree of discrimination was "nowhere worse than in Edgefield County."
>
> *Not only were "discriminatory registration and balloting procedures created by the State, but also there were incidents of physical intimidation and violence exhibited by organized groups of white supremacists in Edgefield County."
>
> *During the 1950's and into the mid-60's the principal obstacle to black voter registration "was the hostility displayed by the white registration clerks."
>
> *There was "a severe degree of racial bloc voting" and only a "minimal degree of electoral success by minority candidates."

Based upon "the totality of the circumstances," the at-large system diluted black voting strength in violation of Section 2 of the Voting Rights Act.[1012]

The board of trustees adopted a remedial plan and submitted it to the Department of Justice for preclearance under Section 5. The plaintiffs urged the Attorney General to object on a number of grounds, including that the plan failed to

[1012] Jackson v. Edgefield County, 650 F. Supp. 1176, 1180-1183, 1203-1204 (D.S.C. 1986).

provide blacks with an equal opportunity to elect candidates of their choice. The Attorney General agreed and denied preclearance. He concluded that the existence of racial bloc voting and other factors "strongly suggest that blacks will have a realistic opportunity for electing candidates of their choice in only two of the school board's proposed districts - as opposed to the four claimed by the county." Not only were blacks "firmly" opposed to the trustees' plan, but they "were afforded no input into the development of the plan." The plan was apparently drawn "in a manner calculated to minimize black voting strength," a fact that was evident from alternative configurations that would have provided black voters "an equal opportunity to participate in the electoral process."[1013] Faced with the Section 5 objection, the board of trustees adopted an alternative plan that met with the plaintiffs' approval. The plan was submitted for preclearance, approved by the Attorney General, and implemented in November 1987.

Thomas v. Mayor and Town Council of Edgefield

Jackson v. Mayor and Town Council of Johnston

Also in 1987, black residents, again with the assistance of the ACLU filed suit challenging the at-large method of electing the town councils in Edgefield and Johnston, the two largest towns in the county. Following the decision in the case against the school trustees, both municipalities settled by adopting districting plans rather than go

[1013] William Bradford Reynolds, Assistant Attorney General, to James B. Richardson, Esq., May 22, 1987.

to trial to defend their at-large systems. In both cases the parties stipulated that the plaintiffs could present "a prima facie case" that the challenged system diluted black voting strength in violation of the Voting Rights Act.[1014]

The plan for the town of Johnston provided for six single member districts, and at the ensuing election three black candidates were elected from three majority black districts. The release of the 1990 census showed the districts to be malapportioned, and the council adopted, over the objections of the three black members, a plan which overconcentrated, or packed, black residents in three districts at 94.5%, 82.7%, and 82% of the population respectively. This change left the three the remaining districts majority white. Given the existence of racial bloc voting, the plan ensured that whites, who were now 40% of the town population of approximately 2,500, would control 50% of the council seats.

The plan was submitted for preclearance under Section 5, but the Attorney General objected in June 1992, concluding that the plan unnecessarily packed black voters, and had been approved by a vote "along racial lines" without any legitimate nonracial reason given for its adoption.[1015] The town then submitted a marginally revised plan, but it too drew an objection. According to the Attorney General, the plan persisted in "unnecessarily 'pack[ing]' black voters into three districts," and the

[1014] Thomas v. Mayor and Town Council of Edgefield, South Carolina, Civ. No. 9:86-2901-16 (D.S.C. May 27, 1987); Jackson v. Johnston, South Carolina, Civ. No. 9:87-955-3 (D.S.C. September. 30, 1987).

"proffered reasons for rejecting [an] alternative proposal [recommended by its demographer and endorsed by the black community] appears pretextual."[1016] The town was finally forced to submit an alternative plan that provided a fairer opportunity for black voters to elect candidates of their choice, and it was precleared.

Fairfield County

Walker v. Fairfield County Council

In 1988, just prior to the November 8 election, the ACLU filed suit on behalf of black voters in Fairfield County challenging at-large elections for the county council under the Constitution and Section 2.[1017] The county's election system had been challenged by other plaintiffs in 1986, but that suit had been withdrawn because of failure to join the county elections commission as a defendant.

At-large elections in the Town of Winnsboro, the Fairfield County seat, had also been challenged. In July 1988, the District Court ruled that black plaintiffs had established a prima facie case that Winnsboro's at-large system violated Section 2 and ordered the implementation of a remedial district plan.[1018]

[1015] John R. Dunne, Assistant Attorney General, to W. Bernard Welborn, June 5, 1992.

[1016] James P. Turner, Acting Assistant Attorney General, to W. Bernard Welborn, July 6, 1993 & October 26, 1993.

[1017] Walker v. Fairfield County, South Carolina, County Council, Civ. No. 0-88-2927-6 (D.S.C.).

[1018] Broome v. Winnsboro, South Carolina Mayor and Town Council, Civ. No. 0-88-1160-16 (D.S.C.).

A rural county in the middle of the state with a population under 25,000, Fairfield County had a history of racially polarized voting. And, in the days leading up to the November 1998 election, a black councilman told the state's leading newspaper that whites had "threatened blacks to stay away from the polls." Councilman Robert Davis, who had been the only black candidate nominated in the June primary that year, described "a plantation mentality, [which] has included threats against job security, exploitation of 'financial problems,' and outright asking blacks to stay away from the polls."[1019]

In the case against the county, black plaintiffs did not seek to enjoin the election, but simply to invalidate the at-large method of elections and replace it with a fair district plan. In late November, the ACLU sought an injunction to block the county from failing to "conduct special elections for the Fairfield County Council pursuant to a new apportionment and method of elections" and enjoining the candidates elected on November 8, 1988 from taking office. The court ruled that plaintiffs could establish a prima facie case of a violation of Section 2, and the parties agreed in December to submit a new plan for district elections with a schedule for holding a special election within 30 days.

This suit was the 21st voting rights law suit the ACLU had filed in South Carolina.

[1019] Jeff Miller, "Fairfield elections protested," The State, November 4, 1988, p. 1-C.

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Georgetown County

Schooler v. Harper

Watkins v. Scoville

Georgetown County, South Carolina, was governed by a five member council elected at-large. Black residents, organized as the Committee for Single Member Districts for Georgetown County, secured enough signatures to require the county to conduct a referendum to increase the number of council seats to seven, with elections held in single member districts. The referendum was held in February 1983, and was approved by 56% of the voters.

Whites who opposed the change, and who were supported by the county council, then filed an election protest and instituted a suit in state court challenging implementation of the district system on the grounds that the referendum had not been conducted in conformity with state law. They claimed the method of electing the chairman was not specified, with the result that the referendum question was "ambiguous" and thus void under state law.[1020]

Black residents of the county, who had been active in the Committee for Single Member Districts for Georgetown County, and represented by the ACLU, then filed suit in federal court in March 1983, contending that at-large elections diluted minority voting strength, and that the election challenge and state court suit were attempts to

[1020] Schooler v. Harper, Case No. 83-CP-22-143 (Ct. of Common Pleas).

deny or abridge the right of blacks to vote. Plaintiffs also contended that state law required any ambiguities in referenda or election ballots to be challenged prior to the referendum elections or be waived, and that allowance of the challenge and state court law suit constituted changes in voting which could not be implemented absent preclearance under Section 5.[1021]

The ACLU also represented certain of the defendants in the state court lawsuit, who were also plaintiffs in the federal court action. The state court ruled in December 1983, that the local board of elections had exclusive jurisdiction over election challenges, and denied the plaintiffs relief. The board of elections subsequently heard, and dismissed, the election challenge on the grounds that the challengers had waived any objection to the referendum ballot by failing to file a contest prior to the election, and the ballot was not in any event ambiguous.

Despite continuing delaying tactics by the county council, a single member district plan was finally adopted in 1984, and plaintiffs accordingly consented to the dismissal of their Voting Rights Act claims.[1022] The new plan was implemented, and three black candidates were elected in the 1984 election.

[1021] Watkins v. Scoville, Civ. No. 83-0648-8 (D.S.C.).

[1022] Id., Order of May 21, 1984.

Laurens County

On March 12, 1785, the general assembly established Laurens and five other counties out of the old Ninety-Six District in northwestern South Carolina. During the late 19th century, Laurens County was home to many prominent African Americans. Charles H. Duckett, a prominent businessman, was the only African American in the southeastern United States operating a retail lumber business. Henry McDaniel, a distinguished black politician from Laurens County, served in the South Carolina Legislature from 1868 until 1872.

The vitality of black political participation was short lived. During Reconstruction, white residents of Laurens County resented the enfranchisement of newly freed blacks, most of whom supported the despised Republican Party. Whites organized rifle and saber clubs that used intimidation and violence to suppress the black vote. As a result of Ku Klux Klan activity in lower Piedmont counties, and the Laurens race riot of 1870 near the Courthouse Square, Laurens and eight other South Carolina counties were placed under martial law in 1871. But Reconstruction ended in 1877, bringing with it the systematic disfranchisement of black residents.

As late as the 1970s, black political participation in local government in Laurens County was severely depressed. Though blacks comprised a sizable minority within the various municipalities and government entities in the county, few blacks were elected to office. As a result, the ACLU brought several lawsuits on behalf of black

residents in the late 1980s, challenging the use of discriminatory at-large elections in various jurisdictions in the county.

Beasley v. Laurens County

The Laurens County Council consisted of five members elected at-large, with the chair selected by the members. Majority vote and numbered post requirements were in effect. According to the 1980 census, the population of the county was 52,214 people, of whom 15,165 (29%) were black. Despite numerous attempts, no black candidate had ever been elected to the county council. In 1987, a group of African American voters represented by the ACLU sued in federal court under Section 2 and the Constitution, seeking single member districts.[1023]

On November 17, 1987, the court entered a consent judgment and decree in which defendants agreed to implement a system of district elections for the county council. Subsequently, the defendants adopted a single member district plan, it was precleared by the Department of Justice, and approved by the Court on April 28, 1988. The plan increased the number of representatives from five to seven and created two majority black districts. In the consent order, the defendants did not admit all of plaintiffs' allegations, but "recognize[d] that black voters have given significant support to black candidates seeking election to the Laurens County Council, and despite this

[1023] Beasley v. Laurens County, South Carolina, County Council, Civ. No. 6:87-1122-3 (D.S.C.).

support, black voters have never been able to elect candidates of their choice." The county further acknowledged:

> Black candidates supported by black voters were defeated in at-large elections for . . . County Council in 1970, 1974, 1976, 1978, 1984, and 1986 . . . [t]he black population of Laurens County is sufficiently geographically concentrated in certain parts of the county that a system of single member districts . . . under which black voters would obtain an opportunity to elect candidates of their choice to the county council on an equal basis with white voters.

The single member district plan was implemented for the 1988 election and black candidates won election to the county government.

Smith v. Laurens County School Districts 55 and 56

Traditionally, the boards of trustees for School Districts 55 and 56 in Laurens County were composed of seven members appointed by the county board of education from six attendance districts, with the chair appointed at-large. In the event 12 or more qualified electors in a particular district endorsed a candidate and requested an election, the board of education was required to hold an election in that district. Only qualified electors in the district were eligible to vote for that district's trustee. Then, in 1971, the general assembly adopted at-large elections for members of both boards. The state submitted the changes for preclearance under Section 5, but was advised by the Department of Justice that no determination could be made until additional information

was submitted.[1024] The county nonetheless implemented at-large elections for the trustees.

On January 14, 1987, the county resubmitted the change adopting at-large trustee elections to the Department of Justice for preclearance, and it did so in tandem with another act that altered the attendance areas for District 55. African American voters in Districts 55 and 56 then brought suit in March 1987, charging that the at-large method of electing the trustees had not been precleared under Section 5, and violated the Constitution and Section 2.[1025] On April 7, 1987, however, the Attorney General advised the state that at-large elections for the school districts had, in fact, been precleared in 1972, when the Attorney General, in connection with a submission of voting changes at that time, failed to object within sixty days after he was informed that certain requested information was unavailable.[1026] In view of the preclearance letter, the plaintiffs advised the court that their Section 5 claim was now moot, and proceeded with their Section 2 vote dilution claim.

Following settlement discussions, the parties were able to agree on plans using single member districts for both boards, which the general assembly enacted. Each board had seven districts, two of which were majority black. On December 15, 1987, the

[1024] David L. Norman, Department of Justice, to Hardwick Stuart, Jr., August 18, 1972.

[1025] Smith v. Laurens County, South Carlina School District 55, Civ. No. 6:87-512-1 (D.S.C.).

[1026] William Bradford Reynolds, Assistant Attorney General, to C. Havird Jones, April 7, 1987.

court entered a consent order approving single member districts for both school districts and providing for special elections.

Paden v. Laurens County School District 55

The 1990 census showed that the districts for the Board of Trustees of District 55 were severely malapportioned, with a total deviation of 54.2%. African American residents of the district, represented by the ACLU, filed suit challenging the plan on one person, one vote grounds, and alleging that it diluted the voting strength of black voters in violation of Section 2.[1027] The parties subsequently entered into a consent decree on May 10, 1995, in which the general assembly was called upon to enact a constitutional districting plan and submit it for preclearance. A special election was to be conducted under the plan once it was precleared. Plaintiffs thereafter dismissed their claims as moot.

Glover v. Laurens

Laurens, the county seat of Laurens County, had a population of 10,587 in the 1980s of whom 39% were black. City government consisted of a mayor and six member council elected at-large and by majority vote. Because of bloc voting by the white majority, no black person had ever been elected mayor or to the city council. As a

[1027] Paden v. Laurens County School District 55, Case No. 6:95-878-21 (D.S.C.).

result, black residents of Laurens and the local NAACP, represented by the ACLU and the NAACP, brought suit in federal court in 1987, challenging at-large city council elections.[1028]

The plaintiffs moved for summary judgment, which the defendants did not oppose. In its order granting the motion, the court found "at-large elections for the Mayor and City Council are in violation of [Section 2]." The court enjoined elections under the at-large system and directed the defendants to propose a "new system of district elections for the City of Laurens," which "shall fairly represent black residents."[1029] The city submitted a plan, which was approved by the plaintiffs, providing for a mayor and six member council elected from districts, three of which were majority black. The plan was approved by the court, precleared under Section 5, and implemented in 1988.

The City of Clinton

In 2002, the Department of Justice objected to annexations that would have hampered black electoral success in the City of Clinton, another municipality in Laurens County. The city council was composed of seven single member districts, three of which were majority black. The annexation would have reduced the minority

[1028] Glover v. Laurens, South Carolina Mayor and Council, Civ. No. 6:87-1663-17 (D.S.C.).

[1029] Id., Order of March 18, 1988.

percentage in Ward 1 from 59.3% to 50.0%, and the percentage of black voting age residents to less than 50%. In issuing its objection, the Department of Justice determined that a reduction in the voting strength of African Americans was avoidable:

> The effect of the designation of the annexations to Ward 1 significantly reduces the level of black voting strength in that district, and according to our election analysis, eliminates the ability that black voters currently have to elect their candidate of choice in the district. Concomitantly, the elimination of Ward 1 as a district in which black voters can elect a candidate of choice reduces the level of minority voting strength in the expanded city from three out of seven (42.9 percent) to two out of seven (28.6 percent), while their relative share of the city-wide electorate drops no more than a percentage point to not less than 37 percent.
>
> [W]e sought to ascertain whether the elimination of the district as one in which black voters could elect a candidate of choice, and the resulting inability of the electoral system in the expanded city boundaries to reflect minority voting strength, was unavoidable. As part of that analysis, we prepared an illustrative limited redistricting plan that affects only Wards 1 and 2. Our conclusion is that the failure to provide a fair recognition of minority voting strength in the expanded city is avoidable, through either a city-wide or a limited redistricting. We recognize that the city is aware that such redistricting is feasible, and has indicated it expects to redistrict in this manner in the future, but has chosen not to do so at this time.
>
> Where annexations significantly decrease minority voting strength, the reasons for the annexations must be objectively verifiable and legitimate, and the post-annexation election system must fairly reflect the voting strength of the minority community in the expanded electorate.[1030]

Since the city failed to carry its burden of proof, the reduction of black voting strength under the proposed plan was objectionable under Section 5 and the potential discriminatory change was blocked.

[1030] Ralph F. Boyd, Jr., Assistant Attorney General, to C. Samuel Bennett II, December 9, 2002.

Lexington & Saluda Counties

R.O. Levy vs. Lexington County, South Carolina, School District Three Board of Trustees

Lexington School District 3 is one of five school districts lying wholly or partially within Lexington County in the central part of the state. Beginning in 1994, its seven member board of education was elected at-large in nonpartisan elections held in even number years with staggered terms. Although blacks constitute 28.5% of the population of the school district, prior to a vote dilution lawsuit filed by the ACLU on behalf of black residents in 2003, no black person had ever been elected to the school board under the challenged system.[1031]

After the lawsuit was filed, Cora Lester, a retired black school teacher, was elected in 2004, after a former school trustee declined to seek reelection. Lester was advised by members of the board that they would support her election. Indeed, one of the board members who solicited her candidacy did so after seeing that the plaintiffs' proposed remedial plan would place him in a majority black district. Still, only 38% of white voters actually cast one of their four ballots for Lester.

Lexington County has a long history of racial discrimination. Schools were racially segregated; town ordinances required segregation in places of public accommodation; there was racial discrimination in hiring; the Ku Klux Klan was active

[1031] Levy v. Lexington County School District Three, Civ. No. 03-3093 (D.S.C.)

in the county; blacks were excluded from juries; election campaigns were characterized by racial appeals; whites fled the Democratic Party because of its support of civil rights laws; and housing was constructed on a segregated basis.

Horace King, a resident of Lexington County, was head of the South Carolina chapter of the Christian Knights of the Ku Klux Klan. To promote the organization's white supremacist goals, he encouraged Klan members to burn black churches. In 1998, a member of the local Ku Klux Klan pled guilty to shooting three black teenagers outside a rural nightclub in Pelion in Lexington County.

The City of Batesburg, which is in School District 3, adopted a council form of government and a majority vote requirement in 1986. On February 24, 1986, the Department of Justice objected to the majority vote requirement:

> Our analysis of elections in Batesburg raises a clear inference that voting in elections involving black candidates is polarized along racial lines and that this voting pattern has hampered the ability of black voters to elect candidates of their choice. The city has not provided us with sufficient information to counter this conclusion.
>
> In this context, the incorporation of a majority vote requirement, which increases the probability of "head-to-head" contests between black candidates and white candidates, will in all likelihood dilute minority voting strength and thereby exacerbate the election difficulties currently faced by black voters.[1032]

Seventeen years later, local officials once again tried to impose the same discriminatory mechanism after Batesburg and the adjoining town of Leesville, also located in District Three, consolidated in 1993. The new City of Batesburg-Leesville

[1032] William Bradford Reynolds, Assistant Attorney General, to Richard J. Breibart, February 24, 1986.

adopted a majority vote requirement for council and mayoral elections. Again, the Department of Justice objected to the majority vote requirement on June 1, 1993:

> Our analysis reveals an apparent pattern of racially polarized voting in town elections for both Batesburg and Leesville that has hampered the ability of black voters to elect candidates of choice and has deterred potential candidates of choice of the black community from competing for at-large offices. Indeed, single-member districts were adopted for the election of councilmembers for the consolidated town as a way to address the concern that municipal elections in the respective towns had been racially polarized.
>
> With regard to the majority vote requirement, we note that on February 24, 1986, the Attorney General interposed a Section 5 objection to the majority vote requirement for the mayor and council for the Town of Batesburg. In our objection letter we stated that in the context of an at-large electoral scheme, the proposed change might, 'dilute minority voting strength and exacerbate the election difficulties currently faced by black candidates.' Thus, the change now before us would impose in the consolidated town the same electoral feature, i.e., a majority vote requirement, to which we interposed an objection in 1986 in Batesburg.
>
> We recognize that a majority vote requirement in councilmanic elections in the single-member districts, four of which have black voting age population majorities, does not raise the same concerns as its use in an at-large system. But the mayor of the consolidated town will be elected at large. It is well recognized that where a jurisdiction has a significant minority population and a pattern of racially polarized voting exists, the adoption of a majority vote requirement in an at-large election system may further limit the opportunity of minority voters to elect candidates of choice by increasing the probability of 'head-to-head' contests between minority and white candidates.[1033]

The case against Lexington County School District Three is presently scheduled for trial in March 2006.

[1033] Letter of James P. Turner, Acting Assistant Attorney General, to Jonathan R. Hendrix, June 1, 1993.

Marion County and the City of Mullins

Reaves v. City Council of Mullins

The City of Mullins, South Carolina, was governed by a mayor and six member council elected at-large and by plurality vote. African Americans comprised about half of the city population, but whites were a majority of registered voters. After passage of the Voting Rights Act and increased black voter registration, the city adopted an ordinance in 1977, providing for elections by majority vote. The voting change was submitted to the Department of Justice but was objected to because the change "could have the potential for abridging minority voting rights."[1034] The city asked for reconsideration, but it was denied by the Attorney General who concluded that, "our analysis of election returns reveals evidence of racial bloc voting, and our research indicates that black candidacies may be deterred by the existence of a majority vote requirement."[1035]

Seventeen years later, black residents of the town, represented by the ACLU, filed suit in federal court challenging at-large elections as diluting minority voting strength.[1036] At the time of the lawsuit, only one black person had ever been elected to city government. Three years later, the court issued an order invalidating the at-large

[1034] Drew S. Days III, Assistant Attorney General, to Raymond Pridgen, June 30, 1978.

[1035] Drew S. Days III, Assistant Attorney General, to Raymond Pridgen, September 28, 1978.

[1036] Reaves v. City Council of Mullins, South Carolina, Civ. No. 4:85-1533-2 (D.S.C.).

system under Section 2 and made detailed findings, including a "history of both public and private discrimination" that "has hindered, both directly and indirectly, the ability of Mullins' blacks to participate effectively in the political process," and "racially polarized voting . . . and the general inability of the minority-preferred candidates to win elections."[1037]

Rather than accept a plan formulated by the city, the court adopted a plan prepared by the state Division of Research and Statistical Services which called for six single member districts with the mayor elected at-large. Three of the council districts were majority black, ensuring that racially polarized voting would not prevent minority voters from electing candidates of their choice.[1038]

Orangeburg County and the City of Orangeburg

Owens v. City Council of Orangeburg

Orangeburg County, which is majority black, is home to two historically black institutions of higher learning, Claflin College and South Carolina State College. The county also has a stark history of racial discrimination and conflict.

In the aftermath of Reconstruction, Samuel Dibble, a former legislator from Orangeburg, designed a congressional redistricting plan that packed as many blacks as

[1037] Id., Order of August 8, 1988.

[1038] Id., Order of February 6, 1990.

possible in one district, the Seventh, to allow white Democrats to control the remaining six. The Seventh District, also known as the Boa Constrictor District:

> began on the banks of the Savannah River and meandered up the coast (excluding the city of Charleston) to Winyah Bay in Georgetown County; it then moved inland to include lower Richland and Sumter Counties. Also included were all or portions of Berkeley, Charleston, Clarendon, Colleton, Orangeburg and Williamsburg Counties.[1039]

After the plan was adopted in 1882, only the Seventh District elected a black congressman, despite the fact that a majority of the state population was black. The following year, Dibble was elected to Congress from one of the white controlled districts.

In more recent times, Orangeburg was the site of the infamous Orangeburg Massacre, in which three black students were killed and 27 others wounded on February 8, 1968, by members of the state highway patrol in the aftermath of civil rights protests over a segregated bowling alley. The protestors had built a bonfire on the campus of South Carolina State University, and when the highway patrol moved in to extinguish it, one patrolman fired his carbine in the air and others started shooting. Nine highway patrol officers were charged with violations of federal law, but all were acquitted.[1040]

[1039] Walter Edgar, South Carolina: A History (Columbia, South Carolina: University of South Carolina Press, 1998) pp. 415-16.

[1040] CNN.com, "South Carolina Marks 'Orangeburg Massacre' Anniversary," February 8, 2001, found at:

The state blamed the massacre on Cleveland Sellers, a black civil rights organizer for the Student Nonviolent Coordinating Committee (SNCC). Sellers was convicted under state law for inciting a riot, and served a year in prison, but was granted a full pardon by the governor in 1994. Sellers, who went on to get a Ph.D. in history, now teaches at the University of South Carolina in Columbia.[1041]

The 1980 census showed the City of Orangeburg, including its student population, was 49% black, but no black person had ever been elected mayor or to the four member council, all of whom were elected at-large. In May 1985, state representative Larry Mitchell urged the city council to adopt single member districts and presented a map containing one majority black district out of four. The council rejected Rep. Mitchell's plan.

In the summer of 1986, the ACLU, on behalf of black voters in Orangeburg, sued the city council alleging that its at-large system diluted black voting strength in violation of Section 2 and the Constitution.[1042] The case was scheduled for trial in May 1987, but on the eve of trial, and in the face of strong evidence of white bloc voting and racial polarization, the defendants agreed to settle the case. The plaintiffs' analysis of elections was confirmed by the South Carolina Advisory Committee to the U.S.

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http://archives.cnn.com/2001/US/02/08/orangeburg.masscre/ Last accessed February 7, 2006.

[1041] Sellers has written an autobiography, River of No Return: The Autobiography of a Black Militant and the Life and Death of SNCC (Jackson, Mississippi: University Press of Mississippi, 1990).

[1042] Owens v. City Council of Orangeburg, S.C., 5:86-1564-6 (D.S.C.).

Commission on Civil Rights, which found "racial polarity in voting" in Orangeburg.[1043] In a subsequent consent order, the court found "plaintiffs would present a prima facie case" that the at-large system violated Section 2.[1044] The parties agreed to settle the case based on a plan using six single member districts for city council elections.

Orangeburg County also has a history of Section 5 objections. In 1984, Elloree, a rural town in eastern Orangeburg County, adopted staggered terms for its council members and a majority vote requirement for town council members and water commission elections. The Department of Justice objected to the changes, saying:

> We note that blacks constitute 34.43 percent of the town's population. Our analysis also indicates that, in the context of the racial bloc voting patterns that seems to exist in Elloree, a change from concurrent elections by a simple plurality to staggered terms and a majority vote requirement adversely affect the ability of minorities to elect candidates of their choice to office, particularly where, as here, single—shot voting is permitted under state law.[1045]

Prior to 1976, Orangeburg County was governed by a five member commission elected at-large. Although the county was majority (56%) black, no black person had ever been elected to the commission. In 1976, under the Home Rule Act, the county chose a commission/administrator form of government with seven commissioners elected from single member districts, three of which were majority black and black

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[1043] Briefing Memorandum, South Carolina Advisory Committee (Atlanta; 1985).

[1044] Owens, Order of June 3, 1987.

[1045] William Bradford Reynolds, Assistant Attorney General, to Charles Whetstone, Jr., June 11, 1984.

candidates were subsequently elected from the majority black districts on a consistent basis.

After the 1980 census, the state's demographer prepared a redistricting plan for the commission containing four majority black districts. But in a racially divided vote, the commission rejected the plan and adopted one containing four majority white districts instead. To accomplish this, blacks were packed in one district at the level of 98%, and in another at 70%. The plan was not submitted to the Department of Justice until 1985, and commission elections were held in violation of Section 5 in 1982 and 1984. When the Department of Justice objected to the plan, it noted that:

> Our review of the information submitted to us revealed that several alternative plans were developed and considered by county officials, but that the plan ultimately selected, and submitted, failed to give any meaningful recognition to the significant increase in the county's minority population over the past decade. . . . While the Act imposes no obligation on a jurisdiction to maximize minority voting strength, it does prohibit the drawing of a redistricting plan so as to unfairly minimize the voting strength of black citizens.
>
> In light of the county's failure to reflect in its submitted redistricting the measurable increase in the county's minority voters, and the absence of a satisfactory explanation for this oversight, I cannot conclude, as I must to preclear this plan, that Orangeburg County has met its burden under Section 5 in this instance.[1046]

[1046] William Bradford Reynolds, Assistant Attorney General, to Robert R. Horger, September 3, 1985 (internal citations omitted).

The commission took up redistricting again in 1986, and in light of the Section 5 objection adopted a plan containing four majority black districts. The Department of Justice precleared the plan in April 1986.

Following the 1990 census, the county council attempted once again to dilute black voting strength but the Department of Justice objected, saying:

> According to the 1990 census, black persons comprise approximately 58 percent of the total population in Orangeburg County. The seven members of the Orangeburg County Council are elected from single-member districts and there appears to be a pattern of racially polarized voting in county elections.
>
> Our review of the redistricting process has shown that the black community consistently sought from the earliest stages a redistricting plan that would contain at least four districts in which black citizens would have the opportunity to elect candidates of their choice. A series of alternative redistricting plans was presented to the council by representatives of the black community. None of these alternative plans was adopted, nor does it appear that they received serious consideration by the council majority. While Orangeburg County was not required to adopt any particular plan advocated by the black community, the county is required to show that the plan it adopted was not motivated, at least in part, by a desire to deny or abridge the right to vote on account of race or color.
>
> In this regard, many of the reasons presented to us for rejecting these alternative plans appear to be pretextual. Furthermore, it appears that the protection of incumbents, particularly white incumbents, and the desire to confine the black population percentage in District 5 to a predetermined and unnecessarily low level, were dominant factors in the council's redistricting choices.
>
> Moreover, as you are aware the 1990 census showed that the current redistricting plan is malapportioned and that District 5 in particular is significantly overpopulated. Our analysis indicates that the proposed

> redistricting plan unnecessarily removes black population from existing District 5 in the process of reducing the district's population deviation. We note also what appears to be unnecessary fragmentation of a majority-black areas within the City of Orangeburg.[1047]

As a result of this objection, the county was again forced to adopt a plan that complied with Section 5. As these developments clearly show, Section 5 has been critical to preventing the adoption of discriminatory voting changes even in jurisdictions with minority black populations during the 1980s and 1990s.

Richland County

NAACP v. Richland County

The NAACP, represented by John Harper, a black lawyer in Columbia, filed suit in 1987, asking the court to enjoin a referendum on whether to reduce the size of the Richland County Council from 11 to 9 members absent preclearance under Section 5.[1048] On the day the complaint was filed, Harper issued a news release and held a press conference at which he said the NAACP opposed a reduction in the size of the council, and thus a reduction in the number of majority black districts, because it would have a negative impact on black voters. In response, defendants filed a motion for sanctions

[1047] John R. Dunne, Assistant Attorney General, to Robert R. Horger, July 21, 1992.

[1048] NAACP v. Richland County, South Carolina, Civ. No. 3-87-2597-17 (D.S.C.).

against the plaintiffs and their attorney for prejudicial pre-trial publicity "based upon a press conference and news release which was held and given out."[1049]

The district court entered an order enjoining the referendum absent compliance with Section 5, and the ACLU agreed to represent the plaintiffs and their lawyer on the motion seeking sanctions. In its response to the motion, the ACLU cited numerous federal court decisions invalidating under the First Amendment local court regulations prohibiting attorney extrajudicial comments during litigation, particularly civil litigation before a judge alone. The ACLU further pointed out that attacks upon lawyers representing minority plaintiffs in civil rights cases was one of the long standing, and most dubious, traditions of the white southern bar.

A number of southern states enacted statutes aimed at civil rights lawyers and civil rights lawsuits, making it a crime to "engage in exciting and stirring up" litigation. The Supreme Court invalidated one such statute in Virginia noting that "[w]e cannot close our eyes to the fact that the . . . civil rights movement has engendered the intense resentment and opposition of the politically dominant white community. . . . In such circumstances, a statute broadly curtailing group activity leading to litigation may easily become a weapon of oppression."[1050] Despite the ruling of the Supreme Court, the South Carolina Supreme Court subsequently issued a public reprimand to a lawyer

[1049] Id., Defendants' Memorandum in Support of Motion for Sanctions, September 25, 1987, p. 1.

[1050] NAACP v. Button, 371 U.S. 415, 435-36 (1963).

for offering the free legal assistance of the ACLU to indigent black women who had been sterilized by their doctor as a condition for receiving Medicaid benefits. The reprimand was set aside by the U.S. Supreme Court, which, relying upon its prior decision in the Virginia case, held that the conduct in question was protected by the First Amendment.[1051] The district court in the Richland County case issued an order denying the defendants' motion for sanctions, similarly concluding that the conduct of plaintiffs and their lawyers was protected by the First Amendment.

Washington v. Finlay

The City of Columbia, which has a black population of about 35%, is the capital of South Carolina and the county seat of Richland County. In the 1970's, the city's mayor and four member council were elected at-large, but no black person had ever been elected to city office, although black candidates had run numerous times. The city had a significant history of discrimination, as did the rest of the state, the legacy of which extended to racial bloc voting and polarization.

On the eve of passage of the Voting Rights Act, blacks were only 13% of the registered voters in Richland County. As late as 1970, Albert Watson, a former member of the general assembly from Richland County and a member of the U.S. House of Representatives, ran a strong campaign as the Republican Party's nominee for governor

[1051] In re Primus, 436 U.S. 412 (1978).

on a platform of segregation and white supremacy. To dramatize his commitment to white dominance, he wore a white tie on the campaign trail.[1052]

In 1977, black voters of Columbia, represented by the ACLU, filed a lawsuit challenging at-large elections for the city council.[1053] Shortly thereafter, the city adopted a resolution to hold a referendum whether the size of the council should be increased to six members, with three members plus the mayor elected at-large, and three members elected from single member districts. The so-called 3-3-1 plan would have created only one majority black district. The state's demographer, who drew the plan, admitted "it would be difficult . . . for a minority to get elected" in the two majority white districts or to an at-large position.[1054] Although it would have been possible to draw a plan with additional majority black districts, the council was determined to limit the number of such districts to one.

There was resistance to the 3-3-1 plan in both the black and white communities. Many blacks opposed it because they felt it was an effort to limit black representation on the council to a mere token. Many whites opposed the plan because, in the words of one council member, "It's - what's the name of that movie - 'Apocalypse Now,' is the attitude I'm getting from a lot of old line Columbians. They think it is changing a way

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[1052] NAACP v. City of Columbia, Civ. No. 3:92-914-17 (D.S.C.) Tr. Trans. 1794-95 (testimony of Jack Bass).

[1053] Washington v. Finlay, Civ. No. 77-1791 (D.S.C.).

[1054] Id., Tr. II 188-89.

of life."[1055] The referendum was defeated, with a majority of both blacks and whites voting "no."

At trial, none of the witnesses, white or black, disputed that at-large elections made it more difficult for blacks to win. Cultural and social barriers erected by segregation denied minority candidates access to white voters and white support. As one unsuccessful black city council candidate put it:

> We cannot depend, as voting practices have proven in the past, on the white vote to elect a black candidate to city council. That's it, and I'm not being racist in what I'm saying, and I'm certainly not being anti-white or pro-black. I'm speaking from the facts as they have proven themselves in past campaign results.[1056]

Douglas McKay, an expert for the plaintiffs in electoral geography, said that race was "very significant" in explaining voting behavior, and that at-large elections clearly disadvantaged blacks.[1057] Earl Black, a professor of government at the University of South Carolina and another expert for the plaintiffs, said that for many white voters "it's most unlikely that they are going to take seriously the question of whether they vote for a black candidate." In Columbia, there was a "typical pattern of widespread racial polarization," and "at-large elections of this type put black candidates at a severe disadvantage."[1058]

[1055] "Council OKs New Political Boundary Lines For City," The State, October 18, 1979.

[1056] Washington v. Finlay, R. IV 139.

[1057] Id., Tr. I 20.

[1058] Id., Tr. I 56, 69.

Despite this evidence, the district court ruled against the plaintiffs, concluding that there was no evidence of "any racially discriminatory intent or purpose on the part of the Defendants in maintaining a City Council with four councilmen elected at large."[1059]

Following the district court's decision, the city conducted a second referendum in April 1981, involving a 6-2-1 plan, which called for six single member districts and two members and the mayor elected at-large. The referendum was defeated in a sharply polarized vote, with 100% of blacks voting "yes," and 85% of whites voting "no." After the referendum, one council member said that Columbia "is about as polarized as I've ever seen it."[1060]

Plaintiffs appealed the decision of the district court. While the appeal was pending, the council, in response to pressure from the minority community and a recommendation from the Columbia Community Relations Council (CRC), adopted a resolution setting yet another referendum for December 15, 1981, on whether the method of elections should be changed to provide for the election of the mayor and two council members at-large and four council members from single member districts (the 4-2-1 plan). In its recommendation, the CRC said that the existing at-large system

[1059] Id., Order of March 23, 1980.

[1060] "Community Leaders Urged To Help Heal Referendum Injuries," The State, April 10, 1981.

"prohibits Blacks from being elected."[1061] A month later, the court of appeals affirmed the decision of the district court on the grounds that "no racially discriminatory purpose had been shown."[1062]

The 4-2-1 referendum was supported by the mayor and two members of the council, but two other members formed a group called The Committee to Save Columbia in opposition to the proposal. Angus "Red" McLendon, former chair of the city election commission, said the 4-2-1 proposal was a mistake. "We redheads are minorities," he said. "This thing of calling people minorities is sickening. They (blacks) just want something handed to them on a silver platter - that's a lot of crap."[1063] The council's resolution was precleared under Section 5 and the 4-2-1 plan was approved by the voters in December 1981.

The effect of the referendum was to render the plaintiffs' challenge to the at-large system moot. Accordingly, plaintiffs filed a petition for writ of certiorari asking the Supreme Court to vacate the opinions of the lower court on mootness grounds, but the petition was denied.[1064]

[1061] Quote in NAACP v. City of Columbia, Order of August 26, 1993, p. 13.

[1062] Washington v. Finlay, 664 F. 2d 913, 924 (4th Cir. 1981).

[1063] "4-2-1 Lines Forming," The State, November 15, 1981.

[1064] Washington v. Finlay, 457 U.S. 1120 (1982).

The new plan was implemented at the next election in March 1983, and two black candidates were elected to the city council - the first in the city's modern history.

The 4-2-1 plan worked in practice as many in the black community had predicted it would. Although blacks frequently ran for at-large positions on the city council, none was ever elected. The only black candidates to win were elected from the two majority black single member districts.

Simkins v. City of Columbia

Modjeska Simkins was the Rosa Parks of South Carolina. Born Modjeska Monteith in 1899, Simkins attended Benedict College in South Carolina, and went on to become a school teacher at the Booker T. Washington School in Columbia, although she was forced to resign her position after marrying because the local public school system did not permit married women to teach. Simkins was forced out of her next job as Director of Negro Work with the South Carolina Tuberculosis Association in 1942, because she refused to quit the NAACP. As secretary of the South Carolina Conference of the NAACP, she helped lead efforts to equalize teacher salaries for blacks and whites, challenge the white primary, campaigned against lynching, fought segregation in the public schools, and achieved national recognition as a civil rights leader and political activist.

In 1984, Simkins and other black residents of Columbia, represented by the ACLU, filed suit to enjoin a special election for the city council because of the city's

failure to comply with Section 5.[1065] The city had changed the date of its regular election, thereby shortening the time candidates had to qualify and campaign against white incumbents. Although the city had submitted the change for preclearance, it immediately began to implement it without waiting for a decision from the Department of Justice. In its answer to the complaint, the city contended that opening candidate qualifying and setting the dates for the election were merely "administrative" matters and were not practices or procedures subject to Section 5.

A three-judge court was convened and a trial was set for February 15, 1984. The day before the trial, however, the Attorney General precleared the special election and plaintiffs voluntarily dismissed their complaint as moot. The defendants moved for costs and attorneys' fees, but the request was denied by the court in August 1984.

NAACP v. City of Columbia

By 1990, the black population in Columbia had increased to 45%. And in 1992, the NAACP filed suit challenging the 4-2-1 plan as diluting minority voting strength in violation of Section 2.[1066]

Following the illness of one of the NAACP lawyers, and just prior to trial, the ACLU was asked to assist in the trial of the case and agreed to do so. The district court

[1065] Simkins v. City of Columbia, South Carolina, Civ. No. 84-65-15 (D.S.C.).

[1066] NAACP v. City of Columbia, Civ. No. 3:92-914-17 (D.S.C.).

concluded that "racially polarized voting does exist in white versus black elections," but blacks were able to elect candidates of their choice in white/white contests and thus there was no minority vote dilution.[1067] The plaintiffs appealed but the decision was affirmed.[1068] The Supreme Court denied a petition for writ of certiorari on February 21, 1995.[1069]

The litigation over the method of elections in Columbia spanned 18 years. And regardless of the rulings by the courts on legal issues, no honest observer could deny the continuing existence of racial division and polarization in the electorate.

Saluda County

Lewis v. Saluda County

Historically, Saluda County was majority black, but by 1980, the black population had dwindled to approximately 35%. No black person within memory had ever been elected to the county council, which was composed of five members, all elected at-large. In June 1983, black residents of the county, represented by the ACLU, filed suit, challenging the at-large system as violating Section 2 and the Constitution.[1070]

[1067] NAACP v. City of Columbia, 850 F. Supp. 404, 414, 416 (D.S.C. 1993).

[1068] NAACP v. City of Columbia, 33 F. 3d 52 (4th Cir. 1994).

[1069] NAACP v. City of Columbia, 513 U.S. 1147 (1995).

[1070] Lewis v. Saluda County, South Carolina, C.A. No. 13-1514-3 (D.S.C.).

Saluda County, like its neighbor Edgefield, was at the forefront of the movement to disfranchise and remove blacks after Reconstruction. According to an 1895 editorial in The Saluda Sentinel, "we propose gradually to get rid of our negro population and build up our county for our own children . . . We will gradually let them drift out and let our children occupy the country. Other counties can do as they please."[1071] In 1896, the Saluda County Democratic Party adopted rules that "Every negro applying for membership in a Democratic club or offering to vote in a Democratic primary election must produce a written statement of 10 reputable white men, who shall swear that they know of their own knowledge that the applicant or voter, voted for General Hampton in 1876 and has voted the Democratic ticket continuously since."[1072] The same year the paper called for "PURE WHITE DEMOCRACY forever," and urged "Patriots of Saluda be worthy of they trust, and trail not the robes of thy bride in the dust. Shake from her garments the hands once enslaved, And let white Democracy ever o're us be waved."[1073] In the 1920 presidential election, only two black voters in the entire county cast a ballot.[1074]

[1071] "Butler Family," The Saluda Sentinel, November 7, 1895.

[1072] "The New Rules," The Saluda Sentinel, June 11, 1896.

[1073] "The Padgett Big Picnic," The Saluda Sentinel, July 1, 1896.

[1074] "Few Votes In County," The Saluda Sentinel, November 11, 1920.

After the abolition of the white primary, several blacks in Saluda County registered to vote for the 1948 election. One of them was Ernest Townsend, who said he was advised shortly thereafter by a white man not to vote "because it wasn't a good idea." John Graham, who had also registered, was physically assaulted by a precinct worker when he went to vote. The poll official told him he was at the wrong precinct and then proceeded to hit him over the head with a stick. After the election, a number of houses owned by blacks who had voted were shot into. John Daniels said, "they shot into my brother in law's house. It had been shot into with shotguns and rifles. George Dean, another black man also had his house shot into"

After the ACLU filed suit in 1983, the defendants proposed to conduct a referendum at the next regularly scheduled election on whether to adopt single member districts. Plaintiffs agreed to hold their complaint in abeyance pending the referendum, in return for defendants' promise that they would actively promote the adoption of single member districts at the election. In fact, only one of the council members supported passage of the referendum. The other four chose not to take a public position one way or the other.

The referendum was held against a background of racial confrontation and was defeated by a substantial margin, after which plaintiffs reactivated their case. At a pretrial hearing, the presiding judge said the failure of the referendum "didn't shock anybody, did it?" Counsel for the defendants said he was willing to cooperate and

could stipulate "to about ninety percent" of the plaintiffs' case, and that "I can't argue that in the forties, fifties, sixties, and early seventies that there wasn't racial discrimination that affected black voting rights in my county. For me to do so would be ludicrous."[1075] The court responded, "Well, if you're interested in cooperating so, why can't y'all draw some single-member district lines?"[1076]

Prior to trial, the defendants sought a settlement and the parties agreed to a new plan containing four single member districts, one of which was majority black, with the chair elected at-large. The district court entered an order on July 19, 1985, finding that "the plaintiffs have established a prima facie case that the present method of at-large elections for the County Council is in violation of 42 U.S.C. § 1973," and ordered into effect the agreed upon plan. Elections under the new plan were held in August 1986.

Despite the modest progress made through the courts by the black community, securing greater opportunity to elect representatives of choice, race relations remained sharply polarized in the county. In 1989, three black teenagers who were volunteers for a United Methodist Church program repairing homes for the poor, were denied access to a swimming pool owned and operated by the Saluda Jaycees. Church volunteers in the church program had been given permission by the Jaycees to use the facility, but when a group showed up to take a swim they were told all were welcome, except the

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[1075] Lewis v. Saluda County, Transcript of Hearing, July 24, 1984, p. 3.

[1076] Id., p. 6.

three black teenagers. The entire group then left. Willie Teague, the editor of the church's newspaper, said "It's a rather sad commentary on the progress that we hoped we had made but apparently had not. It says that racism is still alive and well in South Carolina."[1077]

Sumter County

County Council of Sumter County, South Carolina v. United States

Sumter County is named for General Thomas Sumter, the "Fighting Gamecock" of the American Revolutionary War. It was also home to Citadel Cadet George Edward "Tuck" Haynsworth, who is credited with firing the first shot of the Civil War, as well as renowned African American educator Mary McCleod Bethune.

In more modern times, Sumter County has been distinguished by its Section 5 objections. Prior to 1976, the members of the Sumter County Board of Commissioners were appointed by the governor on recommendation of the local legislative delegation. As long as the appointive system was in effect, no black person was ever appointed to the commission. In mid-1967, the governor began appointing African Americans to various offices, and that same year the legislature enacted Act 371 providing for a seven member county council elected at-large by majority vote. The act was not submitted for preclearance, and the county held elections in 1968, 1970, 1972, 1974, and 1976 in

[1077] "3 black teens bared from Jaycees' pool," The State, July 25, 1989.

violation of Section 5. In August 1976, the county submitted Act 371 for preclearance, and the Department of Justice noted an objection:

> Our analysis reveals that although blacks represent a substantial proportion of the population of Sumter County, only one black has ever been elected to the Sumter County Commission. Our analysis further reveals that bloc voting along racial lines likely exists in Sumter County. Where such a phenomenon does exist, under an at-large system of elections blacks have little chance of electing a candidate of their choice. On the other hand, we note that the black population of Sumter County is relatively concentrated and a fairly drawn single-member district plan would assure blacks of some representation on the Commission. Under these circumstances, therefore, I must, on behalf of the Attorney General, interpose an objection to the at-large election provisions of Act No. 371 and of the resolution and ordinance implementing the South Carolina Home Rule Act.[1078]

An election was scheduled for 1978, and black residents of Sumter County, represented by the ACLU, filed suit seeking to enjoin further use of the unprecleared at-large system.[1079] A similar suit was filed by the United States, the two cases were consolidated, and the three-judge court permanently enjoined county elections under the at-large system until the requirements of Section 5 were met. However, the three-judge court subsequently held that an intervening referendum adopting at-large elections, which had been precleared, and a letter from the county which it labeled "a submission for preclearance," had the effect of preclearing the at-large system.[1080] The

[1078] J. Stanley Pottinger, Assistant Attorney General, to E. M. Dubose, December 3, 1976.

[1079] Blanding v. DuBose, Civ. No. 78-764 (D.S.C.).

[1080] Blanding v. DuBose, 509 F. Supp. 1334 (D.S.C. 1981).

private plaintiffs, but not the United States, appealed and the Supreme Court reversed. It held the letter from the county was in fact a "request for reconsideration" of the prior Section 5 objection, and that the Attorney General had acted in a timely manner in denying the request.[1081]

In 1982, the county filed suit in the District of Columbia seeking preclearance of Act 371.[1082] Black residents of the county, represented by the ACLU, intervened to urge denial of preclearance of the at-large voting change as denying black voters the opportunity to elect candidates of their choice.[1083] One of the arguments raised by the county was that Section 5 was no longer constitutional because Congress made no findings in 1982 of the extent of voter registration in 1975 and 1982 that would justify the extension, and that in any event as of May 28, 1982, more than half of blacks were registered to vote in Sumter County and in South Carolina. In rejecting the county's claim, the court noted that a similar challenge to the constitutionality of the 1975 amendment had been dismissed by the Supreme Court,[1084] and that the 1982

[1081] Blanding v. DuBose, 454 U.S. 393 (1982).

[1082] County Council of Sumter County v. United States, Civ. A. No. 82-0912 (D.D.C.).

[1083] County Council of Sumter County v. United States, 555 F. Supp. 694 (D.D.C. 1983).

[1084] City of Rome v. United States, 446 U.S. 156 (1980).

amendments "had a much larger purpose than to increase voter registration in a county like Sumter to more than 50 percent."[1085]

On May 25, 1984, the three-judge court denied preclearance to Act 371 on the grounds that Sumter County had not carried its burden of proving that the proposed change would not have an unlawful purpose or effect. The county:

> failed to carry their burden of proving that the legislature did not pass Act 371 in 1967 for a racially discriminatory purpose at the insistence of the white majority in Sumter County, because the at-large method of voting may have diluted the value of the then-increasing voting strength of the black minority, may have prevented formation of a black majority senate district, and probably prevented appointment by the Governor of blacks to the Sumter County Council. . . [and] failed to carry their burden of proving that the at-large system was not maintained after 1967 for racially discriminatory purposes and with racially discriminatory effect.[1086]

In reaching its conclusion the court also found:

> *Racial segregation was, and in large measure remains, the way of life in much of the private sector of Sumter County.
>
> *Voting in Sumter County is racially polarized.
>
> *Act 371 . . . was formulated without significant input from Sumter County's black community.
>
> *[R]acial considerations influenced the Council's decision not to hold a referendum [permitted under state law to allow the voters to select a form of local government].[1087]

[1085] County Council of Sumter County, 555 F. Supp. at 707.

[1086] County Council of Sumter County v. United States, 596 F. Supp. 35, 38 (D.D.C. 1984).

[1087] Id. at 37-8.

Following the decision of the three-judge court, the state legislature enacted a single member district plan for the county council. A special election was held for all seven council seats on October 8, 1984, and three black candidates were elected.

The Department of Justice also objected in 1976, to the adoption of at-large elections with residency requirements for the county school board to replace an existing system of multi-member districts:

> We have noted particularly information concerning the predominantly white appointive body prior to 1974, and the election of black candidates under the 1974 multi-member district system. Additionally, we have not been apprized [sic] of any compelling reasons for the use of the candidate residency districts with at-large voting in lieu of the multi-member district method.
>
> The use of the candidate residency districts in effect creates separate offices and permits each voter to vote for only one candidate in each place. In the context of an at-large electoral system, the opportunity for minority voters to elect a representative of their choice to the board of trustees is significantly lessened [citation omitted].[1088]

Still another Section 5 objection was entered by the Department of Justice after the City of Sumter attempted to annex portions of the county in 1985:

> At the outset, we note that even though black citizens constitute almost 40 percent of the city's population, and although there have been several minority candidacies, no black has been elected to the city council in recent times. This appears in substantial part to be the result of a general pattern of racially polarized voting occurring in the context of Sumter's at-large election system--a system that

[1088] J. Stanley Pottinger, Assistant Attorney General, to Treva Ashworth, October 1, 1976.

> includes a majority vote requirement and staggered terms. Against this electoral milieu, the proposed annexations, which our analysis shows have decreased the city's minority population by approximately 4.98 percent, serve to enhance the ability of the white majority to exclude blacks totally from participation in the governing of the city through membership on the city council, an effect not permissible under the Voting Rights Act. [Citation omitted] In addition, we are concerned that what appears to be a pattern of annexation which seems calculated to take in only whites while excluding predominantly black areas has not been satisfactorily explained.[1089]

The city submitted other changes for preclearance in 1986, including an increase in the size of the council from four to six members, four of whom would be elected from single member districts. The city also asked the department to reconsider its objections to the annexations in light of these new changes; however, the department, citing "the uncontroverted existence of racial bloc voting in the city," declined to do so:

> The plan increases the size of the city council from four to six members and maintains the full voting power of the mayor, thus effectively creating a seven-member council. Four councilmembers would be elected from single-member districts and two other councilmembers and the mayor would be elected at large. Two of the four single-member districts have black voting age majorities providing blacks a realistic opportunity, given existing racial polarization, to elect two of the seven voting members of the council. At the same time, because the proposed plan provides for the election of three members at-large, the city's pattern of racial bloc voting effectively eliminates all prospects for minority representation in those positions. Our concern is that this proposal fails in its particulars to ameliorate the retrogressive effect of the

[1089] William Bradford Reynolds, Assistant Attorney General, to Lourena N. English, October 21, 1985.

> annexations in a sufficient manner to permit preclearance of both.[1090]

The 2000 census showed that Sumter County had gained an additional majority black district, District 7, on its county council, increasing the number of majority black districts from three to four. Blacks made up approximately 47% of the population of the county. District 7 had a black voting age population of 58.6%, and had little deviation from ideal district size. Thus, there was no reason to adjust the district to comply with one person, one vote. However, when the council drew a new plan, it lowered the black population in District 7 to 49.3%. At the outset of the redistricting process, white council members said they were going to create a plan that contained three majority white districts, three majority black districts and one "even" district. The Department of Justice denied preclearance:

> Under 2000 census data, four of the seven districts in the current, or benchmark, plan have both total and voting-age populations that are majority black. In three of these four, black voters will continue to have the ability to elect candidates of their choice. Our analysis, however, shows that this is not true for the fourth district, District 7. Under the benchmark plan, black voters in that district have the ability to elect their candidates of choice, and they will not have that same ability under the proposed plan, which decreases the black total population by 8.7 percentage points to 54.2 percent and the black voting-age population by 9.6 percentage points to 49.3 percent.
>
> Our analysis shows that elections within District 7 are marked by a pattern of racially polarized voting. Moreover, we analyzed several

[1090] William Bradford Reynolds, Assistant Attorney General, to Jack W. Erter, Jr., April 10, 1986.

> county-wide elections to determine whether black voters would have the present ability to elect candidate of choice [sic] under the benchmark plan District 7. We determined that, while under the benchmark plan black voters did indeed have the ability to elect a candidate of choice, under the proposed plan they would not; analysis of two prior elections demonstrates that under District 7 as configured under the proposed plan, the black candidate of choice would lose, or at best win by an extremely narrow margin. Accordingly, the implementation of the proposed plan will result in a retrogression in the minority voters effective exercise of their electoral franchise.
>
> This retrogression was avoidable. Our analysis of the information submitted indicates that the reduction of the black population percentage in District 7 was not required to comply with the county's stated redistricting criteria. First, the district had the lowest deviation of all districts and did not require any modification. Second, the county's own consultant presented an alternative plan, Version 1, which satisfied the county's initial redistricting criteria and maintained the demographics of the benchmark district.[1091]

Following the department's denial, county politics became even more racially charged. County elections were fast approaching and the current plan was malapportioned. One council member said the council should take its case to the Supreme Court and challenge the constitutionality of Section 5 because "the Constitution states the majority will rule."[1092] This sentiment was reiterated at council meetings in 2003, when the council decided to consider redistricting yet again. The county offered compromises claiming that black voters who were a majority in District

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[1091] Ralph F. Boyd, Assistant Attorney General, to Charles T. Edens, June 27, 2002.

[1092] Memorandum of Randy Singleton, August 8, 2002.

7 should be content with a minor variation on the council's original 3-3-1 plan. Councilman Burr refused to vote for any plan that included four majority black districts. More than a dozen proposals were reviewed by the community and county council. A local newspaper editor wrote: "The very fact that voting lines must be determined by race is inherently an insult to every Sumter resident who queues up at a polling place each November. What it states, bluntly, is that 200 years after Abraham Lincoln, we, blacks and whites, still are unable to see past the color of a candidate's skin."[1093]

Following the council's refusal to allow certain black citizens to speak during public meetings, two black citizens of District 7 showed up at the next council meeting holding signs saying "Don't Reduce the Black Vote." Some council members walked out of council meetings. One resident yelled at a meeting, "I didn't know the NAACP was going to run it [the meeting]."[1094]

The council finally adopted a plan that preserved District 7 as majority black, and the Department of Justice granted preclearance. Sumter County now has four black council members. As with other counties in South Carolina and across the South having similarly high levels of racial polarization, the events in Sumter County strongly support the continued need for Section 5 preclearance.

[1093] The Item, October 16, 2003.

[1094] Id.

Union County

Rodgers v. Union County

In 2002, white voters in Union County filed suit claiming that one of the two majority black districts for the county council was racially gerrymandered in violation of the Fourteenth and Fifteenth Amendments.[1095] The challenged district, District 2, had elected a black representative for over two decades and was represented by the widow of the first black county councilman.

Under the 1990 plan, the City of Jonesville was split between Districts 1 and 2. During the 2000 round of redistricting, a group of disgruntled, predominately white voters complained to the county council that they did not want Jonesville split again under the new plan. Over their objections, county council approved a plan that split Jonesville because the county council did not want to dismantle District 2 – which was the only district that elected a black representative – and violate the retrogression standard of Section 5. The Department of Justice precleared the county's plan.

Dissatisfied with the outcome, three residents of District 2 sued Union County alleging that the council had racially gerrymandered District 2 by splitting Jonesville. They said they did not mind being represented by a black councilwoman, but objected

[1095] Rodgers v. Union County, 7:02cv1390 (D.S.C.).

to being joined with politically active black precincts in Carlisle and other areas where there were trailer parks.

The ACLU, representing black residents and the Union County Branch of the NAACP, moved to intervene to defend the challenged plan and protect the rights of minority voters. The plaintiffs made several implausible arguments. First, they argued that black voters in District 2 had no interest in the outcome of the litigation, despite the fact it could diminish their ability to elect candidates of their choice. Second, plaintiffs claimed black citizens should not be allowed to intervene because they would divert the court's attention from racial gerrymandering and focus it instead on vote dilution and Section 2. The court was not persuaded by the plaintiffs' arguments, and granted the motion to intervene as of right.

The ACLU asked Dr. John C. Ruoff, an expert in racially polarized voting in South Carolina, to analyze voting patterns in Union County. He concluded that voting was racially polarized. In every contest involving black and white candidates, including those for Districts 2 and 5, black voters and white voters were both cohesive and cast ballots for different candidates. Black candidates were only successful in contests in majority or near majority black districts. In addition, black voters experienced the chilling effect of knowing they constituted a minority in the county, with little likelihood of effective political participation except in voting for less preferred white Democratic candidates. Intervenors argued that the maintenance of

District 2 as a majority black district was necessary to comply with Section 2 and avoid retrogression under Section 5. Intervenors further argued that the configuration of District 2 complied with the racial fairness standards of the Voting Rights Act while respecting, and not subordinating, the redistricting principles of contiguity, compactness, respect for traditional values, maintaining communities of interest, and party competitiveness.

After intervention was granted, the parties settled the case by redrawing District 2 so that Jonesville was not split, but, as important, maintaining the district as majority black. As part of the settlement agreement, intervenors introduced the findings of Dr. Ruoff as evidence of a Section 2 violation justifying maintaining two of the districts as majority black.

Williamsburg County

NAACP v. Hemingway

Williamsburg County, South Carolina, is majority (64%) black, but Hemingway, the county seat, is only 3% black. The racial disparity is explained in large measure by a series of annexations conducted by the town of almost exclusively white areas, and its refusal to annex adjacent majority black areas of the county.

Racial tensions have long simmered in Williamsburg County. As recently as 1995, members of the Ku Klux Klan torched the Mt. Zion AME Church in Greeleyville. Two of the Klansmen responsible for the arson also pleaded guilty to state charges of

stabbing a black man, and burning another black church in neighboring Clarendon County. According to news reports, lawyers for the Klansmen said the two decided to set the church fires after attending a Klan rally at which "black churches were blamed for promoting the interests of blacks to the detriment of whites."[1096]

On October 18, 1993, black residents of Hemingway and Williamsburg County, represented by the ACLU, filed suit alleging that the town had failed to preclear several of its recent annexations of white areas, and that the town's annexation policies were racially selective and discriminatory.[1097] The plaintiffs included county residents who had submitted a petition for annexation to the town in 1993. The town initially refused to consider the petition and then later rejected it saying that it did not comply with state law concerning the percent of area residents signing the petition and the percent of property they owned.

On February 22, 1994, the three-judge district court granted plaintiffs' motion for summary judgment and enjoined further use of the disputed annexations absent Section 5 approval. The defendants submitted the annexations for preclearance, and the Attorney General objected. He noted that the selective approach to annexations "raise significant doubts as to the town's motivations."[1098] Rather than take in the disputed

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[1096] "Former Klansmen plead guilty in church fires", CNN, August 14, 1996.

[1097] NAACP v. Mayor and Council of Hemingway, South Carolina, 4:93cv2733 (D.S.C.).

[1098] Deval L. Patrick, Assistant Attorney General, to Gregory B. Askins, Esq. and Jeffrey N. Thordahl, Esq., July 22, 1994.

black areas, or apply its annexation policy in a non-discriminatory manner, the town elected instead to deannex the white areas, thus maintaining its overwhelmingly white population majority.

The Attorney General also objected to another proposed change which would have transferred a portion of Williamsburg County, including Hemingway, to adjacent Florence County, which was majority (61%) white. In denying preclearance, the Attorney General concluded that "the town's discriminatory definition of its town boundaries in turn infects the definition of the proposed transfer area."[1099]

After additional discovery, plaintiffs determined that their annexation petition was in fact defective, owing primarily to the fact that many petition signers owned and lived in trailers which were not counted as real estate for purposes of complying with state law petition requirements. Plaintiffs moved to dismiss their selective annexation claim as moot, which the court did on June 2, 1995. Because of the dismissal on mootness grounds, plaintiffs were free to file a new annexation petition that complied with state law.

[1099] Id.

TENNESSEE

STATEWIDE ISSUES

Although Tennessee is not covered by Section 5, it has a history of voting discrimination against blacks similar to that of covered jurisdictions elsewhere in the South.[1100] That history, and its continuing effects, discussed in the cases below, demonstrate the pervasiveness of racial division throughout the region and further supports the extension of the special provisions of the Voting Rights Act in the covered jurisdictions.

Tennessee permitted slavery, and its antipathy to free blacks was so marked that in 1833 the legislature authorized the payment of $10 to the American Colonization Society for each free black removed by the society to the coast of Africa.[1101] Following the Civil War, blacks were granted the right to vote, but conservative white Democrats quickly won control of the state legislature and adopted a new constitution in 1870, which contained a number of discriminatory provisions. Racial intermarriage was prohibited, segregation in the public schools was required, and payment of a poll tax was made a condition for voting.[1102]

[1100] Tennessee used many techniques to deprive blacks of the franchise, but unlike the jurisdictions covered by Section 5, it never used a literacy or understanding test for voting, which is part of the Section 5 "trigger."

[1101] Tenn. Acts 1833, ch. 64.

[1102] Tenn. Acts 1870, ch. 39, art. 11, §§ 4, 12, 14.

As evidence of general white hostility toward black rights, the legislature adopted a resolution in 1875, to use "all honorable means" to prevent passage of a federal bill defining and guaranteeing equal rights for blacks under the Fourteenth Amendment because "its passage will be fraught with the greatest evil to the people of both races."[1103] In 1885, the legislature affirmed the "existing right" to maintain segregation in places of public accommodation. Four years later it enacted a series of laws designed to disfranchise blacks. One was the "Dortch Law," which required the use of a secret, Australian style ballot. The effect of the law was to impose a literacy test for voting, and it had a severe impact on illiterate blacks. Another was the "Myers Law," which required registration by race 20 days prior to each election. The act had the predicable effect of disfranchising many minority voters. A third law, the "Lea Law," provided for separate ballot boxes for state and federal elections in an attempt to remove state elections, including whatever fraud white officials might practice on black voters, from federal oversight.[1104] In the ensuing years, segregation in the public schools was repeatedly affirmed, as was segregation in railroad passenger cars, and even in coal mines.[1105]

[1103] Tenn. Acts 1875, ch. 22.

[1104] Tenn. Acts 1889, chs. 188, 207, 218. These laws and their operation are discussed at Buchanan v. City of Jackson, 683 F.Supp 1515, 1523 (W.D.Tenn. 1988), and Cousin v. McWhereter, 840 F. Supp. 1210, 1213 (E.D.Tenn. 1994).

[1105] Tenn. Acts 1905, ch. 150; Tenn. Acts 1921, ch. 24; Tenn. Acts 1941, ch. 43.

1990 Redistricting

RWTAAAC v. McWherter

Residents of Rural West Tennessee, which includes Fayette, Hardeman, Haywood, Lauderdale, Madison, and Tipton Counties, as well as residents of Shelby County, filed suit in 1992, represented by the ACLU, challenging the redistricting of the state house and senate.[1106] The plaintiffs, organized as the Rural West Tennessee African-American Affairs Council (RWTAAC), contended that the redistricting plans diluted minority voting strength in violation of Section 2 and the Constitution by creating only majority white districts in Rural West Tennessee. Although 34% of the population in Rural West Tennessee was African American, no black person in modern times had ever been elected to the house or senate from that area. At least one majority black house district could have been drawn in that part of the state, as well as two additional majority black senate districts.

The legal challenges to house and senate redistricting proceeded on two different tracks. The house plan was held to violate one person, one vote, in a case brought by other plaintiffs that was consolidated with the Rural West case, and the decision was affirmed by the Supreme Court.[1107] While the appeal was pending, the court held a trial

[1106] RWTAAAC v. McWherter, Civ. No. 92-2407 (W.D. Tenn.).

[1107] RWTAAAC v. McWherter, 836 F. Supp. 447, 452 (W.D.Tenn. 1993), aff'd, sub nom. Millsaps v.

and ruled in the challenge to the senate plan brought by the Rural West plaintiffs. On November 4, 1993, the three-judge district court held that the 1992 senate plan diluted minority voting strength in violation of Section 2, and directed that an additional majority black district be drawn in the Rural West Tennessee area. In doing so, the court made extraordinary findings of past and continuing discrimination, including that:

> *[Blacks in west Tennessee are geographically compact within] the first element of Gingles.
>
> *[T]he African-American communities of rural southwest Tennessee . . . are politically cohesive.
>
> *[There is] a high level of white bloc voting which usually enables the majority to defeat the black community's candidate of choice."
>
> *[Racial polarization is so extreme that] black candidates cannot expect to succeed in majority-white districts.
>
> *[N]o black from a majority white district has won a seat in the state Senate this century.
>
> *[Blacks are discouraged from running in majority-white districts because of the lack of] white support in the form of votes or fundraising, [and because a l]ower economic status inhibits the ability of potential black candidates to raise funds in the black community.
>
> *[B]lack community leaders . . . have tried to recruit qualified blacks to run for elective office and found it difficult . . . [because] they often see a black candidacy in a majority-white district as a futile gesture.
>
> *Historical black political disenfranchisement also limits potential black electoral success," and black candidates "are not now in a position to enjoy the benefits of incumbency and political sponsorship which comes with being part of the political mainstream.

Langsdon, 510 U.S. 1160 (1994).

*[The] effects of past discrimination are still apparent and there remains some evidence of official discrimination against blacks in the last 15 years.

*[T]he political gains by black citizens during the civil rights movement of the 1950's and 60's were accompanied by increased official discrimination in voting.

*Government officials manipulated voter registration requirements to discourage black voters, and supported or initiated physical and economic intimidation of those blacks who did manage to register.

*The strongest example of economic intimidation was the eviction of more than 400 black sharecropping families, most of them in Fayette County after the 1960 election.

*These mass evictions led to the formation of two 'tent cities' for displaced sharecroppers, one in Fayette County and one in Haywood County. The tent cities became national symbols of the struggle of west Tennessee blacks for equal access to the polls.

*[O]ne federal court has found evidence of intentional discrimination against black candidates and voters in west Tennessee.

*[In Taylor v. Haywood County, 544 F.Supp. 1122, 1131 (W.D. Tenn. 1982), the court found that a change from district to at-large elections for the Haywood County Board of Highway Commissioners was] a result of the purposeful intention to dilute black voting strength in Haywood County, Tennessee.

*[In addition to the Haywood County case, the adoption of a new majority vote requirement by the City of Bolivar in Hardeman County in response to the success of two black candidates for mayor in 1981,] indicate to the court that official discrimination against blacks in voting is not entirely a thing of the past in west Tennessee.

*[P]ast discrimination, especially that which took place during the civil rights movement, affects present-day politics. It has had a psychological effect upon black citizens who lived through it, creating in some a lingering sense of disillusionment, frustration, and mistrust.

*[Official discrimination in the 1950s and 60s] also means that today there are few entrenched and powerful black elected officials from that era. There is no tradition of black electoral success.

> *[I]n west Tennessee there is a history of official discrimination against blacks in voting which has present-day effects.
>
> *In west Tennessee, black citizens are more likely than white citizens to live in poverty, to be unemployed, and to live in substandard housing.
>
> *Black citizens are less likely to have completed high school, to own their own homes, to have access to a car, or to have telephones in their homes.
>
> *[W]hite supporters of black candidates are often unwilling to display bumper-stickers or yard signs or to otherwise publicly announce their support.
>
> *[Taking into account the] totality of the circumstances . . . black voters in west Tennessee [have] less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[1108]

The state appealed and the Supreme Court, without elaboration, vacated and remanded for further consideration in light of a voting case from Florida decided the same day.[1109] On remand the court held that the senate redistricting plan did not violate Section 2 (RWTAAAC II), and the Supreme Court affirmed.[1110]

In RWTAAAC II, the court reaffirmed its factual findings of discrimination in RWTAAAC I as being "correct," but held that the existence of three "influence" districts in which blacks constituted 31% to 33% of the voting age population precluded a

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[1108] RWTAAAC v. McWherter, 836 F. Supp. 453, 457, 459, 460-61, 463, 466 (W.D.Tenn. 1993) (RWTAAC I).

[1109] McWherter v. RWTAAAC, 512 U.S. 1248 (1994). The Rural West plaintiffs also appealed, arguing that two majority black districts were required to remedy the vote dilution in the Rural West area, but their appeal was dismissed. RWTAAAC v. McWherter, 512 U.S. 1249 (1994).

[1110] RWTAAAC v. McWherter, 877 F. Supp. 1096 (W.D.Tenn. 1995) (RWTAAAC II), aff'd, RWTAAAC v. Sundquist, 516 U.S. 801 (1995).

Section 2 violation. The court acknowledged that as a factual matter blacks did not have the equal opportunity to elect candidates of their choice under the senate plan, and "were we still unable to consider the existence of influence districts, we would reinstate our holding in Rural West I." The court further held that influence districts were not a substitute for majority minority districts, and concluded that:

> We do not imply that the legislature could adopt a plan under current circumstances with no majority-minority districts at all if it created a sufficient number of influence districts. Under current doctrine, the facts in this case require some majority-minority districts.[1111]

The court was also of the view that white elected officials were often responsive to the needs of blacks and that "adding an additional majority-minority district in western Tennessee would actually reduce the influence of black voters in the Tennessee Senate." It found "most probative" for this proposition the testimony of a white senator (Stephen Cohen) from west Tennessee concerning passage of a bill to make the birthday of Dr. Martin Luther King, Jr. a state holiday. According to Senator Cohen, the bill passed the state senate by only one vote (17 to 16), with Senator Cohen and another white senator from west Tennessee voting with the majority. Senator Cohen concluded, and the district court found, that the creation of an additional black senate district would have caused the election of "at least one more conservative white senator" who "would have been inclined to vote against the Martin Luther King holiday" ensuring

[1111] RWTAAAC II, 877 F.Supp at 1099, 1107 n.11.

that the measure would not have passed.[1112] Senator Cohen and the court, however, were mistaken. According to the Senate Journal, only eight senators voted against the Martin Luther King, Jr. bill, with 18 "Ayes" and six "Present, not voting." The bill would have passed without Senator Cohen's "influence" vote.[1113]

In January 1994, the state legislature enacted a three-part redistricting plan for the house; Plan A, the enacted plan, and alternative Plans B and C. Plan A created 12 majority African American house districts, but none in the Rural West Tennessee area. The legislation provided that should a court find that Plan A diluted minority voting strength, Plan B would be implemented. Plan B created 13 majority black districts, including one in Rural West Tennessee containing portions of Hardeman, Haywood, and Madison Counties. The legislation further provided that should the state prevail on its appeal in the one person, one vote case, the house redistricting plan of 1992, Plan C, would be reinstated.

The Rural West plaintiffs amended their complaint to challenge Plan A solely under Section 2, with the result that their claim would be heard by a single judge of the district court. As the result of various delays the case was not decided until November 1998, when the court adopted the findings of discrimination and its continuing effects in education and employment that had been made in the senate case, and concluded that

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[1112] Id. at 1106.

[1113] Tennessee Senate Journal, May 24, 1984, p. 2831.

plaintiffs had demonstrated that the house plan violated Section 2. Blacks were found to be geographically compact and politically cohesive, with whites voting as a bloc usually to defeat the candidates preferred by black voters. Few blacks had been elected to office and none to the legislature from Rural West Tennessee.

One of the significant findings of the district court was that white voters "targeted" black candidates for the legislature. In contests with no black candidates, whites voted together for the winning white candidate at an average rate of 59%. In contests with a black candidate, however, white cohesion for the winning white candidate jumped to an average of 86%. According to the court, "[t]his increase in cohesion . . . shows that when a black candidate is in a race, whites are even more likely to vote as a bloc to defeat the black preferred candidate."[1114] The court of appeals unanimously affirmed the decision of the trial court, and the Supreme Court denied the state's petition for review.[1115]

Plan B, to which the plaintiffs had no objections, was implemented at the 2000 elections. A black minister, Rev. Johnny Shaw, won the Democratic primary in August in the majority black district in the Rural West Tennessee area and had no opposition in the November 2000 general election. Thus, he became the first African American in

[1114] RWTAAAC v. Sundquist, 29 F. Supp. 2d 448, 457 (W.D. Tenn. 1998).

[1115] RWTAAAC v. Sundquist, 209 F.3d 835 (6th Cir. 2000), cert. den'd, 531 U.S. 944 (2000).

history to be elected to the state legislature from the six county area of Rural West Tennessee.

COUNTY AND MUNICIPAL LITIGATION IN TENNESSEE

Hamilton County and the City of Chattanooga

Brown v. Board of Commissioners of Chattanooga

The first case brought by the ACLU in Tennessee after the 1982 extension and amendment of the Voting Rights Act was in 1987, against the City of Chattanooga in Hamilton County. The law suit, which was brought on behalf of black residents, challenged the at-large method of electing the members of the city board of commissioners, as well as state and municipal laws that permitted nonresident property owners to vote in city elections. [1116] Following a trial in the spring of 1989, the court concluded that the at-large system had been adopted with a discriminatory purpose and diluted minority voting strength in violation of Section 2. It also held that the property qualified voting scheme was unconstitutional under the Fourteenth Amendment.

Based on the 1980 census, Chattanooga had a population of 170,000 people, 32% of whom were black. Prior to the Civil War, few blacks lived in the city. As a result of federal occupation during the war years, however, hundreds of African Americans fled to Chattanooga as refugees until they constituted nearly half the population. Given their numbers and the implementation of federal Reconstruction, newly enfranchised blacks voted, and served on the city government, on the board of education, in fire

[1116] Brown v. Board of Commissioners of Chattanooga, Tenn., Civ. No. 1-87-388 (E.D.Tenn.).

companies, as justices of the peace, and as constables and deputy sheriffs. But as the district court found, black participation in city governance "rankled whites," who undertook "to minimize black political strength." In 1883, the city charter was amended to institute a poll tax and special voting registration procedures, which, according to a local black lawyer of the time, were "aimed at the negro and nothing else." In 1901, the legislature enacted the "Peak bill," which revised the city charter by creating a bicameral form of government (aldermen and councilmen) and "had the effect of eliminating all black aldermen after 1902."[1117]

The city enacted its at-large and elected commission form of government in 1911. It also made it a crime to pay another person's poll tax and eliminated "ward workers," who had been used to assist blacks in voting. An important goal of the new commission system, as the district court found, "was the elimination of the last vestiges of black electoral power." The views of blacks who opposed the commission system were reported in The Chattanooga Times "in Uncle Remus-like dialect." From 1911, until the filing of the vote dilution lawsuit 76 years later, only one black person had been elected to the Chattanooga City Commission.[1118]

Throughout the modern era, Chattanooga and Hamilton County have been plagued with racial conflict and division. City parks, churches, public libraries,

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[1117] Brown v. Board of Commissioners of Chattanooga, Tenn., 722 F. Supp. 380, 386-87 (E.D. Tenn. 1989).

orphanages, public hospitals, schools, restaurants, movie theaters, and the American Legion all were segregated. A number of blacks narrowly escaped lynching by an angry mob of whites in 1912 after they were arrested in connection with the slaying of a police officer. In 1927, city police raided the office of the Universal Negro Improvement Association because of an alleged plan of the association to purchase and distribute to its members "high power repeating rifles." Blacks were excluded from membership on city boards and agency staff positions.[1119]

The Grand Dragon of the Ku Klux Klan claimed in 1946 that there was "a strong Chattanooga Klan." The National Urban League issued a report in 1947 documenting the continued existence of segregation at every level in Chattanooga and the depressed socio-economic conditions of blacks. A black policeman was suspended from the force in 1948, for arresting a white man in violation of department policy.[1120] Black policemen also had to come to work at a different time because they were not allowed to line up in formation with white officers.[1121]

[1118] Id. at 387.

[1119] Id., Pl. Exs. 208, 212. This history is detailed in many places, including Cousin v. McWherter, 840 F. Supp. 1210, 1216-19 (E.D. Tenn. 1994).

[1120] Id.

[1121] Brown v. Board of Commissioners, Pl. Ex. 319.

In 1953, lots were deeded in a local subdivision "subject to covenants forbidding sale or rental 'to any Negro, mulatto, or other person of color . . . [or] to any person of Jewish or Hebrew blood."[1122]

When a black person took a seat in the "whites only" section of the city auditorium during a dance in 1956, a fight broke out. In 1957, after the Southern Coach Lines removed the segregated seating signs from its buses following a decision of the Supreme Court that the segregation was unlawful, someone hung an effigy on the Walnut Street bridge on which was written "All NAACP bus-riding niggers." Two dynamite explosions were set off within one week in 1958 at the Phyllis Wheatley Branch of the YMCA for Negroes.[1123] The NAACP was linked in the press with communism. [1124]

The first modern civil rights demonstration in Chattanooga took place in 1960 when black high school students staged sit-ins at downtown lunch counters to protest segregation. Whites assaulted the protestors precipitating the most massive racial clash in the city's history. Scores of people were arrested and black homes were bombed, in

[1122] Cousin v. McWherter, 840 F. Supp. at 1217.

[1123] Id.

[1124] Brown v. Board of Commissioners, Pl. Ex. 218.

what the mayor described as an "organized effort to terrorize the Negroes in this community."[1125]

The city hired its first black bus driver in 1963. He was taunted by racial slurs, and someone shot the bus he was driving. Public housing was built and operated on a racially segregated basis. As late as 1964, an official of the Chattanooga Housing Authority said that we "have always been segregated and we have never had any complaints." The University of Chattanooga was operated on a racially segregated basis until 1965. Erlanger Hospital did not desegregate until the government threatened to cut off federal funds in 1966. When the hospital's board finally agreed to sign a certificate of compliance with the Civil Rights Act of 1964, the president of the board resigned in protest.[1126]

Violence erupted in the city again in 1968 as blacks protested the assassination of Rev. Martin Luther King, Jr. The city proclaimed a "civil emergency" and imposed a 3:00 p.m. curfew. Blacks protested employment discrimination by picketing three downtown stores in 1969. The home of Rev. H. H. Wright, a spokesperson in the black community, was burned the same year. A race riot broke out in Alton Park in 1970 after a policeman attempted to arrest a man for assaulting a waitress. [1127]

[1125] Id., Pl. Exs. 132, 238, 239, 240, 244, 245, 247.

Cousin v. McWherter, 840 F. Supp. at 1217 .

[1127] Id., Pl. Exs. 264, 265, 275, 298.

In 1971, another race riot erupted following the cancellation of a performance at the city auditorium. The riot lasted for several days and the National Guard was called out to quell the disturbance. There were numerous incidents of sniper fire, arson, fire bombing, and rock and bottle throwing. [1128]

Schools were desegregated in Chattanooga as the result of litigation begun in 1960, but not concluded until 1986.[1129] There were racial incidents and confrontations of varying duration and intensity throughout the late 1960s and early 1970s. Racial tensions in city schools in 1969 were described as "nearing exploding point." "[S]warms" of city policemen converged on Brainerd High School in 1970 as whites and blacks "shouted and shoved their way to a near riot." Eighty students were suspended at Central High in 1971, after two days of racial disturbances.[1130] In an opinion written in 1975, a court noted that resegregation had occurred in the public schools and that it was a "subtle and lingering malaise of fear and bias in the private sector which persisted after curative action had been taken to eliminate the dual system itself." By 1988, "22 of the 52 schools in the city system were racially identifiable (90% or more of one race."[1131]

[1128] Id., Pl. Ex. 299-306.

[1129] Mapp v. Board of Education, 648 F. Supp. 992 (E.D. Tenn. 1986).

[1130] Brown v. Board of Commissioners, Pl. Exs. 287, 289, 290, 291, 318.

[1131] Quoted in Cousin v. McWherter, 840 F. Supp. at 1218.

In April 1980, three Klan members burned wooden crosses in a predominantly black neighborhood in Chattanooga. Afterwards, they drove through the neighborhood and shot four elderly black women who were standing on the sidewalk. They also shot into a parked car, shattering glass which struck and injured a fifth black women who was watering flowers in her yard. The Klansmen were subsequently tried and acquitted by an all white state court jury touching off another round of racial violence. Eight police officers were wounded by gun fire in three days of rioting that followed.[1132] The five black victims later filed a lawsuit in federal court, which enjoined the defendants and the Klan from assaulting black residents of the city and attempting to deprive them of their constitutional rights.[1133]

In 1986, however, Klan members drove through black neighborhoods in Chattanooga playing "Dixie" and burned a cross on the lawn of a local black family. A van owned by Rev. H. H. Wright was bombed the same year. In 1987, the Klan held a rally on Lookout Mountain attended by some 200 people. Klan spokespersons blamed Jews and blacks for the "problems" facing America. The same year, another Klan rally was held in downtown Chattanooga. In 1989, a Klan rally was held in nearby Rockmart.[1134]

[1132] Brown v. Board of Commissioners, Pl. Exs. 164, 165, 354, 358-360.

[1133] Crumsey v. Justice Knights of KKK, CIV-1-80-287 (E.D. Tenn. March 1, 1982).

[1134] Brown v. Board of Commissioners, Pl. Exs. 116, 378, 391-394.

After the filing of the voting rights lawsuit in 1987, the city appointed a charter study commission which recommended a mayor/council form of government, with council members elected from districts. The proposal was put to a referendum and was defeated, with a majority of blacks voting for the change and a majority of whites voting against it.[1135]

In addition to finding that the challenged system had been adopted in 1911 with a discriminatory purpose, the court found that it violated the results standard of Section 2. Blacks were geographically compact, politically cohesive, and whites voted as a bloc, usually to defeat the candidates of choice of black voters. Except for one black candidate first elected to the commission in 1971, the white crossover rate for black candidates "averages only 1.8%." The court also found that the city used a number of other voting practices that enhanced the opportunity for discrimination, including a majority vote requirement, an unusually large election district, and an anti-single shot provision.[1136]

Tennessee has an enabling statute that allows municipalities to enact ordinances permitting nonresident property owners to vote in city elections. Chattanooga had enacted such an ordinance and as a result 547 nonresidents, almost all of whom were white and lived in affluent suburban areas around Chattanooga, were qualified to vote

[1135] Cousin v. McWherter, 840 F. Supp. at 389.

[1136] Id. at 395.

in city elections. In addition, the ordinance was so broad that even residents of other states or foreign countries, including non-citizens, could vote in Chattanooga elections, provided they owned property - even a small fractional share was sufficient - within the city. The plaintiffs contended that such a voting scheme, aside from diluting the voting strength of city residents, and particularly black residents, was arbitrary and irrational. The court held that because the system "permits a nonresident who owns a trivial amount of property to vote in municipal elections, it does not further any rational governmental interest," and was unconstitutional.[1137]

In a subsequent order entered on January 18, 1990, the court adopted a new form of government for the city consisting of a mayor and nine member council elected from districts. At the special election to implement the plan held in May 1990, four black candidates won election to the council.

The district court, with the consent of the parties, also exercised its authority under the "pocket trigger" of the Voting Rights Act to require the defendants to seek Section 5 preclearance of any new reapportionment plan for the city necessitated by the 1990 census.[1138] The new census showed that the existing districts were malapportioned and the city adopted a redistricting plan sponsored by Leamon Pierce, one of the plaintiffs in the 1987 law suit and a member of the city council. The city presented the

[1137] Id. at 399.

[1138] The provisions for the "pocket trigger" are found at 42 U.S.C. § 1973a (c).

plan to the district court for Section 5 approval, the plaintiffs had no objections, and on January 17, 1992, the court approved the plan.

Cousin v. McWherter

In 1990, black residents of Hamilton County, assisted by the ACLU, challenged the at-large method of electing county judges as violating Section 2. Hamilton County has a substantial black population but no black person had ever won a judicial post running at-large. Plaintiffs contended that at-large elections discouraged blacks from running for office and deprived the minority community of the equal opportunity to elect candidates of its choice. [1139]

In 1994, the district court ruled that the challenged elections diluted black voting strength, and that the state's interest in conducting judicial elections at-large, while a factor to be considered, did not outweigh the interest in minority political participation protected by the Voting Rights Act. The court, taking note of the findings in the suit against the Chattanooga Board of Commissioners, held that "Blacks in Hamilton County, as a result of past and continuing discrimination in education, employment, and other areas, have been isolated from the economic and political main stream. They remain a socioeconomically depressed minority with a limited ability to fund and

[1139] Cousin v. McWherter, 840 F. Supp. at 1217 (E.D. Tenn. 1994).

mount political campaigns." In addition, the court held that: blacks were geographically compact, politically cohesive, and whites voted as a bloc usually to defeat the candidates preferred by black voters; "[b]ased upon the most recent voting patterns the level of racial bloc voting is increasing in Hamilton County making it more difficult than ever for a black to win a countywide judicial office;" "[i]n 1942 the state supreme court held that qualified blacks could be denied admission to the College of Law of the University of Tennessee;" and although there were blacks qualified for judicial office, "no black has ever won a majority of the votes in a county-wide judicial contest."

The court gave the state an opportunity to propose a remedy for the vote dilution but it declined to do so. The court accordingly ordered into effect a system of cumulative voting by which each voter could cast all or some of his/her votes for one or more candidates. Cumulative voting, which has occasionally been adopted by consent of the parties in Section 2 cases, allows a politically cohesive minority a better chance of electing a candidate of its choice when compared to a pure at-large system. The district court justified the use of cumulative voting on the grounds that it provided an adequate remedy for the vote dilution and at the same time retained at-large elections, thus preserving the state's asserted interest in maintaining a link between a judge's electoral and jurisdictional base. The state, however, appealed to the Sixth Circuit which vacated and remanded for further findings and clarification. It held that the court had not made

specific findings of the Gingles factors and failed adequately to consider the state's interest in at-large elections of judges.[1140] The appellate court expressed no view as to the merits.

On remand the district court held another hearing and once again invalidated the circuit wide method of electing judges on the grounds that it diluted black voting strength. It made specific findings of the existence of the Gingles factors, and held that the state's interest in at-large judicial elections was "substantial" but "will not suffice to overcome a violation of Section 2."[1141]

The court directed the state to adopt a remedial plan within 90 days, but it refused to do so. Following the state's refusal, the district court implemented a court ordered plan in July 1996, providing for cumulative voting for the election of all judges. The state appealed, and again the appellate court set aside the district court's order. It held that cumulative voting was prohibited by Section 2 and that the alternative remedy of single member districts was against state policy. The essence of the ruling was that the Voting Rights Act does not apply to the method of electing state court judges.[1142] The plaintiffs filed a petition for a writ of certiorari, but despite the fact that the Court

[1140] Cousin v. McWherter, 46 F.3d 568 (6th Cir. 1995).

[1141] Cousin v. McWherter, 904 F. Supp. 686, 712 (E.D.Tenn. 1995).

[1142] Cousin v. Sundquist, 145 F. 3d 818 (6th Cir. 1998).

had held that Section 2 applied to the method of electing judges, the petition was denied.[1143]

[1143] Cousin v. Sundquist, 525 U.S. 1138 (1999).

TEXAS

Section 5 Enforcement and Public Education

Texas v. United States

In an attempt to address problems with its public school system, the Texas legislature enacted a statute in 1993, allowing the state to appoint management teams to supervise underachieving or failing school districts. In 1995, when the state attempted to appoint a management team to oversee one of its school districts, a district court issued a preliminary injunction against implementation of the plan for failure to comply with Section 5.[1144] The district court reasoned that the appointment of a management team might result in the replacement of an elective body or office with an appointive one, thus requiring preclearance.

Shortly thereafter, in 1995, the legislature repealed the 1993 statute and enacted a comprehensive scheme by which the state could monitor a school district's academic performance, financial and accounting practices, and the actions of superintendents and trustees. If a school district did not meet the state's accreditation criteria, the commissioner of education could impose various sanctions against the school district, including (1) appointing someone to oversee a district's operation; and (2) appointing a management team to direct the operations of the district in areas of unacceptable

[1144] Cassius v. Moses, Civ. No. SA-95-CA-0221 (W.D. Tex.).

performance or require the district to obtain certain services under a contract with another person.[1145]

Once the legislature passed the bill, Texas submitted it to the Attorney General for a determination whether any of the sanctions affected voting and required preclearance. Although the Attorney General did not object to the sanctions outlined in the bill, she cautioned that under certain circumstances their implementation might result in a Section 5 violation. On June 6, 1996, the Attorney General precleared Texas's appointment of a management team for the Wilmer-Hutchins School District under the new law.

On June 7, 1996, Texas filed a complaint in the District Court for the District of Columbia, seeking a declaratory judgment that Section 5 did not apply to the sanctions in the new law because they did not affect voting rights, and were consistent with the conditions upon which the state received federal financial assistance. Texas thus sought preclearance not only of the enabling statute, but of any future applications of the law. The district court did not reach the merits of the case because it concluded that Texas's claim was not ripe for adjudication.[1146]

The state appealed, and the ACLU, along with the NAACP Legal Defense and Educational Fund, filed an amicus brief in the Supreme Court supporting the district

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[1145] Texas Education Code, Chapter 39, §§ 39.131(a)(7) and (8).

[1146] Texas v. United States, Civ. No. 96-1274 (D. D.C.), Order of March 5, 1997).

court's decision. The amicus contended there was no way to determine in the abstract, and in the absence of specific facts of a particular jurisdiction, the impact of future applications of the statute upon minority voting rights.[1147] The ACLU also argued that if, for example, the authority of the commissioner were invoked predominantly in majority minority school districts, the result could be the effective disfranchisement of a disproportionate number of minority voters.

The Supreme Court denied Texas the prospective preclearance it sought and held that a claim resting upon "contingent future events that may not occur as anticipated, or indeed may not occur at all," is not fit for adjudication.[1148] The Court further concluded that the hardship to Texas of withholding judicial consideration until the state chose to implement one of the sanctions was insubstantial. The Court thus rejected the state's attempt to circumvent the Voting Rights Act, and affirmed the need to look carefully at Texas's implementation of sanctions to ensure that minority voting rights were not abridged.

[1147] Amicus Brief for the American Civil Liberties Union and NAACP Legal Defense and Educational Fund, Texas v. United States, No. 97-29.

[1148] Texas v. United States, 523 U.S. 296, 300 (1998).

VIRGINIA

In 1974, when the State of Virginia sought to bail out from Section 5 coverage, the continuing effects of discrimination and racial polarization were apparent in state and local electoral systems. The District of Columbia court found that Virginia's maintenance of inferior schools for minorities hindered their ability to pass the state's literacy test and thus the state could not show that it had employed a test or device free of a racially discriminatory effect. The court concluded that:

- The state's literacy test was "motivated primarily by a desire to exclude blacks from voting in any significant number;"
- The racially segregated schools for blacks were substantially inferior to those for whites;
- Black voter registration was depressed compared to that of whites;
- The state had failed to demonstrate that its dual school system had no discriminatory effect of the ability to pass the literacy test.[1149]

Seven years later, the U.S. Commission on Civil Rights noted that only four of the 100 members of the Virginia House of Delegates were black, and that "the drawing of legislative boundaries and the extensive use of multimember districts has limited black

[1149] Commonwealth of Virginia v. United States, 386 F. Supp. 1319, 1322 (D.D.C. 1974), aff'd, 420 U.S. 901 (1975).

opportunities for elected office." Virginia also had the lowest number of black elected officials at the federal, county, and municipal levels of any state covered by Section 5.[1150]

Although a total of 10 Virginia cities and counties have successfully bailed out of Section 5 coverage since 1997, the legal cases below offer ample evidence of continued racial polarization, and the lack of equal political opportunity for black voters, at the state and local level in Virginia to the present day.[1151]

STATEWIDE ISSUES

1990 Redistricting

Moon v. Meadows

Following the 1990 census, the Virginia General Assembly created the first majority black congressional district in the Commonwealth's long history. African Americans comprised approximately 63% of the new Third Congressional District,

[1150] U.S. Commission on Civil Rights, The Voting Rights Act: Unfulfilled Goals (Washington, D.C.; September 1981), pp. 12, 56-7.

[1151] Statement of Bradley J. Schlozman, Acting Assistant Attorney General, Civil Right Division, Department of Justice, Subcommittee on the Constitution, Committee on the Judiciary, U.S. House of Representatives, October 25, 2005. The 10 Virginia jurisdictions that have bailed out, and the dates bailout was granted, are: Fairfax City (October 21, 1997), Frederick County, (September 9, 1999), Shenandoah County (October 15, 1999), Roanoke County (January 24, 2001), Winchester City (May 31, 2001), Harrisonburg City (April 17, 2002), Rockingham County (May 21, 2002), Warren County, (November 25, 2002) Greene County (January 19, 2004), Augusta County (November 30, 2005). See: Statement of J. Gerald Hebert, Committee on the Judiciary, Subcommittee on the Constitution, Oversight Hearing on "The Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act," October 20, 2005.

which stretched from Norfolk to Richmond, in southeastern Virginia. When the Third District elected State Senator Bobby Scott as its first congressman in 1992, he became only the second African American to be elected to the United States House of Representatives from Virginia, and the first since Reconstruction.

In 1995, several voters challenged the Third District in federal court as an unconstitutional racial gerrymander.[1152] The ACLU, along with the NAACP Legal Defense and Educational Fund, represented other residents of the district who intervened in the suit as defendants to defend the challenged plan.

A three-judge district court heard the case in September 1996. The defendants introduced extensive evidence to show that political considerations, not race, were the primary factors motivating the general assembly when it drew the district. Specifically, the defendants argued that the general assembly sought to protect most incumbents and to divide the Commonwealth's shipbuilding interests among three congressional districts, thus ensuring that at least three members of Congress would support those interests. The district court nonetheless invalidated the district in February 1997, finding that race had predominated in drawing the district and that the defendants could not adequately justify their use of race as a districting factor. The defendants

[1152] Moon v. Meadows, 952 F. Supp. 1141 (E.D. Va. 1997) (three-judge district court).

appealed, but the Supreme Court affirmed the district court's decision without an opinion.[1153]

In 1998, the general assembly redrew the Third District and four surrounding districts to comply with the district court's order. The revised Third District reunited several formerly split towns and counties but left the core of the old district intact. The revised Third District remained majority black, with African Americans making up just under 55% of the district's total population and 50.47% of the district's voting age population. Voters reelected incumbent congressman Bobby Scott to the revised district in 1998, and he continues to represent the Third Congressional District today.

2000 Redistricting

Wilkins v. West

Following the 2000 census, Virginia redrew its house and senate districts to comply with one person, one vote. The new plan created essentially the same number of majority minority districts as under the 1990 benchmark plan, and so was precleared by the Justice Department.

In 2001, 46 complainants filed suit in state court against state officials challenging the reapportionment of 13 house and 5 senate districts as racial gerrymanders and

[1153] Meadows v. Moon, 521 U.S. 1113 (1997) (mem.) and Harris v. Moon, 521 U.S. 1113 (1997).

violating the state constitution.[1154] Among other things, the complainants, all Democrats, argued that African Americans had been unfairly packed into legislative districts by the Republican controlled legislature in order to confine black voting strength to the smallest possible number of districts. As a remedy, the plaintiffs sought a plan that would disperse minority voters, thus creating greater opportunities for Democrats.

The trial court found for the plaintiffs, and on March 13, 2002, struck down 12 house and 6 senate districts as unconstitutional, saying the general assembly had subordinated traditional redistricting principles to race in drawing district lines. The court invalidated a number of districts as unnecessarily packed along racial lines and found that other districts improperly separated minority communities. The court also held some districts were not contiguous, which it believed violated state law.

The defendants appealed and the ACLU filed an amici brief to assert two legal points. First, the ACLU argued the court should not adopt a restrictive definition of a contiguous district. For example, the trial court held if a candidate had to drive outside a district to reach all of its parts then the district was invalid for lack of contiguity. In Virginia's Tidewater area, contiguity by water has been the accepted practice for decades, and the ACLU was concerned that this more restrictive definition would inhibit the drawing of majority minority districts in the future. The ACLU also argued

[1154] The litigation is discussed in Wilkins v. West, 264 Va. 447, 571 S.E.2d 100 (Va. 2002).

that freeways often split minority communities, and the lack of exits often made it difficult to travel within a minority community, but this should not be a basis for refusing to recognize a viable minority community in the redistricting process. Second, the ACLU argued the trial court had invalidated several districts as being packed without relying upon evidence of racially polarized voting. In the absence of such evidence, the court's findings were made upon assumptions.

The state supreme court reversed the trial court, finding the legislature had not subordinated traditional redistricting principles to race.[1155] The court did not reach the ACLU's contention that in some instances the trial court had made racial assumptions based on the percentage of African Americans in a district, but for each district at issue it held there was insufficient evidence to find that race predominated, thereby crediting the defense that race had been properly correlated with partisan performance.

The court also adopted a functional definition and flexible standard of contiguity, holding that in the current era of ease of communication, physical contact among voters is not necessary. The supreme court thus approved non-contiguous districts, if there were a reason for the separation and if the separation were not extreme.

[1155] Id.

This litigation in Virginia, and the 1990 redistricting case that follows, shows how blacks remain at the center of redistricting disputes, and are at risk of being packed by Republicans and fragmented by Democrats to advance their partisan goals.

Modern Day Poll Taxes and Access for Party Delegates

Morse v. Oliver North

During the post-Reconstruction period, most Southern states adopted a variety of measures to deny recently freed blacks the right to vote. One of the most effective deterrents to voting, given the poverty of the black community, was a requirement that voters prove they had paid a poll, or head, tax as a condition for casting a ballot.

The Supreme Court upheld the constitutionality of poll taxes well into the 20th century.[1156] Congress subsequently made numerous attempts to abolish the tax, but it was not until 1964, with ratification of the Twenty-fourth Amendment, that the poll tax was banned in federal elections. Section 10 of the Voting Rights Act, passed the following year, contained a congressional declaration of policy against poll taxes as a discriminatory device that "has the purpose or effect of denying persons the right to vote because of race or color," and created a cause of action to enjoin use of the tax.[1157]

In 1966, in a case from Virginia, the Supreme Court reversed its earlier decisions and declared use of the poll tax in state elections unconstitutional because "the affluence of the voter or payment of any fee" was not a proper "electoral standard."[1158] Despite abolition of the poll tax, many states have continued to impose fee requirements as a

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[1156] See Breedlove v. Suttles, 302 U.S. 277 (1937).

[1157] 42 U.S.C. § 1973h.

[1158] Harper v. Virginia State Board of Elections, 383 U.S. 663, 666 (1966).

condition for participating in the electoral process, which has resulted in challenges brought by the ACLU.

The Republican Party of Virginia adopted a requirement that delegates to the party's 1994 U.S. Senate nominating convention pay a registration fee of $35 to $45. Three state residents filed suit challenging the requirement on the grounds that it had not been precleared under Section 5, and that the fee was an unlawful poll tax prohibited by the Constitution and the Voting Rights Act. The three-judge district court dismissed the Voting Rights Act claims because it was of the opinion that the registration fee was not subject to Section 5, and only the Attorney General was authorized to enforce Section 10.[1159] The plaintiffs appealed to the Supreme Court, and the ACLU filed an amicus brief on their behalf.

Amicus, together with the appellants, contended that the requirement that delegates to the party's nomination convention pay a registration fee was subject to Section 5, given the role the party and its nominating convention played in the state's electoral process. They also argued that the legislative history made clear that private parties could challenge the fee under the Voting Rights Act as an impermissible poll tax. The Supreme Court agreed, reversed the dismissal of the complaint by the district court, and sent the case back for further proceedings.[1160] On remand, rather than seek

[1159] Morse v. Oliver North for U.S. Senate Committee, 853 F. Supp. 212 (W.D.Va. 1994).

[1160] Morse v. Republican Party of Virginia, 517 U.S. 186 (1996).

preclearance, the defendants elected not to enforce the fee requirement for those participating in the nomination convention.

NVRA Enforcement in Virginia

Richmond Crusade for Voters v. Allen

The compliance deadline for the 1993 National Voter Registration Act (NVRA) for the majority of states was January 1, 1995, but Virginia and two other states with constitutional provisions in conflict with the NVRA, were given an extension to allow them to adopt and implement any necessary amendments to their state constitutions. Three provisions of Virginia's constitution were in direct conflict with the NVRA: a requirement that voter registration be "in person;" a requirement that voter registration be taken "under oath;" and a requirement that registered voters be purged for failure to vote. In 1994, Virginia voters ratified amendments to the state constitution eliminating the conflicts with the NVRA, and the following year the general assembly passed legislation that would have brought the Commonwealth into substantial compliance with the NVRA by January 1, 1996.

On May 5, 1995, however, Governor George Allen vetoed the NVRA enabling legislation, and on the same day he and the Commonwealth filed suit against the United States seeking to have the NVRA permanently enjoined and declared

unconstitutional.[1161] Like South Carolina, another state that challenged the constitutionality of the NVRA, the Commonwealth argued in its complaint that, "the NVRA exceeds Congress' power." Governor Allen was reported as saying the NVRA was an "unfunded mandate on the states" from the "nannies" in Washington "treating us like puppets and minions."[1162]

On July 3, 1995, the ACLU, the ACLU of Virginia, and the NAACP Legal Defense and Educational Fund, Inc., filed suit on behalf of several public interest organizations against the Commonwealth to require it to implement the NVRA.[1163] The complaint noted that only 65.4% of eligible voters were registered in Virginia. The League of Women Voters filed a similar suit, while the United States in its answer asked the court to find the NVRA constitutional and order the state to comply with its provision. [1164] Upon motion of the private plaintiffs, the three cases were consolidated.

All parties filed motions for summary judgment, and the Commonwealth moved to dismiss the suits by the private plaintiffs as premature. A hearing in the consolidated cases was held on October 3, 1995. The district court, in a ruling from the bench, held the NVRA constitutional and set March 6, 1996, as the date by which the

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[1161] Commonwealth of Virginia v. United States, Civ. No. 3:95-CV357 (E.D. Va.).

[1162] Id., Complaint, p. 17.

[1163] Richmond Crusade for Voters v. Allen, 3:95CV531 (E.D. Va.).

[1164] League of Women Voters of Virginia v. Allen, Civ. No. 3:95CV532 (E.D. Va.).

Commonwealth must comply with its provisions. According to the court, "the National Voter Registration Act falls within the powers explicitly delegated to the federal government under the Constitution." The court also dismissed the private plaintiffs' lawsuits for lack of standing because the "Act is not yet effective so there can be no actual violations."[1165]

On October 18, 1995, the court issued a final written order holding the NVRA constitutional. It also ordered Virginia not to enforce the provision of its constitution in conflict with the NVRA after March 6, 1996, "to avoid the confusion presented by a dual system of voter registration," until such time as the constitution was amended to eliminate the conflict.

In early 1996, the Virginia legislature passed NVRA enabling legislation and submitted it to the Attorney General, who precleared it.

COUNTY AND MUNICIPAL LITIGATION IN VIRGINIA

Brunswick County and the City of Emporia

White v. Daniel

Smith v. Board of Supervisors

[1165] Richmond Crusade of Voters v. Allen, Excerpts of Hearing, October 3, 1995.

Brunswick is a rural, majority black county located in Southside Virginia. It elects its five member board of supervisors from districts, and in 1975, two black candidates were elected to the board, the first since Reconstruction. In 1988, the ACLU of Virginia filed suit on behalf of black residents of the county alleging that the districting plan, which had been adopted in 1971, diluted minority voting strength in violation of Section 2. The district court agreed. On appeal by the county, however, the court of appeals dismissed the complaint and vacated the decision of the district court on the grounds that the plaintiffs were guilty of laches (inexcusable delay) because they had not challenged the plan at the time it was first enacted. In addition, the court held that since no new elections were scheduled until after release of the 1990 census, it was likely that the county would have to adopt a new redistricting plan.[1166]

The ACLU assisted with the preparation of a petition for a writ of certiorari. The issues presented for review were: whether the doctrine of laches applied where (1) the Section 2 violation was continuing in nature, and (2) a challenge under amended Section 2 was unavailable at the time the disputed voting practice was adopted; whether the timing of a law suit is a factor more properly to be taken into account in formulating a remedy for a Voting Rights Act violation; and whether the restoration of a plan found by the district court to dilute minority voting strength erroneously deprived plaintiffs of a non-discriminatory benchmark for measuring retrogression of any new plan

[1166] White v. Daniel, 909 F.2d 99 (4th Cir. 1990).

submitted for preclearance under Section 5 following the 1990 census and reapportionment.

After the petition for certiorari was filed, the Supreme Court asked for the views of the Solicitor General. He submitted an amicus brief in June 1991, in which he agreed that the decision of the court of appeals was wrongly decided, but said the case did not warrant plenary review by the Supreme Court. The court, following the recommendation of the Solicitor General, denied review.[1167]

The ACLU filed a second suit on behalf of black residents of Brunswick County in 1991, following the adoption of a new redistricting plan for the board of supervisors based on the 1990 census.[1168] Plaintiffs contended that the plan diluted minority voting strength in violation of Section 2, and that the county intended to use the plan at the November 1991 election despite the fact that it had not been precleared. A three-judge court was convened and enjoined the November 1991 election until the new plan had been precleared "or until further order of this court." The Attorney General precleared the plan, and the district court scheduled a special election for April 1992.[1169] The election was held, and both black incumbents were defeated in head to head contests with whites. A third black candidate, George Smith, who was a plaintiff in the second

[1167] White v. Daniel, 501 U.S. 1260 (1990).

[1168] Smith v. Board of Supervisors, 801 F. Supp. 1513 (E.D.Va. 1992).

[1169] Id. at 1514-15.

voting rights lawsuit, was also defeated in another head to head contest against a white candidate.

The plaintiffs contended that because of extreme racial bloc voting in Brunswick County, African Americans would need to constitute 65% of the population to have an effective opportunity to elect candidates of their choice. Under the challenged plan, only one of the five districts had a 65% black majority. Following a trial, the district court invalidated the challenged system as diluting minority voting strength and made detailed findings of fact, including:

> *Historically, both Virginia and Brunswick County enforced laws that discriminated against African American residents. Brunswick County has a particularly long and sorry record in this regard. Black citizens of the County suffered the effects of this bias publicly and privately. Such discrimination included de jure and de facto sanctions of race-based denial of public accommodations, state requirements for segregation in schools and housing, and denial of equal access to the ballot.
>
> *Segregation persists in nearly all aspects of the Brunswick County community. Not a single witness denied that churches, clubs and political organizations split along racial lines in Brunswick County . . . [and] [t]he same disparity exists in County committees, commissions and boards.
>
> *[Blacks in Brunswick County have made repeated requests for increased opportunities for voter registration which were consistently denied by local white registration officials. Finally, in 1982, the long time Registrar of Brunswick County] resigned rather than maintain longer office hours, as required by law, so that minority citizens had greater opportunities to sign up.
>
> *No African American has ever been appointed to the Board of Supervisors, despite two recent openings.
>
> *[The Democratic Party in Brunswick County, which was historically white, began to lose its white members once blacks began to participate in party affairs in the 1970s and 1980s.] Today, the Democratic Party membership is virtually all black, the Republicans predominantly are white.

> *[Blacks are substantially underrepresented as poll officials in Brunswick County.] Mr. Alvin Rice serves as the sole African American precinct captain in all Brunswick County.
>
> *In the November 1991 general election, a white election official, aiding a black voter who is blind, apparently would have cast a vote for the white candidate against his wishes, but for the intervention of the voter's relative.
>
> *The evidence strongly suggests that black candidates continue to encounter harassment, subtle and overt, when attempting to run for political office.
>
> *In the 1991 election for Virginia State Senate from the 18th District, Ms. Louise Lucas, a black woman, was characterized as a 'welfare bureaucrat' and 'an inner-city resident' in her opponent's campaign literature. Her photograph appeared next to these depictions of her character.
>
> *[N]o black candidate for a county office has ever won a countywide head-to-head contest against a white candidate, nor has a black candidate ever won a majority of the votes cast.
>
> *[White voters voted for white candidates at the rate of 98%, a level of racial bloc voting that was]extraordinary [and] at the mathematical maximum.[1170]

The court also accepted the conclusion of Dr. Alan Lichtman, an expert who testified on behalf of the plaintiffs, that despite the active and substantial participation of blacks in the election process, they had not been sufficiently successful because "they are essentially blocked from any significant electoral success by the monolithic wall of votes cast by the white voters for white candidates." Dr. Lichtman gave his opinion that

[1170] Id. at 1517-19, 22-24.

the minimum black population necessary in any Brunswick County voting district "to create an equal opportunity for a black candidate to win would be 65 percent."[1171]

On appeal, the court reversed, despite the fact that it did not find any of the district court's findings of fact or the ultimate finding of racial vote dilution to be clearly erroneous. Instead, it adopted a per se rule that no districting plan could violate Section 2 or the Constitution where blacks "represent the majority" or "have the numbers necessary to win."[1172] The court's legal conclusion, however, cannot disguise the continuing racial polarization and division that characterizes life in Brunswick County, Virginia.

Brunswick County League for Progress/Southern Christian Leadership Conference v. Town Council of Lawrenceville, Virginia

The ACLU also challenged at-large elections for the town council of Lawrenceville, a small town (population 1,486) with an extensive history of discrimination similar to that documented by the court in the case against Brunswick County.[1173] Lawrenceville was 58.8% black (42.9% black if the predominantly black student body of St. Paul's College were excluded), but no black person had been elected

[1171] Id. at 1523.

[1172] Smith v. Board of Supervisors, 984 F.2d 1393, 1401-02 (4th Cir. 1993).

[1173] Brunswick County League for Progress v. Town Council of Lawrenceville, Civ. No. 3:91CV00091 (E.D. Va.).

to the seven member town council since Reconstruction.

In February 1991, the ACLU filed suit on behalf of black voters in Lawrenceville, as well as the Brunswick County League for Progress, a local organization affiliated with the Southern Christian Leadership Conference. On April 23, 1991, the town council adopted a resolution announcing its intent to implement a system with two multi-member districts, one majority black, which would elect three members of the council, and the other majority white, which would elect four members. The resolution also stipulated that following voluntary resignations of the three council members whose terms were set to expire in 1994, new elections for all seven seats would take place in May 1992. The court approved the terms of the resolution in a consent decree signed November 1991.

Person v. Ligon

While Brunswick County was 60% majority black in the 1980s, the town of Emporia, located just north of the North Carolina border, was 60% majority white. Black residents of Emporia, represented by the ACLU, filed suit in April 1984, challenging at-large elections for the nine member city council as violating the Constitution and Section 2. Only one of the members of the council was black.[1174]

[1174] Person v. Ligon, Civ. No. 84-0270-R (E.D. Va.).

After the complaint was filed, the defendants moved to stay the proceedings so the city could decide by referendum whether to merge with the county, or alternatively to annex a large area of the county. Merger of the city and county, and its racial implications, had been an ongoing controversy. In 1981, Charles Sabo, the chair of the county board of supervisors, said that fear of black dominance lay behind the city's opposition to merger. For that reason, he said, the city favored annexation of an area in the county that would maintain the same 60-40 white/black ratio as the city currently had. "That's the reason they want to annex," said Sabo.[1175]

In February 1985, a city/county commission recommended that the city be consolidated with the surrounding county and the new government be composed of eight commissioners from residential wards plus a mayor, all elected at-large. The city and county signed an agreement under which a referendum would be held on consolidation. If the referendum failed, the city would then annex a large populated area of the county.

The city council was strongly opposed to merger because, it said, the new council would be dominated by rural interests. According to the city manager, Emporia voters "would be absolutely crazy to support this thing."[1176] Gilbert Hudson, co-chair of a citizens committee supporting consolidation, said "It's a shame, but race is a part of this.

[1175] "Sabo charges city has racial motive," Southside Sun, December 10, 1981.

[1176] Id.

Black and white. To some people, that's really what the terms rural and urban mean."[1177]

The merger referendum was held on July 1, 1987, and was soundly defeated in the city. The county, with its majority black population, heavily favored merger, but the referendum had to pass separately in each jurisdiction. Following the failure of the referendum, the city annexed a large area of the county and maintained its majority white status.

The vote dilution case was finally settled on January 12, 1988, by a consent decree that reduced the size of the council from nine to eight members, and created three single member districts and two multi-member districts. According to the decree, the new method of elections would provide "black voters of the City of Emporia, a greater opportunity than previously existed to elect candidates of their choice." The plan was precleared by the Department of Justice on March 14, 1988, and was implemented at the elections held in May 1988, at which three black candidates were elected to the city council.

Halifax County and the Town of Halifax

Carr v. Covington

The town of Halifax is located in the heart of Virginia's tobacco growing

[1177] "Merger proposal heads to the wire," Times-Dispatch, May 4, 1986.

Southside region along the North Carolina border. Established in 1777, it is the county seat of rural Halifax County, which had a thriving plantation and railroad economy prior to the Civil War. During the Civil Rights Movement of the 1950s and '60s, Halifax participated in Virginia's "Massive Resistance" campaign to preserve segregation, successfully staving off racial integration in its public schools until 1970. Although African Americans constituted approximately one quarter of the town's population, the seven member town council remained all white until 1973, when an African American was appointed to fill a vacancy. The council regained its all white status, however, when the African American appointee was defeated in his bid for election in 1974.

By the time the ACLU filed suit on behalf of three African American voters in early 1985, not a single African American candidate had won election to the town council in the more than 100 years since the town's incorporation in 1875. The plaintiffs alleged that the at-large method of electing the town council diluted black voting strength in violation of Section 2 and the Constitution.[1178]

Hoping to avoid the expense of protracted litigation, the town quickly entered into settlement negotiations and the parties ultimately agreed on a proposed consent decree under which four members of the town council would be elected from single member wards and three members, including the mayor, would be elected at-large. African Americans constituted 96% of the population in one of the four proposed

[1178] Carr v. Covington, No. 85-0011-D (W.D. Va.).

wards.

The federal court approved the settlement in 1986. An African American who had been appointed to the council in late 1985 ran unopposed in the majority black Ward A in 1986, and has represented the ward ever since. He remains the only African American ever elected to the Halifax Town Council.

Lancaster County

Taylor v. Forrester

Lancaster County is located on Virginia's Northern Neck peninsula, between the Rappahannock River and Chesapeake Bay, and was one of 19 counties in the state in 1988, with a sizeable black population, but little black representation. Although African Americans made up approximately one-third of the county population, three single member districts drawn by the county council in 1981, failed to yield black representation. Qualified black candidates had run for office, but no black person had been elected in the county since the 19th century, when Armistead Nickins represented the county in Virginia's House of Delegates from 1871 to 1875.[1179]

By the late 1980s, the number of retirees migrating to this Tidewater county - most of whom were white - was increasing. At the same time, declining employment in the region's fishing and farming communities also meant that the area's black population was decreasing.

In July 1988, the three member county council had supported the idea of expanding to five members and creating one 54% majority black district. The council agreed to hold public hearings, but then decided to postpone consideration of the proposal until after data from the 1990 census would be available.

[1179] Ashlea Ball Ebeling, "ACLU suit aims to give Lancaster politics a new look," The Daily Press, January 1, 1990, p. 1.

In December 1989, acting on behalf of black voters, the ACLU challenged the election districts of the all white, three member Lancaster County Board of Supervisors as violating Section 2 and the Constitution.[1180] In a consent decree signed just six months later, the defendants stipulated that the county's single member districts had "the effect of violating Section 2 of the Voting Rights Act," and agreed to expand the council to five members and appoint two African Americans to the council.[1181] The new members, from a two member, county wide district, would hold seats with terms to run concurrently with the elected members. The agreement anticipated that a new five district plan would be drawn following the 1990 census, subject to preclearance, with elections to follow. The consent decree also expanded the county's redistricting committee - an advisory body - from seven to nine members, with two new members selected by the plaintiffs. The court expressly noted that the interim remedial measures would not require preclearance, but retained jurisdiction until the 1991 redistricting process was complete.

City of Newport News

Pegram v. City of Newport News

[1180] Taylor v. Forrester, Civ. No. 89-00777-R (E.D. Va. 1989).

[1181] Id., Interim Consent Decree, May 17, 1990.

The City of Newport News, a major shipping and ship building center on the Virginia coast, was governed by a mayor and six council members elected at-large. During the 1980s, African Americans achieved moderate electoral success in city elections, winning three council seats. By 1994, blacks made up one-third of the city's population of 170,000, but unlike the previous decade, African Americans had begun to experience difficulties electing their candidates of choice. For example, in the four election cycles preceding 1994, only one black candidate managed to win an election.

In July 1994, the ACLU filed suit challenging the at-large method of city elections.[1182] On October 26, 1994, a consent decree was entered in which the city admitted that its at-large system violated Section 2 as well as the Fourteenth and Fifteenth Amendments. The consent decree required the city to implement a racially fair election plan beginning with the next regularly scheduled elections in May 1996. Under the new plan, the city was divided into three two member districts for council elections with the mayor continuing to be elected at-large. One of the two member districts is predominantly African American. Currently the vice-mayor and at least one other council member are African American.

Nottoway County and the Town of Blackstone

Neal v. Harris

[1182] Pegram v. City of Newport News, Virginia, 4:94cv79 (E.D.Va.).

The town of Blackstone, Virginia, is located in rural Nottoway County, approximately 50 miles southwest of Richmond. Founded before the Revolutionary War, the town was originally known as the village of Blacks & Whites – named after the two rival taverns that stood at the intersection of three stagecoach routes – until 1885, when residents adopted the name of the English jurist William Blackstone. Blackstone is the largest of three towns in Nottoway County, which had a thriving plantation and railroad economy prior to the Civil War.

A century later, Blackstone had not yet outlived its history of racial discrimination. Town leaders participated actively in Virginia's Massive Resistance campaign opposing desegregation, establishing a separate "academy" in 1965, so that white children would not have to attend integrated schools. The local drugstore removed the stools from its lunch counter to avoid being forced to serve blacks and whites on an equal basis. And when an African American ran for the Blackstone town council for the first time in 1965, the all white county electoral board struck his name from the ballot on the grounds that he had not paid his poll taxes for the previous six months. Even though African Americans constituted almost 45% of the Blackstone's population, not a single African American candidate won election to the town council until 1984.

In September 1985, the ACLU filed suit on behalf of seven African American voters, alleging that the at-large method of electing the seven member town council

diluted black voting strength in violation of Section 2 and the Constitution.[1183] The town initially decided to fight the lawsuit. Shortly before trial, however, and after its expert witness admitted in a deposition that the at-large scheme was indefensible under Section 2, the town agreed to settle the case.

On June 4, 1986, the district court adopted a remedial plan under which five members of the town council would be elected from single member wards and two would be elected at-large. African Americans were a majority in three of the five wards, constituting 65.3%, 62%, and 65.9% of the total population, respectively. The court rejected the defendants' preferred plan, which would have contained only two majority black wards, because "race conscious voting that occurred amongst both the black and white electorate in Blackstone" would likely have resulted in the continued under representation of African Americans on the town council.[1184]

Because the next regular elections were almost two years away, the plaintiffs asked the court to order a special election to implement the remedial plan. The defendants objected. They argued that the district court had no authority to order a special election because they had not admitted that the previous plan was unlawful. When the district court granted the plaintiffs' motion the defendants appealed and sought a stay of the order requiring a special election.

[1183] Neal v. Harris, No. 85-0738-R (E.D. Va.).

[1184] Id., Order of June 4, 1986.

The court of appeals refused to enjoin the special election and it went ahead as scheduled on March 17, 1987.[1185] Two African Americans won election from the majority black wards and a third lost by a single vote. A black incumbent who had opposed the remedial plan was defeated by a large margin.

On July 28, 1987, the court of appeals affirmed the district court, holding that the special election and the cutting short of incumbents' terms were authorized by the terms of the consent agreement.[1186]

Prince Edward County

Eggleston v. Crute

Prince Edward County, Virginia, which was one of the original defendants in the Brown school desegregation case, has an aggravated history of racial discrimination, polarization, and white intransigence. [1187] After the Brown decision, rather than operate its public schools on a desegregated basis, the county shut them down in 1959, and authorized tuition grants to students to attend private, racially segregated, all white schools, including the Prince Edward Academy. The public schools were not reopened

[1185] Neal v. Harris, No. 86-1734 (4th Cir. March 16, 1987) (per curiam).

[1186] Neal v. Harris, 837 F. 2d 632 (4th Cir. 1987) (per curiam).

[1187] Brown v. Board of Education, 347 U.S. 483, 486 (1954).

until five years later, in 1964, and only then under order of the federal courts.[1188] But even then, the schools remained segregated, with blacks attending the public schools and whites, supported by tuition grants, attending all white private schools. The practice of county support of racially segregated private schools was ultimately invalidated by the federal courts.[1189]

As for the Prince Edward Academy, it was enjoined from discriminating in admissions on the basis of race, and in 1979, it was denied tax exempt status because it continued to maintain a racially discriminatory admissions policy, and "retained, and in fact teaches, its belief that racial segregation is desirable . . . . [and] seeks to inculcate the merits of segregation in the value system of its students."[1190] As recently as 1982, Charles B. Pickett, the chair of the Board of Supervisors of Prince Edward County, was quoted in The Washington Post as defending segregation in the county school system. "This is a southern county," he said. "I've just been raised that way, raised that there were two separate races. It's a way of life."[1191]

In 1983, black residents of Prince Edward County and the county seat of Farmville, represented by the ACLU and the NAACP, filed suit under the Constitution

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[1188] Griffin v. County School Board of Prince Edward County, 377 U.S. 218, 232, 234 (1964).

[1189] Griffin v. Board of Supervisors of Prince Edward County, 339 F. 2d 486 (4th Cir. 1964).

[1190] Runyon v. McCrary, 427 U.S. 160 (1976); Prince Edward School Foundation v. United States, 450 U.S. 944, 948-49 (1981).

[1191] "Farmville's School Without Blacks," The Washington Post, January 26, 1982.

and Section 2, challenging at-large elections for the Farmville Town Council and the multi-member district for the Prince Edward County Board of Supervisors.[1192] The plan for the board of supervisors used a combination of single member districts for county residents and a three seat, at-large district for city residents. Blacks were 38% of the population of the county, and 23% of the population of Farmville. While several African Americans had had been elected to the board of supervisors, all but one was elected from a majority black - or near majority black - single member district, and no African Americans had ever been elected to the Farmville town council.

The county defendants offered to settle shortly after the complaint was filed and the parties agreed on a single member plan for the three seat town district. The county's case was then severed by consent from that of the town's and the new county plan was implemented at the election held in 1985.

After extensive discovery, the town also agreed to settle, and the parties adopted a plan establishing five single member districts, two of which were majority black, and retaining two at-large seats. The plan was precleared by the Attorney General and was implemented at the regularly scheduled elections in May 1984. Carl Eggleston, one of the plaintiffs, ran in one of the majority black districts and was elected to the town council.

[1192] Eggleston v. Crute, Civ. No. 83-0287-R (E.D.Va.).

VOTING RIGHTS LITIGATION IN INDIAN COUNTRY

Despite the application of the Voting Rights Act to American Indians, both in its enactment in 1965 and in its extension in 1975, relatively little litigation to enforce the act, or the Constitution, was brought on behalf of Native American voters in the West until fairly recently. For example, from 1974 to 1990, only one law suit was brought in Montana challenging at-large elections as diluting Indian voting strength, despite the presence in the state of seven Indian reservations, a significant Indian population, and the widespread use of at-large voting.[1193] In Georgia, by contrast, during the same period of time, lawsuits were brought by African Americans against 97 counties and cities challenging their use of at-large elections.[1194] Indian country was largely bypassed by the extensive voting rights litigation campaign being waged elsewhere, particularly in the South after the amendment of Section 2 to incorporate a discriminatory results standard.

The lack of enforcement of the Voting Rights Act in Indian Country was the result of a combination of factors, including: a lack of resources and access to legal assistance by the Native American community, lax enforcement of the Voting Rights Act by the Department of Justice, the isolation of the Indian community, and the

[1193] Windy Boy v. County of Big Horn, 647 F. Supp. 1002 (D.Mont. 1986).

[1194] Laughlin McDonald, et al., "Georgia," in Quiet Revolution, Davidson and Grofman, eds. (1994), p. 81.

debilitating legacy of years of discrimination by the federal and state governments. But where there has been litigation, the courts have invariably found patterns of widespread discrimination against Indians in the political process, including chronic racial bloc voting. And in response to these findings, the courts have often ordered remedies that have enabled Native American voters, some for he very first time, to elect representatives of their choice.

In addition to documenting various discriminatory election systems impacting American Indians, this report also sheds light on another facet of voting discrimination which bears close resemblance to the experiences of black and Latino voters in other jurisdictions: the willful failure of elected officials to comply with the requirements of Section 5.

COLORADO

Montezuma County

Cuthair v. Montezuma County

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

During much of the 19th century "[t]he battle cry in Colorado seemed to be to exterminate the Indians." The governor, for example, issued an appeal on August 10,

1864, for "the people to defend themselves and kill Indians." This anti-Indian sentiment precipitated a surprise attack three months later by the state volunteers on a Cheyenne and Arapahoe village at Sand Creek in eastern Colorado. "Newspapers of the day greeted reports of the massacre with unanimous approval." Citing the persistent efforts of whites to exterminate and remove the Utes and expropriate their land, the court said "[i]t is blatantly obvious" that Native Americans "have been the victims of pervasive discrimination and abuse at the hands of the government, the press, and the people of the United States and Colorado." The evidence revealed "a keen hatred for the Ute Indians and their way of life."[1195]

Anti-Indian attitudes have persisted in Colorado and in Montezuma County well into the 20th century. Communities surrounding the Ute Reservation "treated Indians as second-class citizens. They were discouraged from attending public schools. Discrimination was rampant against Ute children. They were perceived to be unhealthy, unsanitary, and most of all, unwelcome." The plight of the Ute Mountain Utes among Indian tribes was especially dire. In the 1960s "there were only just over 900 tribal members and their infant mortality rate was so high that their death as a viable cultural group could be predicted."[1196]

[1195] Cuthair v. Montezuma-Cortez, Colorado School Dist. No. RE-1, 7 F. Supp. 2d 1152, 1156-57, 1160 (D. Colo. 1998).

[1196] Id. at 1159-60.

The attitude of whites changed somewhat after the tribe began to receive funds from oil and gas leases, as well as revenue from various federal programs and judgments before the U.S. Court of Claims reimbursing the tribe for land that had been ceded to the United States in the late 19th century at prices "so inadequate as to be unconscionable." But despite the economic benefit to the surrounding community from this influx of funds, "[s]harply divided interests and attitudes over Indian rights remained . . . and abuses abounded such as discrimination in law enforcement, health care, and employment as well as incidents of double pricing and disputes over hunting rights." Disputes over land claims remained particularly contentious. "Water rights and tribal sovereignty issues were hotly contested and the local populous made clear their continuing objections to the nonpayment of taxes by Indians. . . The public generally still harbored attitudes that Indians were lazy and not to be trusted." The numerous and existing divides "made it extremely difficult for the Indians to establish any alliances with the whites in the cultural and political arena."[1197]

Indians were not allowed to serve on juries in Montezuma County until 1956. They were historically denied the right to vote in Colorado, and it was not until 1970, that the state constitution was amended to allow tribal members residing on the reservation to vote. Until the late 1980s or early 1990s, Utes were not allowed to register at the tribal headquarters at Towaco, despite the fact that the non-Indian population

[1197] Id. at 1160-61.

was allowed satellite registration at several communities in the county. Prior to the trial of the ACLU voting rights case in 1997, no Indian had ever been elected to public office in Montezuma County.[1198]

A major concern of the Utes has been the extremely high drop out rate (89%-90%) of Indian students from the predominantly white schools in Cortez, the only schools for Indian children in the county. Part of the problem has been the indifference of school officials to the needs and concerns of Indian students and, as a result, Indians have never felt they were a part of the local school system. For example, when Indian parents requested that bilingual education and Indian education programs be included in the school district's mission statement, the school board denied the request saying that the mission statement "must be 'ethnically clean.'"[1199]

In ruling for the plaintiffs, the federal court concluded that Indians were geographically compact, politically cohesive, and the candidates favored by Indians were usually defeated by whites voting as a bloc. The court also found "a history of discrimination-social, economic, and political, including official discrimination by the state and federal government," and a depressed socio-economic status caused in part by the past history of discrimination. As a remedy for the Section 2 violation, the court

[1198] Id. at 1161-62.

[1199] Id. at 1170.

ordered into effect a single member district plan for election of school board members, containing a majority Indian district encompassing the reservation.

MONTANA

1990 Redistricting

Old Person v. Cooney

Earl Old Person, the chair of the Blackfeet Indian Tribe, and other tribal members in Montana, brought suit in 1996, challenging the 1992 redistricting plans for the state house and senate. They contended that the plans diluted Indian voting strength in the area encompassed by the Blackfeet and Flathead Reservations (including portions of Flathead, Lake, Glacier, and Pondera Counties) where an additional majority Indian house district and a majority Indian senate district could be drawn.[1200]

Since 1972, the Montana constitution has granted the exclusive power to conduct legislative redistricting to a Districting and Apportionment Commission. The commission is reconstituted every 10 years in advance of the release of the federal census and consists of five members, four of whom are chosen by the majority and minority leaders of each house. The fifth member is selected by the four commissioners, and if they cannot agree, by the state supreme court. Upon the filing of

[1200] Plaintiffs also challenged redistricting in the area encompassed by the Fort Peck, Fort Belknap, and Rocky Boy Reservations, but those claims were later abandoned.

the redistricting plan by the commission with the secretary of state, the plan becomes law and the commission is dissolved.[1201]

Based on the 1990 census, Indians were 6% of the total population and 4.8% of the voting age population of Montana. While the state population increased by 1.6% between 1980 and 1990, the Indian population increased 27.9%. Approximately 63% of the Indian population lived on the state's seven Indian Reservations.[1202]

The preexisting 1982 plan contained only one majority Indian district, HD 9 on the Blackfeet Reservation in Glacier County.[1203] The 1982 plan also effectively fragmented the Indian population in other parts of the state by dividing the Fort Belknap Reservation between two senate districts, the Fort Peck Reservation among three senate districts, the Rocky Boy Reservation between two house districts, and the Blackfeet Reservation among four house districts. The Flathead Reservation was divided among eight house districts.

As a result of the growth in Indian population reflected in the 1990 census, three majority white districts under the 1982 plan had become majority Indian, HD 20 (portions of Fort Peck), HD 99 (portions of Crow), and SD 50 (portions of Crow and

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[1201] Article V, Section 14, Constitution of Montana.

[1202] Old Person v. Cooney, No. CV-96-004-GF (D.Mont. October 27, 1998), slip op. at 4-5.

[1203] Id. at 8, 11-12.

Northern Cheyenne).[1204] Another district, HD 100 (portions of Crow and Northern Cheyenne), was approximately 50% Indian in light of the new census.

The five-member commission appointed in 1990 had no Indian representation. It held 12 hearings on redistricting around the state, each of which was usually preceded by an afternoon work or planning session. All the sessions were recorded on audio tapes, which were later transcribed for use at trial. The statements made by the commissioners during their planning sessions, as opposed to during the public meetings when they were more circumspect, can only be described as overtly racial and showed an intent to limit Indian political participation.

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

[1204] Id. at 5, 11-13.

pieces of paper instead of a tribal redistricting proposal, one commissioner remarked, "I got a blank one too . . . . [t]his is typical of them Indians."[1205]

In response to requests from tribal members that any districting plan provide equal electoral opportunities to Indian voters, commission members suggested that all the Indians in the state be packed in one district to minimize their voting strength. As one commissioner put it, "give them one District and we go from there." The Indians, according to another commissioner, didn't know what was going on: "you get somebody that's getting in there and stirring them up, yeah, they'll get to thinking hell's an icebox." Another commissioner declared that "[i]f the federal government wants to redistrict Montana according to the Indian Tribes and the Reservations, they are going to have to do it. I am not going to do it." When the commission felt obligated to draw a majority Indian district, one commissioner lamented that "[w]e're being had here, ladies and gentlemen." Another commissioner added, "[a]nd we can't do anything about it." Placing white residents in a majority Indian district would, according to one commissioner, "emasculate" white voters.[1206]

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

[1205] Old Person v. Cooney, Pl. Exs. 38, 44, 45.

[1206] Id.

> During the second half of the seventies a backlash arose against Indians and Indian interests. Anti-Indian editorials and articles appeared in both the local and the national media. Non-Indians, and even a few Indians as well, living on or near Indian reservations organized to oppose tribal interests. Senator Mark Hatfield (R-Ore.) said during Senate hearings in 1977 said that '[w]e have found a very significant backlash [against Indians] that by any other name comes out as racism in all its ugly manifestations.'[1207]

So called "white rights" groups have proliferated in Montana, including Montanans Opposed to Discrimination (MOD), Citizens Rights Organization (CRO), Interstate Congress for Equal Rights and Responsibilities (ICERR), and Citizens Equal Rights Alliance (CERA). In general, these organizations advocate that the states should have exclusive jurisdiction over all non-Indians and non-Indian lands wherever located. The organizations are also interested in eliminating or terminating the Indian reservations, and have clashed with the tribes over specific issues such as taxation, tribal sovereignty, hunting and fishing rights, water rights, and appropriation and development of tribal resources. Joe Medicine Crow, a Crow tribal historian and anthropologist, says the mentality of MOD is "do not give the Indians the opportunity to enjoy those rights that have been traditionally the white man's rights, don't let them have it."[1208]

A political party that is gaining a foothold in Montana is the Constitution Party, which has a controversial, distinctly anti-Indian platform. As appears from its website,

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[1207] United States Commission on Civil Rights, Indian Tribes: A Continuing Quest for Survival (Washington; U.S. Government Printing Office, 1981), p. 1.

[1208] Windy Boy v. County of Big Horn, Tr. Trans. 113.

its 2000 National Platform included: repeal of the Voting Rights Act; opposition to bilingual ballots; an end to all federal aid, except to military veterans; repeal of welfare; and abolishing the U.S. Department of Education.[1209]

In the 2000 general election for the Montana legislature, there were 11 Constitution Party candidates on the ballot. Where they faced candidates from both major parties, they did poorly. Where they faced only one major party candidate, they did better, with one candidate getting 25% of the vote – except in HD 73 in Lake County, the home of the Flathead Reservation and where the only major party candidate was an Indian. There, the Constitution Party candidate got 49% of the total vote, 62% of the white vote, and came within fifty-four votes of being elected.[1210]

Because of the polarization that exists, white politicians are often reluctant to openly campaign or solicit votes on the reservations for fear of alienating white voters. According to Joe MacDonald, one of the plaintiffs in the Old Person case and the president of the Salish-Kootenai College at Flathead, when U.S. Representative Pat Williams, who was chairman of the Post-secondary Education Committee, visited the tribal college, he didn't want any publicity or even to attend a reception to meet members of the faculty. According to MacDonald, "[h]e slid in the side door, he and I

[1209] See: http://www.constitutionparty.com/ustp-p1.html.

[1210] Old Person v. Cooney, Report of Steven P. Cole, p. 18, Table 1; p. 20, Table 3.

went around the campus, [he] went to his car and he was gone."[1211] Another plaintiff, Margaret Campbell, echoed MacDonald's comments:

> Non-Indians come to the Native Americans for their support, but they would prefer that . . . we do not support them publicly among the non-Indian community. For example, they don't bring us bumper stickers and huge yard signs, that sort of thing. . . . If a non-Indian candidate were to make it known that they had the broad support of the Native American community, it would be the kiss of death to their campaign.[1212]

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

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

[1211] Id., Testimony of Joe MacDonald, T. Vol. I, p. 178.

[1212] Id., Testimony of Margaret Campbell, T. Vol. IV, p. 650.

history of official discrimination against American Indians during the 19th century and early 20th century by both the state and federal government."[1213]

The district court also found that "Indians continue to bear the effects of past discrimination in such areas as education, employment and health, which, in turn, impacts upon their ability to participate effectively in the political process." The effects of discrimination included low Indian voter participation and turnout, and very few Indian candidates.[1214]

As for plaintiffs' claim of purposeful discrimination, the court held that the challenged plan had not been adopted with a discriminatory purpose. The patently derisive and condescending comments made by the commissioners about Indians were dismissed as "moment[s] of levity."[1215] Plaintiffs appealed and the court of appeals reversed and remanded for further proceedings.[1216]

The court of appeals held that plaintiffs established the three primary factors identified in Thornburg v. Gingles as probative of vote dilution under Section 2 (geographic compactness and political cohesion of the minority group and legally significant white bloc voting), and that "in at least two recent elections in Lake County .

[1213] Id., slip op. at 39.

[1214] Id. at 42, 44.

[1215] Id. at 51.

[1216] Old Person v. Cooney, 230 F.3d 1113, 1131 (9th Cir. 2000).

. . there had been overt or subtle racial appeals." The court directed the district court to reconsider its ruling in light of its "clearly erroneous finding that white bloc voting was not legally significant," and its erroneous finding of "proportionality between the number of legislative districts in which American Indians constituted an effective majority and the American Indian share of the voting age population of Montana."[1217]

As for the anti-Indian comments made by the commissioners, the appellate court acknowledged that they were "inflammatory," but declined to reverse the ruling of the district court that there was no discriminatory purpose in the adoption of the commission's plan.[1218] An unwillingness of many local federal judges, who are, after all, political appointees, to find that members of their state or community committed acts of purposeful discrimination, and the unwillingness of appellate judges to reverse those decisions, underscore the wisdom of Congress in dispensing with any requirement of proving racial purpose to establish a violation of Section 2, or retrogression under Section 5.

Prior to the decision of the court of appeals, a new commission was appointed by the legislature in 1999, to redistrict the state in anticipation of the 2000 census. The four appointed members could not agree on the fifth member to serve as chair, and accordingly the state supreme court did the appointing. It chose Janine Windy Boy, a

[1217] Id. at 1121, 1127, 1129, 1130-31.

[1218] Id. at 1130.

Crow Indian who had been the lead plaintiff in a voting rights case in Big Horn County.[1219] Having a Native American, for the first time, on the commission would insure that the language of the commissioners would not be as "inflammatory" as it had been in the past. It would also help to ensure that Indians would be treated fairly in the redistricting process. The subsequent adoption of a redistricting plan creating a new majority Indian house district and a new majority Indian senate district in the area of the Flathead and Blackfeet Reservations would also render the Old Person lawsuit moot.

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

> I think ultimately that we will not prevail in this litigation; that the Plaintiffs will indeed prevail in the litigation . . . I think the Ninth Circuit opinion is fairly clear and I think it's ultimately the state of Montana is going to have to draw a Senate district that is at least somewhat similar to that that the Plaintiffs have requested.[1220]

Joe Lamson, another member of the redistricting commission, shared the views of McGrath. He was of the opinion that the 1993 plan did result in "voter dilution of our Native American population in Montana. And that when you look at

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[1219] Windy Boy v. County of Big Horn, 647 F. Supp. at 1004, 1013.

[1220] Old Person v. Cooney, on remand sub nom. Old Person v. Brown, Pl. Ex. 3, p. 14.

proportionality, they're certainly entitled to another Senate district." A third commissioner, Sheila Rice, who was a member of the state legislature when the existing plan was enacted, said that "I actually sat on that House Committee that reviewed this exact plan that was taken to Court - it must have been the 1993 session, and argued pretty strenuously that we were diluting the Native American population, and that we should redraw that district."[1221]

The commission conceded that the 1992 plan diluted Indian voting strength, and adopted a resolution to create "an additional majority Indian House District and an additional majority Indian Senate District in the region of Montana that is dealt with in Old Person, in recognition of the rights of Indians on the Blackfeet and Flathead Reservations under Section 2 of the Federal Voting Rights Act of 1965."[1222]

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

[1221] Id. at 20, 28.

[1222] Id., Expert Report for Susan Byorth Fox, Attachment 1.

social and economic factors hinder the ability of Indians in Montana to participate fully in the political process, and that in at least two recent elections in Lake County there had been overt or subtle racial appeals.

Despite these findings, the court ruled that three Indian preferred candidates (one white, one Indian who had no major party opposition in the general election, and another Indian from a majority Indian district) had been elected to the legislature from the Blackfeet-Flathead area. The court also emphasized the difficulty of redistricting only part of the state using the 2000 census, and "the very real prospect that comprehensive and long-term relief designed to address vote dilution throughout the State of Montana is in the offing within a year under the auspices of the Montana Districting and Apportionment Commission."[1223]

Plaintiffs appealed once again, but this time the court affirmed. It affirmed all the court's prior findings showing vote dilution. In addition, and setting aside the finding of the district court once again, the panel held that Indians' share of majority-minority districts "is not proportional under either a four-county or a statewide frame of reference, [and that] the proportionality factor weighs in favor of a finding of vote dilution." But despite proof of the Gingles and other factors showing vote dilution, including the lack of proportionality, the panel concluded that Indian voting strength was not diluted because of "the absence of discriminatory voting practices, the viable

[1223] Old Person v. Brown, 182 F. Supp. 2d 1002, 1012 (D.Mont. 2002).

policy underlying the existing district boundaries, the success of Indians in elections, and official responsiveness to Native American needs."[1224] The court ignored the evidence presented by the plaintiffs of the resolution of the 2000 Districting and Apportionment Commission, and statements of its individual members, that the 1993 plan diluted Indian voting strength. But in any event, the 2000 redistricting would shortly render the case moot.

After holding a series of hearings around the state, the new commission submitted its redistricting plan to the legislature for comments on January 6, 2003. The plan provided for 100 house districts, six of which were majority Indian, and 50 senate districts, three of which were majority Indian. An additional majority Indian house district (HD 1) was created that included parts of the Flathead and Blackfeet Indian Reservations. House District 1, when combined with the preexisting majority Indian house district on the Blackfeet Reservation (HD 85), created an additional majority Indian senate district (SD 1).[1225] The districts for the house contained a total deviation of 9.85%.[1226]

[1224] Old Person v. Brown, 312 F.3d 1036, 1039, 1046, 1050 (9th Cir. 2002).

[1225] Old Person v. Brown, Response to Appellants' Petition for Rehearing and Rehearing En Banc, Exhibit (Adopted House and Senate District, December 2002).

[1226] Joint Legislative Committee on Districting and Apportionment, Minority Report on SR 2 and HR 3 Regarding the Recommendation to the Montana Districting and Apportionment Commission 2 (January 29, 2003).

Both the house and senate immediately condemned the proposed plans and demanded that the commission adopt new ones. The house, in a resolution passed on February 4, 2003, charged that "the 5% population deviation allowance contained in the plan was used for partisan gain," that the plan was "mean-spirited," "unacceptable," and that "the legislative redistricting plan must be redone." It also condemned the creation of majority Indian districts as being "in blatant violation of the mandatory criterion that race may not be the predominant factor to which the traditional discretionary criteria are subordinated."[1227] The senate leveled virtually identical charges, and concluded that "the legislative redistricting plan must be redone."[1228]

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

On February 5, 2003, the commission formally adopted its plan for legislative redistricting and filed it with the secretary of state. The secretary of state, however,

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[1227] House Resolution No. 3, February 4, 2003.

[1228] Senate Resolution No. 2, February 4, 2003.

refused to accept it and on the same day filed a complaint against the commission in state court for declaratory judgment that the plan was unconstitutional and unenforceable for failure to comply with the population equality standard of HB 309.[1229] The tribal chairs from the various reservations, represented by the ACLU, were granted permission to intervene as defendant to defend the commission's plan. Following a hearing, the state court ruled on July 2, 2003, that HB 309 was unconstitutional and that the secretary of state was required to accept the commission's plan. The secretary of state did not file a notice of appeal but accepted the commission's plan for filing. It thus became the state's redistricting plan, superseding the 1993 plan and rendering the plaintiffs' challenge to the prior plan moot. The Supreme Court, however, denied without comment a petition for a writ of certiorari seeking to vacate the final decision of the lower court on mootness grounds.

As a result of the litigation, which spanned eight years, and despite the concerted opposition of the legislature and secretary of state to the commission's redistricting plan, eight tribal members, as of the 2004 elections, are now members of the Montana state house and senate, the largest Native American delegation of any state legislature. A recent report by the First American Education Project described the success of Native

[1229] Brown v. Montana Districting and Reapportionment Commission, No. ADV-2003-72 (Mont. 1st Jud. Dist. Ct. Lewis & Clark County).

Americans elected to the Montana State Legislature as "a testament [to] the power of Native voters at the smaller geographic and jurisdictional levels."[1230]

City of Billings

Hartung v. Billings

Billings, known as the Magic City because of its rapid growth from the days of its founding as a railroad town in 1882, has a population today of nearly 100,000 people. Not surprising, the 2000 census showed the five districts used to elect the city council were severely malapportioned. The city adopted a new plan in 2005, but it was under the mistaken impression that an individual district with a deviation of plus or minus 10% from average district size was acceptable. The 10% "safe harbor" rule applies, of course, to the total deviation in a plan, as opposed to the deviation in a given district. The plan the city adopted had a deviation of 15.66%, and there was noting in the legislative history to justify the failure to comply with the one person, one vote standard. The plan also unnecessarily divided an area of the city that contained a growing American Indian population.

Local residents, represented by the ACLU, filed suit in August 2005, seeking to enjoin use of the malapportioned plan.[1231] Having no defense to the one person, one

[1230] First American Education Project, Native Vote 2004: A National Survey and Analysis of Efforts to Increase the Native Vote In 2004 and the Results Achieved (Washington, D.C.: National Congress of American Indians, 2004), p. 7.

vote claim, the city requested the litigation be stayed to give it an opportunity to adopt a plan that complied with the equal population standard. The city ultimately adopted a plan in November 2005 that cured the one person, one vote violation, and avoided the unnecessary fragmentation of the Indian population. The plan was acceptable to the plaintiffs, and they dismissed their complaint as moot.

[1231] Hartung v. City of Billings, Montana, Civ. No. CV 05-96-BLG-RWA (D. Mont.).

Big Horn County

Windy Boy v. County of Big Horn

The first Section 2 challenge in Montana was brought in 1983, in Big Horn County. The plaintiffs were members of the Crow and Northern Cheyenne Tribes and were represented by the ACLU. They contended that the at-large method of electing the members of the county commission and one of the school districts in the county allowed the white majority to control the outcome of elections and prevented Indian voters from electing candidates of their choice.[1232] At the time the complaint was filed, no Indian had ever been elected to the county commission or the school board, despite the fact that Indians were 41% of the voting age population of the county.

Following a lengthy trial, the district court issued a detailed order in 1986, finding that the challenged at-large system diluted Indian voting strength in violation of Section 2. Among the court's findings were:

> *the right of Indians to vote has been interfered with, and in some cases denied, by the county;
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> *Indians who had registered to vote did not appear on voting lists;
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> *Indians who had voted in primary elections had their names removed from voting lists and were not allowed to vote in the subsequent general elections;
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> *[Indians were] refused voter registration cards by the county;
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> *evidence of official discrimination touching on the right to participate in elections concerned the failure of the county to appoint Indians to county boards and commissions;

[1232] Windy Boy v. County of Big Horn, Civ. No. 83-225-BLG-ER (D. Mont.).

*discrimination in the appointment of deputy registrars of voters and election judges limiting Indian involvement in the mechanics of registration and voting;

*in the past there were laws prohibiting voting precincts on Indian reservations and effectively prohibiting Indians from eligibility for positions such as deputy registrar;

*there is racial bloc voting in Big Horn County;

*there is evidence that race is a factor in the minds of voters in making voting decisions;

*[w]hen an Indian was elected Chairman of the Democratic Party, white members of the party walked out of the meeting;

*[u]nfounded charges of voter fraud have been alleged against Indians and the state investigator who investigated the charges commented on the racial polarization in the county;

*[the size of the county] is huge (5,023 square miles), the roads are poor, and travel is time consuming;

*the use of staggered terms along with residential districts promotes head-to-head contests . . . making it more difficult for Indian supported candidates to successfully participate in the political process;

*Indians have lost land, had their economics disrupted, and been denigrated by the policies of the government at all levels;

*[there was] discrimination in hiring by the county;

*race is an issue and subtle racial appeals, by both Indians and whites, affect county politics;

*[i]ndifference to the concerns of Indian parents" [by school board members];

*the polarized nature of campaigns;

*a strong desire on the part of some white citizens to keep Indians out of Big Horn County government;

*the effects on Indians of being frozen out of county government remain and will continue to exist in years to come;

*English is a second language for many Indians, further hampering participation;

> *[a depressed socio-economic status that makes it] more difficult for Indians to participate in the political process and there is evidence linking these figures to past discrimination.

The court concluded that "this is precisely the kind of case where Congress intended that at-large systems be found to violate the Voting Rights Act."[1233] Following the implementation of a remedial plan consisting of single member districts, an Indian (from a majority Indian district) was elected to the county commission for the first time in history.

Blaine County

United States v. Blaine County

Blaine County, located in north central Montana, is 45% Native American and home to the Fort Belknap Reservation and the Gros Ventre and Assiniboine Tribes. The county was sued by the United States in November 1999, for its use of at-large voting for its three member commission, which was alleged to dilute Indian voting strength in violation of Section 2.[1234] Both the district court and court of appeals agreed that the challenged system violated the statute. Indians were geographically compact and

[1233] Windy Boy v. County of Big Horn, 647 F. Supp. at 1007-22.

[1234] United States v. Blaine County, Montana, No. CV 99-122-GF-DWM (D.Mont.).

politically cohesive, while whites voted sufficiently as a bloc usually to defeat the candidates preferred by Indian voters.[1235]

Turning to the totality of circumstances, the courts concluded: (1) there was a history of official discrimination against Indians, including "extensive evidence of official discrimination by federal, state, and local governments against Montana's American Indian population;" (2) there was racially polarized voting which "made it impossible for an American Indian to succeed in an at-large election;" (3) voting procedures, including staggered terms of office and "the County's enormous size [which] makes it extremely difficult for American Indian candidates to campaign county-wide," enhanced the opportunities for discrimination against Indians; (4) depressed socio-economic conditions existed for Indians; and, (5) there was a tenuous justification for the at-large system, in that at-large elections were not required by state law while "the county government depends largely on residency districts for purposes of road maintenance and appointments to County Boards, Authorities and Commissions."[1236]

Tribal members, represented by the ACLU, were granted leave to participate in the remedy phase of the trial, at which the court approved a plan using three single

[1235] United States v. Blaine County, Montana, 363 F.3d 897, 900, 909-11 (9th Cir. 2004).

[1236] Id. at 913-14.

member districts, one of which was majority Indian.[1237] At the next election under the plan, an Indian from the majority Indian district was elected for the first time to the county commission.

Blaine County was represented by the Mountain States Legal Foundation, which agreed to represent the defendants on the condition they allow it to challenge the constitutionality of Section 2 as applied in Indian country. Both the district court and the court of appeals rejected the Foundation's arguments and held that Section 2 was a valid exercise of congressional authority to enforce the Constitution. In doing so, the courts relied upon the Supreme Court's recent "federalism" decisions, such as City of Boerne v. Flores,[1238] which invalidated various acts of Congress on the grounds that they were not "congruent" and "proportionate," or appropriately tailored to remedy the constitutional violation at issue. The court of appeals noted that when Boerne "first announced the congruence-and-proportionality doctrine . . . it twice pointed to the VRA as the model for appropriate prophylactic legislation," and that "the Court's subsequent congruence-and-proportionality cases have continued to rely on the Voting Rights Act

[1237] Tribal members also filed a separate Section 2 lawsuit challenging the county's at-large system, but it was stayed pending disposition of the suit brought by the United States and was ultimately dismissed as moot. McConnell v. Blaine County, No. CV 01-91-GF (D.Mont.).

[1238] 521 U.S. 507 (1997).

as the baseline for congruent and proportionate legislation."[1239] The Supreme Court denied the county's petition for a writ of certiorari.[1240]

[1239] Blaine County, 363 F.3d at 904-05.

[1240] Blaine County, Montana v. United States, 125 S. Ct. 1824 (2005).

Rosebud County

Alden v. Rosebud County

Matt v. Ronan School District 30

In 1999, tribal members, represented by the ACLU, sued Rosebud County (Northern Cheyenne) and the Ronan School District 30 (Flathead) for their use of at-large elections as diluting Indian voting strength, Rather than face prolonged litigation, the two jurisdictions entered into settlement agreements adopting district elections.[1241]

The difficulty Indians have experienced in getting elected to office was particularly evident in the Ronan school district. From 1972 to 1999, 17 Native American candidates had run for the school board, and only one, Ronald Bick, who had no formal or announced tribal affiliation at the time, was elected to the board. Bick was elected in 1990. However, when he ran for reelection in 1993, and after it became known that he had joined the Flathead Nation, he was defeated. The settlement plan agreed to by the parties called for an increase in the size of the school board from five to seven members, and the creation of a majority Indian district that would elect two members to the school board. At the ensuing election held under the new plan, two Indians were elected from the majority Indian district.

[1241] Alden v. Rosebud County Board of Commissioner, Civ. No. 99-148-BLG (D.Mont. May 10, 2000), and Matt v. Ronan School District, Civ. No. 99-94 (D.Mont. January 13, 2000). The United States filed a similar vote dilution suit in Roosevelt County, which was also settled by agreement of the parties. United States

NEBRASKA

Thurston County

United States v. Thurston County

Stabler v. Thurston County

Thurston County in eastern Nebraska is home to members of the Omaha and Winnebago Tribes, who in 1975, made up approximately 28% of the county population. Historically, the county elected its board of supervisors from districts, however following the election of an Indian in 1964, and passage of the Voting Rights Act of 1965, the county abandoned its district system and adopted at-large elections in 1971. The practice of switching from district to at-large elections following increased minority registration or office holding was, as we have seen, widespread in the South following passage of the Voting Rights Act. Seven years later, in 1978, the United States sued Thurston County alleging that its adoption of at-large elections diluted Indian voting strength and was in violation of the Constitution and the Voting Rights Act. The county, while specifically denying liability, entered into a consent decree returning to district voting and adopting a plan containing two majority Indian districts out of seven districts overall. The county also consented to being placed under Section 5 for five

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v. Roosevelt County Board of Commissioners, No. 00-CV-50 (D.Mont. March 24, 2000).

years so that its compliance with the court's order could be "more effectively monitored."[1242]

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

The district court, in ruling for the plaintiffs, found: "Native Americans vote together and choose Native American candidates when given the opportunity;" "whites vote for white candidates to defeat the Native American candidate of choice;" "it is obvious that Native Americans lag behind whites in areas such as housing, poverty, and employment;" and there was evidence of "overt and subtle racial discrimination in the community."[1243] The court invalidated the at-large plan under Section 2 and held that plaintiffs were entitled to a new plan creating a third majority Indian district. The

[1242] United States v. Thurston County, Nebraska, Civ. No. 78-0-380 (D.Neb. May 9, 1979).

[1243] Stabler v. County of Thurston, Nebraska, 8: CV93-00394 (D.Neb. August 29, 1995), slip op. at 14-6.

court, however, dismissed similar challenges brought by the plaintiffs against a county school board and the board of trustees of the Village of Walthill because Indians were not sufficiently compact to form a majority in a single member district. Both sides appealed, but the court of appeals affirmed the decision of the trial court.[1244]

SOUTH DAKOTA

2000 Redistricting

Emery v. Hunt

Bone Shirt v. Hazeltine

Steven Emery, Rocky Le Compte, and James Picotte, residents of the Cheyenne River Sioux Reservation, and represented by the ACLU, filed suit in 2000, challenging the state's 1996 interim legislative redistricting plan. In the 1970s, a special task force consisting of the nine tribal chairs, four members of the legislature, and five lay people undertook a study of Indian/state government relations. One of the staff reports of the commission concluded that "[w]ith the present arrangement of legislative districts, Indian people have had their voting potential in South Dakota diluted." The report recommended the creation of a majority Indian district in the area of Shannon, Washabaugh, Todd, and Bennett Counties.[1245] Under the existing plan, there were 28

[1244] Stabler v. County of Thurston, 129 F.3d 1015 (8th Cir. 1997).

[1245] Staff Report, Legislative Apportionment and Indian Voter Potential (Task Force on Indian-State Government Relations, 1974), 17, 25.

legislative districts, all of which were majority white and none of which had ever elected an Indian. Thomas Short Bull, a member of the Oglala Sioux Tribe and the executive director of the task force, said the plan gerrymandered the Rosebud and Pine Ridge Reservations by "divid[ing them] into three legislative districts, effectively neutralizing the Indian vote in that area." The legislature, however, ignored the task force's recommendation. According to Short Bull, "the state representatives and senators felt it was a political hot potato. . . . [T]his was just too pro-Indian to take as an item of action."[1246]

After the release of the 1980 census, the South Dakota Advisory Committee to the U.S. Commission on Civil Rights made a similar recommendation that the legislature create a majority Indian district in the area of the Pine Ridge and Rosebud Reservations. The committee issued a report in which it said the existing districts "inherently discriminate against Native Americans in South Dakota who might be able to elect one legislator in a single member district."[1247]

As a result of the 1975 amendments of the Voting Rights Act, two counties in South Dakota, Shannon and Todd, which are home to the Pine Ridge and Rosebud Indian Reservations respectively, became subject to Section 5 preclearance.[1248] The

[1246] Bone Shirt v. Hazeltine, 336 F. Supp. 2d 976, 981 (D.S.D. 2004).

[1247] Report, South Dakota Advisory Committee to the U.S. Commission on Civil rightsRights (1980).

[1248] 41 Fed. Reg. 784 (January 5, 1976).

Department of Justice, pursuant to its oversight under Section 5, advised the state it would not preclear any legislative redistricting plan that did not contain a majority Indian district in the Rosebud/Pine Ridge area. The state bowed to the inevitable, and in 1981, drew a redistricting plan creating for the first time in the state's history a majority Indian district, District 28, which included Shannon and Todd Counties and half of Bennett County.[1249] Thomas Short Bull ran for the senate the following year from District 28 and was elected, becoming the first Indian ever to serve in the state's upper chamber.

In 1991, the South Dakota legislature adopted a new redistricting plan using data from the 1990 census. The plan divided the state into 35 districts and retained the majority Indian district, renumbered as District 27, in the Todd/Shannon/Bennett Counties area. The plan also provided, with one exception, that each district would be entitled to one senate member and two house members elected at-large from within the district. The exception was the new House District 28. The 1991 legislation provided that "in order to protect minority voting rights, District No. 28 shall consist of two single-member house districts."[1250] District 28A consisted of Dewey and Ziebach Counties and portions of Corson County, and included the Cheyenne River Sioux Reservation and portions of the Standing Rock Sioux Reservation. District 28B

[1249] Bone Shirt, 336 F. Supp. 2d at 981.

[1250] An Act to Redistrict the Legislature, ch. 1, 1991 S.D. Laws 1st Spec. Sess. 1, 5 (codified as amended at

consisted of Harding and Perkins Counties and portions of Corson and Butte Counties. According to 1990 census data, Indians were 60% of the voting age population of House District 28A, and less than 4% of the voting age population of House District 28B.

Five years later, despite its pledge to protect minority voting rights, the legislature abolished House Districts 28A and 28B, and required candidates for the house to run in District 28 at-large.[1251] Tellingly, the repeal took place after an Indian candidate, Mark Van Norman, won the Democratic primary in District 28A in 1994. A chief sponsor of the repealing legislation was Eric Bogue, the Republican candidate who defeated Van Norman in the general election.[1252] The reconstituted House District 28 contained an Indian voting age population of 29%. Given the prevailing patterns of racially polarized voting, which members of the legislature were surely aware of, Indian voters could not realistically expect to elect a candidate of their choice in the new district.

The Emery plaintiffs claimed the changes in District 28 violated Section 2 of the Voting Rights Act, as well as Article III, Section 5 of the South Dakota constitution, which mandated reapportionment every tenth year, but prohibited all interstitial reapportionment. The South Dakota Supreme Court had expressly held "when a

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S.D.C.L. §§ 2-2-24 through 2-2-31).

[1251] An Act to Eliminate the Single-member House Districts in District 28, ch. 21, 1996 S.D. Laws 45 (amending S.D.C.L. § 2-2-28).

[1252] Minutes of House State Affairs Committee, January 29, 1996, p. 5.

Legislature once makes an apportionment following an enumeration no Legislature can make another until after the next enumeration."[1253]

Plaintiffs analyzed the six legislative contests between 1992-1994 involving Indian and non-Indian candidates in District 28 held under the 1991 plan to determine the existence, and extent, of any racial bloc voting. Indian voters favored the Indian candidates at an average rate of 81%, while whites voted for the white candidates at an average rate of 93%. In all six of the contests the candidate preferred by Indians was defeated.[1254]

White cohesion also fluctuated widely depending on whether an Indian was a candidate. In the four head-to-head white-white legislative contests, where there was no possibility of electing an Indian candidate, the average level of white cohesion was 68%. In the Indian-white legislative contests, the average level of white cohesion jumped to 94%.[1255] This phenomenon of increased white cohesion to defeat minority candidates has been called "targeting," and illustrates the way in which majority white districts operate to dilute minority voting strength.[1256]

[1253] In re Legislative Reapportionment, 246 N.W. 295, 297 (S.D. 1933).

[1254] Emery v. Hunt, Civ. No. 00-3008 (D.S.D.), Report of Steven P. Cole, Tables 1 & 2.

[1255] Id., Tables 1 & 3.

[1256] See Clarke v. City of Cincinnati, 40 F.3d 807, 457 (6th Cir. 1994) ("[w]hen white bloc voting is 'targeted' against black candidates, black voters are denied an opportunity enjoyed by white voters, namely, the opportunity to elect a candidate of their own race").

Before deciding the plaintiffs' Section 2 claim, the district court certified the state law question to the South Dakota Supreme Court. That court accepted certification and held that in enacting the 1996 redistricting plan "the Legislature acted beyond its constitutional limits."[1257] It declared the plan null and void and reinstated the preexisting 1991 plan. At the ensuing special election ordered by the district court, Tom Van Norman was elected from District 28A, the first Indian in history to be elected to the state house from the Cheyenne River Sioux Indian Reservation.

Section 5 Compliance

Quiver v. Hazeltine

In addition to bringing Shannon and Todd counties under Section 5 preclearance, the 1975 amendments of the Voting Rights Act also required eight counties in the state (Todd, Shannon, Bennett, Charles Mix, Corson, Lyman, Mellette, and Washabaugh), because of their significant Indian populations, to comply with the language assistance provisions of Section 203 of the act and provide ballots and/or oral assistance in certain American Indian languages.[1258]

William Janklow, the Attorney General of South Dakota, was outraged over the extension of Section 5 and the language assistance provisions of Section 203 to his state.

[1257] Emery v. Hunt, 615 N.W.2d 590, 597 (S.D. 2000).

[1258] 41 Fed.Reg. 30002 (July 20, 1976).

In a formal opinion addressed to the secretary of state, he derided the 1975 law as a "facial absurdity." Borrowing the States' Rights rhetoric of southern politicians who opposed the modern civil right movement, Janklow condemned the Voting Rights Act as an unconstitutional federal encroachment that rendered state power "almost meaningless." He quoted with approval Justice Hugo Black's famous dissent in South Carolina v. Katzenbach (which held the basic provisions of the Voting Rights Act constitutional) that Section 5 treated covered jurisdictions as "little more than conquered provinces."[1259] Janklow expressed the hope that Congress would soon repeal "the Voting Rights Act currently plaguing South Dakota." In the meantime, he advised the secretary of state not to comply with the preclearance requirement. "I see no need," he said, "to proceed with undue speed to subject our State's laws to a 'one-man veto' by the United States Attorney General."[1260]

Of course, the 1975 amendments were never in fact repealed, but state officials followed Janklow's advice and essentially ignored the preclearance requirement. From the date of its official coverage in 1976 until 2002, South Dakota enacted more than 600 statutes and regulations having an effect on elections or voting in Shannon and Todd Counties, but submitted fewer than 10 for preclearance.

[1259] 383 U.S. 301, 328 (1966).

[1260] 1977 S.D. Op. Atty. Gen. 175; 1977 WL 36011 (S.D.A.G.).

The Department of Justice, which has primary responsibility for enforcing Section 5, was surely aware of the failure of the state to comply with the preclearance requirement. It had, for example, sued the state in 1978 and 1979, for its failure to submit for preclearance reapportionment and county reorganization laws affecting the covered counties.[1261] But after that, the department turned a blind eye to the state's failure to comply with Section 5.

A number of the voting changes which South Dakota enacted after it became covered by Section 5, but which it refused to submit for preclearance, had the potential for diluting Indian voting strength. One was authorization for municipalities to adopt numbered seat requirements. A numbered seat provision, as the Supreme Court has noted, disadvantages minorities because it creates head-to-head contests and prevents a cohesive political group from single shot voting, or "concentrating on a single candidate."[1262] Another unsubmitted change was the requirement of a majority vote for nomination in primary elections for United States senate, congressman, and governor.[1263] A majority vote requirement can "significantly" decrease the electoral opportunities of a racial minority by allowing the numerical majority to prevail in all

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[1261] United States v. Tripp County, South Dakota, Civ. No. 78-3045 (D.S.D. February 6, 1979) (ordering state to submit reapportionment plan for preclearance); United States v. South Dakota, Civ. No. 79-3039 (D.S.D. May 20, 1980) (enjoining implementation of law revising system of organized and unorganized counties absent preclearance).

[1262] Rogers v. Lodge, 458 U.S. 613, 627 (1982).

[1263] Ch. 59, 1966 S.D.Laws 104; ch. 110, 1985 S.D. Laws 295.

elections.[1264] Still another voting change the state failed to submit was its 2001 legislative redistricting plan.

The 2001 plan divided the state into 35 legislative districts, each of which elected one senator and two members of the House of Representatives.[1265] No doubt due to the litigation involving the 1996 plan, the legislature continued the exception of using two subdistricts in District 28, one of which included the Cheyenne River Sioux Reservation and a portion of the Standing Rock Indian Reservation. The boundaries of the district that included Shannon and Todd Counties, District 27, were altered only slightly under the 2001 plan, but the demographic composition of the district was substantially changed. Indians were 87% of the population of District 27 under the 1991 plan, and the district was one of the most underpopulated in the state. Under the 2001 plan, Indians were 90% of the population, while the district was one of the most overpopulated in the state. As was apparent, Indians were more "packed," or over concentrated, in the new District 27 than under the 1991 plan. Had Indians been "unpacked," they could have been a majority in a house district in adjacent District 26.

Indeed, James Bradford, an Indian representative from District 27, proposed an amendment reconfiguring Districts 26 and 27 that would have retained District 27 as majority Indian and divided District 26 into two house districts, one of which, District

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[1264] City of Rome, Georgia v. United States, 446 U.S. 156, 183-84 (1980).

[1265] S.D.C.L. § 2-2-34.

26A, would have had an Indian majority. Bradford's amendment was voted down 51 to 16. Thomas Short Bull criticized the way in which District 27 had been drawn because there were "just too many Indians in that legislative district," which he said diluted the Indian vote. Elsie Meeks, a tribal member at Pine Ridge and the first Indian to serve on the U.S. Commission on Civil Rights, said the plan "segregates Indians," and denied them equal voting power.[1266]

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

A three-judge court was convened to hear the plaintiffs' Section 5 claim. The state argued that since district lines had not been significantly changed insofar as they affected Shannon and Todd Counties, there was no need to comply with Section 5. The three-judge court disagreed. It held "demographic shifts render the new District 27 a change 'in voting' for the voters of Shannon and Todd counties that must be precleared

[1266] Bone Shirt, 336 F. Supp. 2d at 985.

under § 5."[1267] The state submitted the plan to the Attorney General who precleared it, apparently concluding the additional packing of Indians in District 27 did not have a retrogressive effect.

The district court, sitting as a single-judge court, heard plaintiffs' Section 2 claim and in a detailed 144 page opinion invalidated the state's 2001 legislative plan as diluting Indian voting strength. The court found the plaintiffs had established the three Gingles factors. Turning to the totality of circumstances analysis, the court found there was "substantial evidence that South Dakota officially excluded Indians from voting and holding office." Indians in recent times have encountered numerous difficulties in obtaining registration cards from their county auditors, whose behavior "ranged from unhelpful to hostile." Indians involved in voter registration drives have regularly been accused of engaging in voter fraud by local officials, and while the accusations have proved to be unfounded they have "intimidated Indian voters." According to Dr. Dan McCool, the director of the American West Center at the University of Utah and an expert witness for the plaintiffs, the accusations of voter fraud were "part of an effort to create a racially hostile and polarized atmosphere. It's based on negative stereotypes, and I think it's a symbol of just how polarized politics are in the state in regard to Indians and non-Indians."[1268]

[1267] Bone Shirt v. Hazeltine, 200 F. Supp. 2d 1150, 1154 (D.S.D. 2002).

[1268] Bone Shirt, 336 F. Supp. 2d at 1019, 1025-26.

Following the 2002 elections, which saw a surge in Indian political activity, the legislature passed "laws that added additional requirements to voting," including a law requiring photo identification at the polls. Rep. Van Norman said that in passing the burdensome new photo requirement "the legislature was retaliating because the Indian vote was a big factor in new registrants and a close senatorial race." During the legislative debate on a bill that would have made it easier for Indians to vote, representatives made comments that were openly hostile to Indian political participation. According to one opponent of the bill, "I, in my heart, feel that this bill . . . will encourage those who we don't particularly want to have in the system." Alluding to Indian voters, he said "I'm not sure we want that sort of person in the polling place."[1269]

Bennett County did not comply with the provisions of the Voting Rights Act enacted in 1975 requiring it to provide minority language assistance in voting until prior to the 2002 elections, and only then because it was directed to do so by the Department of Justice.

The district court also found "[n]umerous reports and volumes of public testimony documenting the perception of Indian people that they have been discriminated against in various ways in the administration of justice." Thomas Hennies, Chief of Police in Rapid City, has said "I personally know that there is racism

[1269] Id. at 1026 (comments of Rep. Stanford Addelstein).

and there is discrimination and there are prejudices among all people and that they're apparent in law enforcement." Don Holloway, the sheriff of Pennington County, concurred that prejudice and the perception of prejudice in the community were "true or accurate descriptions."[1270]

The court concluded that "Indians in South Dakota bear the effects of discrimination in such areas as education, employment and health, which hinders their ability to participate effectively in the political process." There was also "a significant lack of responsiveness on the part of elected officials to Indian concerns." Rep. Van Norman said in the legislature any bill that has "[a]nything to do with Indians instantly is, in my experience treated in a different way unless acceptable to all." "[W]hen it comes to issues of race or discrimination," he said, "people don't want to hear that." One member of the legislature even accused Van Norman of "being racist" for introducing a bill requiring law enforcement officials to keep records of people they pulled over for traffic stops.[1271]

Some of the most compelling testimony in the Bone Shirt case, and which was credited by the district court, came from tribal members who recounted "numerous incidents of being mistreated, embarrassed or humiliated by whites." Elsie Meeks, for example, told about her first exposure to the non-Indian world and the fact "that there

[1270] Id. at 1030.

[1271] Id. at 1041, 1046.

might be some people who didn't think well of people from the reservation." When she and her sister enrolled in a predominantly white school in Fall River County and were riding the bus, "somebody behind us said . . . the Indians should go back to the reservation. And I mean I was fairly hurt by it . . . it was just sort of a shock to me." Meeks said that there is a "disconnect between Indians and non-Indians" in the state. "[W]hat most people don't realize is that many Indians, they experience this racism in some form from non-Indians nearly every time they go into a border town community... [T]hen their . . . reciprocal feelings are based on that, that they know, or at least feel that the non-Indians don't like them and don't trust them."[1272]

When Meeks was a candidate for lieutenant governor in 1998, she felt welcome "in Sioux Falls and a lot of the East River communities." But in the towns bordering the reservations, the reception "was more hostile." There, she ran into "this whole notion that . . . Indians shouldn't be allowed to run on the statewide ticket and this perception by non-Indians that . . . we don't pay property tax . . . that we shouldn't be allowed [to run for office.]" Such views were expressed by a member of the state legislature who said he would be "leading the charge . . . to support Native American voting rights when Indians decide to be citizens of the State by giving up tribal sovereignty and paying their fair share of the tax burden."[1273]

[1272] Id. at 1032, 1036.

[1273] Id. at 1035-36, 1046 (comments of Rep. John Teupel).

Craig Dillon, a tribal member living in Bennett County, told of his experience playing on the varsity football team of the county high school. After practice, members of the team would go to the home of the mayor's son for "fun and games." The mayor, however, "interviewed" Dillon in his office to see if he was "good enough" to be a friend of his son's. Dillon says that he flunked the interview. "I guess I didn't measure up because . . . I was the only one that wasn't invited back to the house after football practice after that." He found the experience to be "pretty demoralizing."[1274]

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

[1274] Id. at 1032.

here today. . . . I'm the only Indian woman in here, and I'm nervous. I'm very uncomfortable."[1275]

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

The court gave the state an opportunity to submit a new, constitutional apportionment plan, but instead it asked the court to certify the question to the state supreme court whether the legislature had the power to redistrict in a year other than the year following the decennial census. The federal court did so, and the state supreme court held that the legislature was authorized to enact a plan to remedy a violation of Section 2. Despite that ruling, the state informed the federal court that it "respectfully declined to submit a new apportionment plan or a remedial proposal to the Court." Accordingly, the court issued an order in August 2005, which adopted the plan proposed by the plaintiffs.[1276]

As for the approximately 600 other unsubmitted voting changes, Elaine Quick Bear Quiver and several other members of the Oglala and Rosebud Sioux Tribes in Shannon and Todd Counties, and again represented by the ACLU, brought suit against the state in August 2002, to force it to comply with Section 5. Following negotiations

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[1275] Id. at 1033.

[1276] Id., Order of August 18, 2005.

among the parties, the court entered a consent order in December 2002, in which it immediately enjoined implementation of the numbered seat and majority vote requirements absent preclearance, and directed the state to develop a comprehensive plan "that will promptly bring the State into full compliance with its obligations under Section 5."[1277] The state made its first submission in April 2003, and thus began a process that is expected to take up to three years to complete.

Bennett County and the City of Martin

Cottier v. City of Martin

Located in southwestern South Dakota, Martin is a small city of slightly more than 1,000 people, nearly 45% of whom are Native American. The city is the county seat of Bennett County, which was created out of the Pine Ridge Indian Reservation in 1909, and today has a slight Indian population majority (52%). Like many border towns in the American West, Martin has seen more than its share of racial conflict. In the mid-1990s, for example, there were deep racial divisions over the homecoming ceremony at the local high school, in which male students designated as the "Big Chief" and "Little Chief" selected a "Princess" in a mock Indian ceremony while wearing traditional Indian regalia.[1278] Also in the mid-1990s, the federal government successfully sued the local

[1277] Quick Bear Quiver v. Hazeltine, Civ. No. 02-5069 (D.S.D. December 27, 2002), slip op. at 3.

[1278] See generally, Paula L. Wagoner, They Treated Us Just Like Indians: The Worlds of Bennett County,

bank for systematic lending discrimination against Native Americans.[1279] Although Bennett County was required by the 1975 amendments of the Voting Rights Act to provide minority language assistance in voting to Indians, it failed to do so until 2002, and only then because it was directed to do so by the Department of Justice.[1280]

In early 2002, Native Americans organized two peaceful marches in Martin to protest what they viewed as racial discrimination and police brutality by the non-Indian sheriff and his deputies. Just weeks after the 2002 march, the ACLU sued the city on behalf of two Native American voters, alleging the city's recently adopted redistricting plan violated the constitutional principle of one person, one vote.[1281] The city responded by changing its election plan to correct the malapportionment, but it did so in a way that fragmented the Indian community and gave white voters an overwhelming supermajority in all three council wards. The city also refused to reopen the candidate qualification period so that prospective candidates could decide whether to run under the new plan.

After a hearing in May 2002, the district court held on technical grounds that the plaintiffs could not challenge the city's decision not to reopen the candidate

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South Dakota (Lincoln; U.: University of Nebraska Press, 2002).

[1279] United States v. Blackpipe State Bank, No. 93-5115 (D.S.D.).

[1280] Bone Shirt, 336 F. Supp. 2d at 1028.

[1281] Wilcox v. City of Martin, No. 02-5021 (D.S.D.).

qualification period because none of the plaintiffs had expressed an intention to run for office under the new plan. The court did, however, allow the plaintiffs to amend their complaint to allege that the new plan violated Section 2 and the Constitution.

After more than two years of pretrial discovery, the case went to trial in June 2004. The plaintiffs demonstrated, among other things, that no Indian preferred candidate had ever been elected to the city council under the challenged plan. The court nonetheless ruled against the plaintiffs in March 2005, finding on the basis of county elections that the plaintiffs had not shown that whites voted as a bloc usually to defeat the candidates preferred by Indian voters.

The plaintiffs appealed, and the Eighth Circuit heard argument in January 2006.[1282] A decision is expected in early 2006.

Buffalo County

Kirkie v. Buffalo County

One of the most blatant schemes to disfranchise Indian voters in South Dakota was used in Buffalo County. The population of the county was approximately 2,000 people, 83% of whom were Indian, and members primarily of the Crow Creek Sioux Tribe. Under the plan for electing the three member county commission, which had been in effect for decades, nearly all of the Indian

[1282] Cottier v. City of Martin, No. 05-1895 (8th Cir.).

population - some 1,500 people - was packed in one district. Whites, though only 17% of the population, controlled the remaining two districts, and thus the county government. The system, with its total deviation among districts of 218%, was not only in violation of one person, one vote, but had clearly been implemented and maintained to dilute the Indian vote and insure white control of county government.

Tribal members, represented by the ACLU, brought suit in 2003 alleging that the districting plan was malapportioned and had been drawn purposefully to discriminate against Indian voters. The case was settled by a consent decree in which the county admitted its plan was discriminatory and agreed to submit to federal supervision of its future plans under Section 5 of the Voting Rights Act through January 2013.[1283] Following the law suit, the Native American community was able to elect two candidates of choice and thereby secure control of the county commission which had eluded them previously, despite the overwhelming Indian population majority in the county.

Charles Mix County

Weddell v. Wagner Community School District

In March 2002, Native Americans, represented by the ACLU, filed suit challenging the at-large method of electing the board of education of the Wagner

[1283] Kirkie v. Buffalo County, S.D., Civ. No. 03-3011 (D.S.D. February 12, 2004).

Community School District in Charles Mix County as violating Section 2. The parties eventually agreed on a method of elections using cumulative voting to replace the at-large system, and a consent decree was entered by the court on March 18, 2003.[1284] At the next election John Sully, a Native American, was elected to the board of education.

Blackmoon v. Charles Mix County

In 2005, tribal members filed suit against the county alleging that the three county commission districts were malapportioned and had been drawn to dilute Indian voting strength. The total deviation among the districts was 19%, and almost certainly unconstitutional. Each district had a majority white voting age population, despite the fact that Indians were 30% of the population of the county and it was possible to draw a compact majority Indian district.

South Dakota law prohibited the county from redistricting until 2012.[1285] In an effort to avoid court supervised redistricting in the event of a finding of a violation of one person, one vote or the Voting Rights Act, the county asked the state legislature to pass legislation establishing a process for emergency redistricting. The legislature complied and passed a bill, which the governor promptly signed,

[1284] Weddell v. Wagner Community School District, Civ. No. 02-4056 (D.S.D. March 18, 2003).

[1285] SDCL 7-8-10.

allowing a county to redistrict, with the permission of the governor and secretary of state, any time it became "aware" of facts that called into question whether its districts complied with federal or state law.[1286] Despite the fact that the new law applied to every county in the state, including Shannon and Todd, and was thus required to be precleared under Section 5, as well as the consent decree in Quick Bear Quiver, Charles Mix County immediately sought permission from the governor to draw a new plan. The plaintiffs in Quick Bear Quiver then filed a motion for a preliminary injunction before the three-judge court to prohibit the county from proceeding with redistricting absent compliance with Section 5. The court granted the motion.

In a strongly worded opinion, the court noted that state officials in South Dakota "for over 25 years . . . have intended to violate and have violated the preclearance requirements," and that the new bill "gives the appearance of a rushed attempt to circumvent the VRA."[1287] Implementation of the new emergency redistricting bill was enjoined until the state complied with Section 5. The state submitted the redistricting bill for preclearance and petitioned the Supreme Court

[1286] House Bill 1265.

[1287] Quick Bear Quiver v. Nelson, 387 F. Supp. 2d 1027, 1031, 1034 (D.S.D. 2005).

for review. The Department of Justice granted preclearance, and at the Indian plaintiffs' request, the Supreme Court dismissed the case as moot.[1288]

[1288] Nelson v. Quick Bear Quiver, 126 S. Ct. 1026 (2006).

WYOMING

Fremont County

Large v. Fremont County, Wyoming

Fremont County is the site of the Wind River Indian Reservation, home to the Northern Arapaho and Eastern Shoshone Tribes. The reservation spans 2,268,008 acres in Wyoming's Wind River Basin, and is the third largest reservation in the country. The total population of the county is 35,804 persons, of whom 7,113 (19.9%) are Native Americans.

Between 1900 and 1938, the tribes suffered extreme hardship resulting from a prohibition on off-reservation hunting, minimal government and outside investment, meager rationing, and epidemics of tuberculosis and measles which ravaged the population. Conditions improved after 1938, as the result of the reactivation of oil, gas, and uranium mining leases, and better health care. But today, tribal members continue to have a depressed socio-economic status. The unemployment rate of Indians on the reservation is 54%. The percentage of Indian families living below the poverty level is 27%.

The Board of Commissioners consists of five members elected at-large, to staggered, four year terms. Despite the fact that Indian candidates have frequently run for the commission, and received strong support from Indian voters, no Indian

has ever been elected. The constant complaint of tribal members is that Native Americans and the reservation are totally ignored by the all white commission.

In October 2005, members of the Northern Arapaho and Eastern Shoshone Tribes, represented by the ACLU, filed suit challenging the at-large method of elections for the commission as diluting Indian voting strength.[1289] By way of a remedy, the plaintiffs seek a five member commission elected from single member districts, one of which would be majority Indian. The case is in discovery.

Challenging the "Reservation" Defense

Defendants in Indian voting rights cases frequently argue that Indians are mainly loyal to their tribes and simply don't care about participating in elections run by the state. In the lawsuit over the 1996 interim redistricting plan in South Dakota, the state conceded Indians were not equal participants in elections in District 28, but argued it was the "reservation system" and "not the multimember district which is the cause of [the] 'problem' identified by Plaintiffs."[1290] The argument overlooked the fact that the state, by historically denying Indians the right to vote, had itself been responsible for denying Indians the opportunity to develop a "loyalty" to state elections. As the court concluded in Bone Shirt, "the long history of discrimination

[1289] Large v. Fremont County, Wyoming, No. 05-CV-270J (D.Wyo.)

[1290] Emery v. Hunt, State Defendants' Response, p. 26.

against Indians has wrongfully denied Indians an equal opportunity to get involved in the political process."[1291]

An alleged lack of Indian interest in state elections was also used by South Dakota to justify denying residents of the unorganized counties the right to vote or run for county office. In one case the state argued that a majority of the residents were "reservation Indians" who "do not share the same interest in county government as the residents of the organized counties." The court rejected the defense noting that a claim that a particular class of voters lacks a substantial interest in local elections should be viewed with "skepticism," because "'[a]ll too often, lack of a 'substantial interest' might mean no more than a different interest, and '[f]encing out' from the franchise a sector of the population because of the way they may vote.'" The court concluded that Indians residing on the reservation had a "substantial interest" in the choice of county officials, and held the state scheme unconstitutional.[1292] In a second case, the state argued that denying residents in unorganized counties the right to run for office in organized counties was justifiable because most of them lived on an "Indian Reservation and hence have little, if any, interest in county government." Again, the court disagreed. It held the

[1291] Bone Shirt, 336 F. Supp. 2d at 1022.

[1292] Little Thunder, 518 F.2d at 1255-56.

"presumption" that Indians lacked a substantial interest in county elections "is not a reasonable one."[1293]

The "reservation" defense has been similarly raised - and rejected - in other voting cases brought by Native Americans in the West.[1294] It may be convenient and self-reassuring for a jurisdiction to blame the victims of discrimination for their condition, but it is not a defense to a challenge under Section 2.

Some Indians have undoubtedly felt their participation in state and federal elections would undermine their tribal sovereignty. But the importance of the Indian vote in recent elections has convinced most that there is no downside to participating in elections that affect the welfare of the Native American community.

In the 2002 election in South Dakota for U.S. Senator, Democrat Tim Johnson defeated Republican John Thune by only 524 votes, a margin of victory credited to the increase in the number of Indian voters. The increasing awareness of the importance of the Indian vote is reflected in the dramatic growth in Indian participation in recent elections. In the 2000 presidential election, the average

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[1293] United States v. South Dakota, 636 F.2d at 244-45.

[1294] See, for example, Windy Boy v. County of Big Horn, 647 F. Supp. at 1021 ("[r]acially polarized voting and the effects of past and present discrimination explain the lack of Indian political influence in the county, far better than existence of tribal government"); Cuthair v. Montezuma-Cortez, Colorado School Dist., 7 F. Supp. 2d at 1161 (the alleged "reticence of the Native American population of Montezuma County to integrate into the non-Indian population" was "an obvious outgrowth of the discrimination and mistreatment of the Native Americans in the past"); United States v. Blaine County, Montana, 363 F.3d at 911.) (rejecting the argument that low Indian voter participation was a defense to a vote dilution claim).

turnout for Buffalo, Dewey, Shannon, and Todd Counties in South Dakota was 42.7%. Turnout in the same counties in the 2004 election, which was driven almost exclusively by Indian voters, grew to 65.2%, an increase of 22.5 percentage points, while turnout for the state as a whole grew by only 9.9 percentage points.[1295] Similar increases in Indian turnout were reported for reservation areas in other states, including Arizona, Minnesota, Montana, New Mexico, and Wisconsin.

The Right of Native Americans to Use Tribal Identification to Vote

ACLU of Minnesota v. Kiffmeyer

Shortly before the 2004 presidential election, several Native Americans, joined by the National Congress of American Indians and the American Civil Liberties Union of Minnesota, challenged Minnesota's restrictions on the use of tribal photo identification cards at the polls.[1296] At issue was a statute prohibiting election officials from accepting a tribal identification card, which bore a picture of the member, as identification at the polls unless the tribal member lived on a tribal reservation. After a brief hearing, the district court issued a temporary restraining

[1295] First American Education Project (2004), p. 37.

[1296] ACLU of Minnesota v. Kiffmeyer, 04-CV-4653 (D.Minn.).

order requiring election officials to accept tribal identification cards regardless of whether the member lived on or off their tribal reservation.[1297]

Some tribal identification cards contained addresses and others did not, and some did not have a current address. On October 29, 2004, the court issued a preliminary injunction that tribal identification cards with addresses "are sufficient proof of identity and residency" in order to register and vote. The court further ruled that a tribal ID that did not contain any address or a current address could, consistent with the state's treatment of other photo identification (e.g., passports, military, and student IDs), be used to register to vote if accompanied with a current utility bill.

In 2005, Minnesota amended its registration statute to eliminate the requirement that American Indians live on their tribe's reservation(s) before their tribal ID could serve as a valid ID for voting.[1298] The change in state law resolved one of plaintiffs' claims, but did not resolve the claim that rejecting tribal photo IDs for registration, while accepting other IDs, violated the Equal Protection Clause, as well as the Help American Vote Act (HAVA).

On September 12, 2005, the parties agreed to a final consent judgment, which was approved and entered by the court. After noting that the parties agreed that the

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[1297] Id, Consent judgment of September 12, 2005, p. 4.

[1298] Minn. Stat. § 201.061. subd. 3.

off-reservation issue had been mooted by the legislation, the judgment directed that tribal IDs that did not have an address, coupled with a utility bill, were also sufficient to meet state law standards for registering and voting on election day. It further directed, by agreement, that the Minnesota Secretary of State implement rules that would incorporate the standard of the court's judgment.

Section 5 Should be Expanded in Indian Country

As is apparent from the documentation contained in this report, as well as extensive findings of past and continuing discrimination against Indians in other recently litigated cases, a strong case can be made for expanding Section 5 coverage to ensure the equal right to vote for all Native Americans. One straightforward way of accomplishing this would be to extend Section 5 coverage to all jurisdictions currently required to provide minority language assistance in voting under Section 203 of the Voting Rights Act because of their significant Indian populations.

Eighty-one local jurisdictions in 18 states currently are required to provide language assistance in voting to American Indians.[1299] (See table, Appendix 3) Under the existing Section 5 "trigger," 31 of these jurisdictions are already covered by the preclearance requirement. Some, like Shannon and Todd Counties in South

[1299] Fed. Reg., Vol. 67, No. 144 (July 26, 2002).

Dakota, Jackson County in North Carolina, and Apache, Coconino, Navajo, and Pinal Counties in Arizona, are covered because of their American Indian populations. The remaining jurisdictions are covered because of the presence of non-Indian populations. For example, Indians in Arizona benefit from the protection of Section 5 because the entire state is covered due to its Hispanic population. Indians in Mississippi and Louisiana are protected because those states are covered in their entirety by Section 5 due to the history of discrimination against African Americans. Once a jurisdiction is covered by Section 5, regardless of the reason, the courts have applied the protection of preclearance to all racial or language minorities.[1300]

However, if coverage were extended to all 81 of the Native American language minority jurisdictions, Indians living in an additional 50 counties would enjoy the protection afforded by Section 5. See table 2. Although such an extension would not capture all of the problematic jurisdictions in Indian country, because not all counties with sizeable native populations necessarily meet the criteria for Section 203 coverage, the benefit to Indians would be direct and palpable. More than

[1300] For example, in City of Port Arthur, Texas v. United States, 517 F. Supp. 987, 1023-24 (D. D.C. 1981), aff'd 459 U.S. 159 (1982), where the state was covered because of its Hispanic population, the court denied preclearance to proposed voting changes because of their discriminatory impact on black voters.

doubling the number of local jurisdictions with sizeable Indian populations covered by Section 5 would be a significant improvement.

The expansion of Section 5 in Indian country would promote the fundamental purpose of Section 5, which is "to shift the advantage of time and inertia from the perpetrators of the evil [of discrimination in voting] to its victims."[1301] The bulk of litigation enforcing Section 2 in Indian country, particularly since its amendment in 1982, has been brought by the Indian community, but only with the assistance of national civil rights organizations such as the ACLU, the National Indian Youth Council, the Native American Rights Fund, the Indian Law Resource Center, and the Legal Services Corporation. Like other minority groups, local Indian communities simply lack the resources to bring such litigation on their own, and requiring them to enforce the vote denial and vote dilution standards of Section 2 is a prescription for non-enforcement and will only prolong and perpetuate discrimination in voting.

Litigation is not only expensive but can drag on for years. As Attorney General Katzenbach explained to Congress in 1965 in urging passage of the Voting Rights Act, "[l]itigation on a case-by-case basis simply cannot do the job." And even when a case is finally won, "local officials intent upon evading the spirit of the law are adept at devising new discriminatory techniques not covered by the letter of the

[1301] South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966).

judgment."[1302] The oversight of state and local voting practices provided by Section 5, as well as its undeniable deterrent effect, argue strongly for the expansion of preclearance in Indian country.

The "inequalities in political opportunities that exist due to vestigial effects of past purposeful discrimination," and which the Voting Rights Act was designed to eradicate, still persist throughout Indian country.[1303] Of all the modern legislation enacted to redress these problems, the Voting Rights Act provides the most effective means of advancing political equality which is essential to realizing the goals of self-development and self-determination that are central to the survival and prosperity of the Indian community in the United States.

[1302] Hearings on S. 1564 before the Senate Comm. on the Judiciary, 89th Cong., 1st Sess., pt. 1, 14 (1965).

[1303] Thornburg v. Gingles, 478 U.S. 30, 69 (1986).

CHALLENGING RESTRICTIVE LEGAL SERVICES CORPORATION REGULATIONS

Texas Rural Legal Aid, Inc. v. Legal Services Corporation

In March 1989, the Legal Services Corporation (LSC) proposed a regulation banning legal services attorneys from participating in redistricting cases approved by their local boards. The LSC considered such representation "political activity," prohibited by federal law and contended that such representation also violated federal law because it would benefit everyone in a district, "result[ing] in an allocation of resources for the benefit of non-eligible persons."

The ACLU filed comments opposing the proposed regulation as contrary to statutory authorization and as an unwarranted effort to limit the rights of poor citizens who were being denied rights protected by the Voting Rights Act. While Congress prohibited legal services lawyers from engaging in political activity, it did not prohibit litigation which affects people's political rights. To the contrary, the LSC statute expressly allowed advice and representation for election activity and voter registration. The ACLU also pointed out that LSC lawyers were valuable resources who knew a given area, including its electoral history and potential witnesses, and that the regulation would prohibit LSC lawyers from assisting other lawyers.

The LSC modified the regulation slightly in response to public opposition by allowing LSC lawyers to work on election cases, but only on their own time and provided no LSC resources were expended. The regulation also allowed a LSC office to spend money on election cases including redistricting cases provided the money did not come from LSC.

In December 1989, three legal services offices - Texas Rural Legal Aid, California Rural Legal Assistance, and North Mississippi Rural Legal Services - sued the LSC challenging the validity of the new regulation.[1304] The ACLU joined with other civil rights organizations as amicus curiae in support of the plaintiffs.

On June 25, 1990, the district court enjoined the enforcement of the regulation ruling that LSC did not have the authority to restrict the type of cases that could be funded by legal services appropriations. Congress, the court said, had already exercised that power by specifying in the statute the types of cases that could be funded.

LSC appealed the decision, and the ACLU participated as amicus curiae on appeal. On August 2, 1991, the court of appeals unanimously reversed, reinstating LSC's ban on use of its funds for election redistricting work.[1305] It concluded LSC had authority to prohibit recipient programs from engaging in redistricting

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[1304] Texas Rural Legal Aid Inc. v. Legal Services Corporation, 740 F. Supp. 880 (D.D.C. 1990).

[1305] Texas Rural Legal Aid Inc. v. Legal Services Corporation, 940 F.2d 685 (D.C. Cir. 1991).

litigation, and the regulations were not inconsistent with the authority of LSC under federal law.

On remand the district court rejected plaintiffs' alternative theories that the regulations were invalid because they were "arbitrary and capricious," and violated the free speech rights of legal services attorneys.[1306] The court left open the door to a First Amendment challenge to the regulations where a lawyer was required by LSC to withdraw from an ongoing redistricting case over a judge's objection.

As a consequence of the appellate court decision, it will be more difficult for poor and minority voters to secure representation to protect their interests in the redistricting process, while the resources of organizations such as the ACLU will be stretched even further.

[1306] Texas Rural Legal Aid Inc. v. Legal Services Corporation, 783 F. Supp. 1426 (D. D.C. 1992).

CHALLENGING FELON DISFRANCHISEMENT

Many of the southern states, as part of the process of White Redemption following the Civil War and Reconstruction, adopted laws disfranchising persons convicted of selected crimes.[1307] The offenses chosen were those blacks were thought more likely to commit, typically petty theft and various domestic crimes. In 1985, in a suit brought by the ACLU, the Supreme Court held that Alabama's law disfranchising those convicted of misdemeanors was unconstitutional because the enactment of the statute "was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect."[1308] Despite their roots in past discrimination and their continuing disproportionate racial impact, modern day felon disfranchising schemes have frequently survived court challenges. But their existence underscores the need to continue the protections afforded racial minorities by the special provisions of the Voting Rights Act.

[1307] For a general discussion of disfranchising schemes adopted in the post-Reconstruction South, see C. Vann Woodward, Origins of the New South, 1877-1913 (Baton Rouge: Louisiana State University Press, 1971). For an assessment of current felon disfranchisement provisions in all 50 states, see, PURGED! How a patchwork of flawed and inconsistent voting systems could deprive millions of Americans of the right to vote, (ACLU, Right to Vote, Demos, 2004).

[1308] Hunter v. Underwood, 471 U.S. 222, 233 (1985).

Florida

Johnson v. Bush

The ACLU, along with several other public interest groups (Demos, Legal Defense Fund, Mexican American Legal Defense and Educational Fund, NAACP, People for the American Way, and The Sentencing Project) filed an amicus brief in the Eleventh Circuit Court of Appeals in Johnson v. Bush[1309] on the side of the appellants, who had argued unsuccessfully in the district court that Florida's felon disfranchisement law violated both the Constitution and Section 2 of the Voting Rights Act. The challenged state law is a permanent ban on voting in state and federal elections by persons convicted of a felony unless they have been pardoned by the governor. The evidence showed that at present 10.5% of voting age blacks in Florida - over 167,000 men and women - were disfranchised as ex-felons, compared with 4.4% of all others.

The challenged law was a 1968 re-enactment of an 1868 constitutional provision that plaintiffs contended had been adopted as part of the state's post-Civil War effort to disfranchise black voters. Amici argued that the district court erred in not requiring the state to demonstrate that passage of the 1968 law was not tainted by its antecedent, and that any connection between the two had been clearly severed.

[1309] 353 F.3d 1287 (11th Cir. 2003).

A panel of the court of appeals reversed and remanded for further proceedings on the grounds that "the record before the district court does not show that the 1968 Constitution gave effect to an independent, non-discriminatory purpose in keeping the felon disfranchisement provision."[1310] The panel also held that the plaintiffs were entitled to a trial on their Section 2 claim. The state filed a petition for rehearing en banc, which was granted. At the rehearing the en banc court upheld the dismissal of the complaint by the trial court, concluding that the statute had been "reenacted in 1968 in the absence of any discriminatory racial bias," and that "Congress never intended the Voting Rights Act to reach felon disenfranchisement provisions."[1311] A petition for a writ of certiorari has been filed by the plaintiffs and is pending.

New Jersey

NAACP v. Harvey

Several civil rights organizations and private plaintiffs, represented by the ACLU, filed suit on January 6, 2004, in state court challenging New Jersey law disfranchising convicted felons on probation or parole.[1312] The law suit makes two

[1310] Id. at 1301

[1311] Johnson v. Bush, 405 F.3d 1214, 1225, 1232 (11th Cir. 2005).

[1312] New Jersey State Conference/NAACP v. Harvey, No. UNN-C-4-04 (N.J. Sup. Ct. Ch. Div).

basic claims. First, that the state disfranchisement law has a disproportionate impact on African Americans and Hispanics and thus denies them the equal right to vote in violation of the state constitution. Second, that the disproportionate impact of the state disfranchisement law dilutes the voting strength of the minority community, consisting of persons of African American and Hispanic descent, and deprives both communities of the ability to elect candidates of their choice in violation of the state constitution. Plaintiffs also contend that the state's interest in rehabilitation of offenders negates any claim that disfranchisement of persons on probation or parole serves a legitimate governmental purpose or interest.

The state court granted the state's motion for summary judgment and held that the complaint failed to state a claim.[1313] The case is pending on appeal.

New York

Muntaqim v. Coombe

A convicted felon imprisoned in New York brought a pro se complaint alleging that New York law disfranchising incarcerated felons, as well as those on probation or parole, had a disproportionate racial impact and violated the discriminatory results standard of Section 2. The district court dismissed the complaint on the grounds that Section 2 did not apply to state disfranchisement

[1313] Id., Order of July 12, 2004 .

laws, and the court of appeals affirmed.[1314] The court subsequently amended its order, and directed the case be heard by the entire court en banc.[1315] Notably, the court invited a list of public officials and civil rights organizations, including the ACLU, to submit amicus briefs addressing various issue, one of which was whether Section 2 can be constitutionally applied to state disfranchising laws.

The ACLU submitted its brief in January 2005, and argued that: Section 2 has been held to be constitutional and has been repeatedly applied by the courts; the Supreme Court has consistently rejected constitutional challenges to the provisions of the Voting Rights Act; recent so-called "federalism" decisions of the Supreme Court did not cast doubt on the constitutionality of Section 2; the legislative history strongly supports the constitutionality of Section 2; and a state may not disfranchise persons convicted of offenses in a racially discriminatory manner. The case is under advisement by the en banc court.

Washington State

Daniel Madison v. State of Washington

Washington, like most other states, denies convicted felons the right to vote. In Washington, once a person has completed all terms of his sentence, he may

[1314] Muntaqim v. Coombe, 366 F.3d 102 (2d Cir. 2004).

[1315] Id., 396 F.3d 95 (2004).

receive a "certificate of discharge" restoring his civil rights. But to get a certificate, he must also pay "any and all legal financial obligations" (LFOs) of the sentence.[1316] All felony convictions include LFOs, such as a victim penalty assessment (whether or not the crime had a victim), restitution, trial costs including fees for court appointed attorneys and jury fees, costs of incarceration, community supervision, and the cost of putting one's DNA into a law enforcement database. Interest accrues on unpaid LFOs at 12% per year from the date of judgment.[1317] Counties can assess up to $100 per year for handling the collection of LFOs.[1318] Payment schedules, set by the sentencing court or the department of corrections, often include minimum monthly payments that do not cover the rate at which interest accrues.[1319] The variety and size of LFOs continue to increase. For example, the required payment to the victims' compensation fund has risen from $25 in 1977 to $500 today.[1320]

The Washington Department of Corrections estimated that as of December 2001, 46,500 convicted felons remained disfranchised solely because of failure to pay

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[1316] RCW 9.94A.637.

[1317] RCW 10.82.090.

[1318] King's County (Seattle) Superior Court Fees, ch. 4.71.160.

[1319] RCW 9.94A.760, et seq.

[1320] RCW 7.68.035.

LFOs.[1321] According to the state, only 970 certificates of discharge were recorded in 2004, while more than 32,000 felons were released or discharged from supervision that year.[1322]

Five citizens, represented by the ACLU, who have completed their felony sentences except payment of their LFOs, filed suit in Washington state court in 2005, asserting that barring them from voting because of a financial obligation violated the Equal Protection Clause and several provisions of the state constitution.[1323] The lawsuit does not challenge the state's authority to disfranchise convicted felons while they are in prison or under supervision, nor does it challenge the state's ability to impose or collect financial obligations as part a sentence.

LFOs can, and do, operate to disfranchise some felons permanently. For example, plaintiff Beverly DuBois was convicted of manufacture and delivery of marijuana in 2002, and assessed $1,610 in fees. She is unable to work due to a permanent disability resulting from an automobile accident. Her only income is her social security payments. She has made regular payments of $10 a month as ordered by the court, but she now owes $1,895.69.[1324] Plaintiff Donald Madison was

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[1321] Department of Corrections, Agency Fiscal Note for Senate Bill 6519 (2002).

[1322] Daniel Madison v. State of Washington, No. 04-2-33414-4 SEA (October 21, 2004, Superior Court of Kings County, Washington), State's response to interrogatories, April 16, 2005.

[1323] Id.

[1324] Id., Plaintiffs' Motion for Summary Judgment, Declaration of DuBois.

convicted in August 1996, and assessed $483.25 in restitution plus another $100 victim assessment fee. State records show that another $200 in fees were later added. Madison is indigent, receiving only social security payments. And though he pays the $15 a month set by court order, he receives monthly notices from the court that his monthly obligation is $25. In 2004, the issuance of a bench warrant regarding his LFO payments temporarily made him ineligible to receive social security payments.[1325]

Plaintiffs contend that while the Supreme Court has held the Fourteenth Amendment allows states to disfranchise persons convicted of felonies, it does not allow states to condition the right to vote on payment of court costs and other fees. Under the state's scheme, ex-felons who can afford to pay the costs and fees can vote, but those who cannot are disfranchised. States should not be allowed to make economic distinctions affecting the fundamental right to vote.

Plaintiffs and the state have moved for summary judgment. Argument was held before the Superior Court in February 2006, and a decision is pending.

[1325] Id., Plaintiffs' Motion for Summary Judgment, Declaration of Madison.

PUNCH CARDS & VOTING TECHNOLOGY

The problems with punch card voting are numerous and have been well documented, particularly in the wake of the 2000 presidential election. Among other problems, punch cards:

- Don't notify voters of undervotes (failure to vote for an office).
- Allow overvoting (voting more than once for the same office).
- Result in uncounted ballots because of hanging chads and other malfunctions.
- Cause misvoting because of improper alignment of the card in the voting machine.
- Are fragile and deteriorate during any recounting process.
- Rely on antiquated technology and machines that are no longer even being manufactured, with repairs made by scavenging old machines.

Punch card voting discounts the votes of all who use it, but it also has a disparate racial impact. More black voters than white are typically exposed to the technology, producing higher rates of uncounted, or denied, black votes, and inevitably the dilution of minority voting strength as a whole. The need for oversight of new voting technology strengthens the case for continuation of the special provisions of the Voting Rights Act.

Georgia

Andrews v. Cox

The first challenge to punch card voting after the 2000 presidential election was brought in federal court on January 5, 2001, by the ACLU and several private attorneys on behalf of Georgia voters in four counties.[1326] The plaintiffs alleged that the use of punch card machines in some, but not all, of the counties in the state deprived voters of equal treatment under the Fourteenth Amendment and had a disparate racial impact in violation of Section 2 of the Voting Rights Act. The plaintiffs also contended that the erratic and disparate results in counting votes throughout the state, no matter what type of election device was used, violated the Fourteenth Amendment.

The Southern Regional Council in Atlanta did a study of the 2000 presidential election based on data compiled by the Georgia Secretary of State's office.[1327] It showed that there were substantial differences in vote counting depending on the technology used. The punch card system, used in 17 counties and by 30.5% of Georgia voters, performed worst, with 4.67% of the ballots registered as uncounted votes, whether because of undervoting, overvoting, or some other cause. By

[1326] Andrews v. Cox, 1:01-CV-0318- ODE (N.D.Ga.).

[1327] New Evidence of Voting Equipment Disparities in Georgia Counties (Atlanta: Southern Regional Council, 2001).

contrast, the optical scan system used in 66 Georgia counties, resulted in 2.72% of votes being discarded as uncounted votes. All told, the ballots of 94,681 (3.51%) Georgia voters were not counted in the presidential election. Nationally, the average undervote rate was 1.9%.

Punch card voting also had a disparate racial impact because of the greater use by black voters of the unreliable technology. Almost half (46.23%) of Georgia's black voters lived in punch card counties, while less than one-quarter (24.73%) of whites voters did so. Conversely, white voters were 1.5 times more likely than black voters to use the more reliable optical scan systems. Slightly more than one-third of black voters (36.53%) used optical scan compared to more than half of white voters (57.88%).

Punch cards also had a disparate partisan impact. Fifty-five percent of Gore voters cast their votes on punch card systems, compared to 43% of Bush voters. Sixty-one percent of Bush voters used the more efficient optical scan systems, compared to 36% of Gore voters.

Before the case could be tried, the Georgia legislature enacted legislation in 2002, decertifying punch cards, requiring new voting technology, and appropriating money to purchase new touch screen equipment for all 159 counties in the state. Given this development, the voting rights lawsuit was dismissed as moot.

The touch screen equipment, which prohibits overvoting and notifies voters of undervotes, was used for the November 2002 general election, making Georgia the first state to have such uniform equipment in place statewide. The secretary of state reported that the undervote rate in the election for the U.S. Senate was 0.86% and 1.01% in the gubernatorial race. Some undervoting is expected because some voters choose not to vote even in high profile contests. The new voting system at least made it highly likely that undervoting was an intentional choice, not something done by mistake. Given the results of the 2002 election, the new technology was an obvious and significant improvement over the error prone punch cards.

Florida

NAACP v. Harris

The ACLU's second challenge to punch card voting was filed on January 10, 2001, appropriately enough, in Florida. There, a broad coalition of civil rights groups joined forces to represent the NAACP and 24 individual African American and Haitian American voter to challenge the use of punch cards as well as various other practices that resulted in the denial of the right to vote.[1328]

[1328] NAACP v. Harris, No. 01-120-CIV-Gold/Simonton (S.D.Fla.). The organizations involved included: ACLU, NAACP, NAACP Legal Defense and Educational Fund, Lawyers' Committee for Civil Rights Under Law, the Advancement Project, and People for the American Way.

The discriminatory impact of punch card voting in Florida was undeniable. Twenty-five of Florida's 67 counties used punch card machines; the rest used electronic scanners or manually tabulated paper ballots. The percentage of nonvotes (the combination of overvotes and undervotes) in the counties using punch card systems was 3.92%, while the nonvote rate under the more modern electronic systems was only 1.43%. Stated differently, for every 10,000 votes cast, punch card systems resulted in 250 more nonvotes than optical scan systems.

There was also a racial bias in the use of punch cards. According to The New York Times, 64% of Florida's black voters lived in counties that used punch card machines compared to 56% of white voters. Because of the higher error rate of punch card machines, the votes of black voters were disproportionately undercounted, or not counted at all, compared to those of white voters.1329

Other discriminatory practices challenged in the law suit included the wrongful purging of voters (some for allegedly being convicted felons), faulty record keeping, inadequate training of poll workers, inadequate opportunities for casting provisional ballots, inadequate staffing, improper maintenance of voter lists, and the misuse of absentee ballots. The defendants included: the secretary of state of Florida; several other state officials with roles in voter registration and the

1329 Josh Barbanel and Ford Fessenden, "Contesting the Vote: The Tools; Racial Pattern in Demographics of Error-Prone Ballots," New York Times, November 29, 2000, p. A25.

conduct of elections; the election supervisors of seven counties (Miami-Dade, Broward, Duval, Hillsborough, Leon, Orange, and Volusia) where the most egregious and systematic election irregularities occurred; and the Georgia based company (Choicepoint) which had prepared the faulty list used by local officials to purge alleged felons from the voter rolls.

After the lawsuit was filed, and in response to widespread publicity and criticism of the state's flawed electoral system, the legislature enacted the Florida Election Reform Act of 2001, which, among other things, prohibited further use of punch card voting systems for future elections in Florida. The plaintiffs voluntarily dismissed their punch card claims against the various county defendants as moot after receiving assurance that the replacement systems would not permit overvoting, would notify the voter of any undervotes, would preserve the secrecy of the ballot, would provide a review to enable the voter to validate all ballot choices before finally casting a vote, would provide access to the disabled and the visually impaired, would insure that no votes would ever be lost or altered, and would provide a method of recounting all votes cast in the event of an election contest.

The plaintiffs eventually entered into comprehensive settlement agreements with all defendants, state and county, the last of which were adopted by the district court in September 2002. As part of the agreements the state and counties agreed to take steps to improve how citizens vote in Florida, including making significant

changes in maintaining the central voter database, improving pollworker training and staffing, and implementing alternative voting and voter registration procedures. The agreements also provided for ongoing monitoring by the plaintiffs, as well as mediation, and application to the court to resolve any disputes concerning compliance with the various provisions of the agreements.

Illinois

Black v. McGuffage

The third case brought by the ACLU (in conjunction with its Illiniois affiliate) challenging punch card voting was filed on January 11, 2001, in Illinois, just one day after NAACP v. Harris.[1330] The facts were similar to those in Georgia and Florida. In Illinois, the average residual vote rate in the 2000 presidential election was approximately 3.85%. In Chicago, which used punch cards, the residual vote rate was 7.06%; and in one precinct it was as high as 36.73%. African American and Latino voters had higher exposure to punch cards than other voters. As a result, minority voters were significantly less likely to have their votes counted than non-minority voters.

After extensive litigation, followed by equally extensive settlement discussions ordered by the court and supervised by a magistrate judge, the parties

[1330] Black v. McGuffage, No. 01 C 208 (N.D.Ill.).

reached a settlement agreement. The agreement, which was approved on December 15, 2003, calls for the implementation of new and improved voting technology by March 2006, and the reimbursement of at least some of the plaintiffs costs in bringing suit. In the event defendants fail to implement the new technology by the specified deadline, the agreement provides that the plaintiffs may reinstate the litigation. The court retained jurisdiction until January 21, 2007, to interpret and enforce the settlement agreement.

California

Common Cause v. Jones

In April 2001, the ACLU of Southern California brought a challenge to punch card voting in California on behalf of a broad coalition of plaintiffs that included Common Cause, Southern Christian Leadership Conference of Greater Los Angeles, Southwest Voter Registration Education Project, Chicano Federation of San Diego County, American Federation of Labor and Congress of Industrial Organizations, and eight registered voters. [1331] The plaintiffs alleged that punch card systems were less reliable than other voting systems permitted by the secretary of state, and that individuals living in counties where punch card systems were used were substantially less likely to have their votes counted. There were nine counties that

[1331] Common Cause v. Jones, CV 01-3470 SVW (C.D.Calif.).

used punch cards: Los Angeles, San Diego, San Bernardino, Sacramento, Alameda, Mendocino, Santa Clara, Shasta, and Solano. Together, these counties contained 8.4 million registered voters. The plaintiffs also alleged that counties which choose the punch card system had high racial minority populations in comparison with counties using other voting systems, which caused a denial of the right to vote on the basis of race in violation of Section 2 of the Voting Rights Act.

The defendant secretary of state of California filed a motion to dismiss, which was denied by the district court on August 24, 2001. The court concluded that plaintiffs had stated proper claims under both the Fourteenth Amendment and the Voting Rights Act.

Following the decision of the district court, the secretary of state announced in September that punch cards would be decertified no later than the 2006 elections. The plaintiffs, however, argued that it was feasible for the state to implement new replacement technology in the nine counties by 2004. The district court agreed. In an opinion issued in February 2002, it held that "[it] is plainly feasible for the [punch card counties] to convert to other certified voting equipment by March 2004." Punch card voting in California, as in Georgia and Florida, has now been relegated to history and those minority voters who had been disproportionately impacted – as well as all other voters likely to be adversely impacted – are better off.

Ohio

Stewart v. Blackwell

Voters in Ohio, represented by the ACLU and the ACLU of Ohio, brought a class action lawsuit in 2002, challenging the state's use of punch card ballots and optical scan systems.[1332] Neither of the systems provides notice to voters before they cast a ballot that there may be errors in how they marked the ballot which would prevent it from being counted. Plaintiffs sued the secretary of state, members of the state Board of Examiners for the Approval of Electoral Marking Devices, members of various county boards of elections, and members of various county councils.

Ohio is a large and populous state with a diverse mix of urban and rural voters, and relies predominantly on punch card voting systems. Sixty-nine of the state's 88 counties use punch cards. Those 69 counties include 72.5% of all registered voters in Ohio, and 74% of the state's 11,756 voting precincts. Among the 19 counties that do not use punch cards, two use automatic voting machines, six have electronic voting devices, and 11 use optical scanning equipment.

The suit was brought on behalf of two subclasses of voters. The first asserted that non-notice punch card and optical scan systems violated the Fourteenth Amendment. The second subclass consisted of African American voters from

[1332] Stewart v. Blackwell, No. 5:02 CV 2028 (N.D. Ohio).

Hamilton, Summit, and Franklin Counties who alleged that their votes had a disproportionate risk of being rejected in violation of Section 2.

Through both lay and expert testimony, the plaintiffs demonstrated there was a racial disparity in counted votes due to the flaws of non-notice technology. Election officials in Hamilton County had also repeatedly expressed concern that punch card systems led to disfranchisement of African American voters in the City of Cincinnati. During the 2000 presidential election, punch card voting equipment resulted in greater intra-county racial differences in overvoting and/or undervoting than did notice technology.

The analysis of plaintiffs' expert, Dr. Richard Engstrom, showed that in the 2000 presidential election in Hamilton County, the ballots of African American voters were rejected because of overvoting at nearly seven times the rate of the ballots of non-African American voters. His analysis of undervotes in Hamilton County showed that African Americans undervoted at nearly twice the rate of non-African Americans. Adjusting for the estimated rate of intentional undervotes, African Americans in Hamilton County suffered unintentional undervotes seven and a half times more than non-African American voters did. In Montgomery County, African Americans voter experienced residual voting around two and a half times as often as non-African American voters. Similarly, in Summit County, African American voters experienced overvoting more than nine times the rate of

non-African Americans. African American voters experienced total undervoting almost two and a half times more frequently than non-African Americans and experienced unintentional undervoting more than three times the rate of non-African American voters.

These results were compared with Franklin County, which used Direct Record Electronic (DRE) voting machines, in order to determine if election machinery was the cause of the disparities. DRE devices do not allow overvoting, notify voters when undervoting occurs, and afford voters an opportunity to correct an accidental undervote. There was no racial disparity in the number of overvotes in Franklin County - neither blacks nor whites experienced any overvoting. Moreover, DRE machines greatly reduced the rate of accidental undervoting. For non-African Americans, the rate became negligible, and for African Americans it dropped below 1%, nearly eliminating the racial gap in accidental undervotes.

Plaintiffs' experts testified that racial disparities in the rates of residual votes exist against a backdrop of consistent socioeconomic disparities between African Americans and whites in each of three counties. However, while the racial disparities interacted with error prone punch card machines in Hamilton, Summit, and Montgomery Counties to cause racially disparate rates of residual ballots, the superior voting technology used in Franklin County prevented the socioeconomic disparities from translating into a racial gap in residual ballots. In other words,

unlike the three defendant counties, Franklin County's use of DRE machines overcame ambient racial disparities and ensured that blacks and whites had an equal opportunity to participate in the political process.

The district court ruled against the plaintiffs on December 14, 2004.[1333] The decision was not a surprise. The judge said from the bench during trial that he had been voting on punch cards for 25 years with no problem and that people who had trouble using them were just "stupid." The court also found that because there were majority white counties in the state that also had high residual vote rates, there was no violation of Section 2. The plaintiffs appealed on the grounds that the court made legal errors, including applying a "rational basis" level of scrutiny, finding that the "litigation is an attempt to federalize elections by judicial rule or fiat," and concluding that punch card technology was not in fact "a non-notice system." The court of appeals heard oral argument in December, and a decision is pending.

Washington State

In re Election of Medina City Council Position 4

In a 2003 race for the Medina City Council, a small municipality of just 3,000 people in the Seattle metropolitan area, only one candidate, Daniel Becker, qualified to have his name on the ballot for the general election. But a second candidate Katie

[1333] Stewart v. Blackwell, 356 F. Supp. 2d 791 (N.D. Ohio 2004).

Phelps, qualified to run as a write-in candidate challenging incumbent Becker. The elections used opti-scan equipment, so voters were required to fill in an oval to cast a vote. For a write-in candidate, voters were not only required to write in the candidate's name but also to fill in the oval next to the write-in line for that office.[1334]

The election was extremely close. Becker, whose name was on the ballot, received 441 votes. There were 479 write-in votes, but 29 of these were not initially counted because the voters had not also filled in the oval. Phelps received 438 of the write-in votes that did fill in the oval. A visual inspection showed that she also received the 29 others.

The election was close enough to require an automatic manual recount under state law, however, the county contended that the statute required votes cast without filling in the oval - about which there was no question of the voters' legitimacy or their intent - be discarded. The ACLU filed an amicus brief in superior court in which it argued that the 29 votes should be counted.[1335]

The ACLU argued that the function of the statute was to facilitate the counting of votes by locating write-in ballots. Requiring voters who cast write-in votes to also fill in the oval enables electronic scanners to identify and separate out

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[1334] A state statute provided: "In order for write-in votes to be valid in jurisdictions employing optical-scan mark sense ballot systems the voter must complete the proper mark next to the write-in line for that office." RCW 29.04.180.

[1335] In re Election of Medina City Council Position 4, Superior Court of Washington for Kings County,

ballots which have write-in votes. The write-in votes can then be manually read and counted. But scanners could also look for all ballots on which the oval was not checked for a particular office. That would yield all of the write-in ballots - meeting the function of the statute. It would also separate the ballots on which no vote was cast but that would minimally affect, and certainly not complicate, the vote counting process. In short, the statute serves an administrative purpose, one which speeds and makes vote counting easier. Its purpose was not to put an additional burden on some voters and to discard their votes despite the clarity of their intent to vote for a given candidate.

The ACLU argued further that various state laws and court decisions demonstrated that the overriding principle of state law was to effectuate the intent of the voter. For example, a longstanding principle of Washington case law holds that, "All statutes tending to limit the citizen in the exercise of the right of suffrage should be liberally construed in his favor. … The important thing is to determine the intention of the voter, and to give it effect."[1336] This suggested that legal votes could only be discarded for specific and important reasons, perhaps for administrative necessity but not administrative convenience. Since counting the votes did not frustrate the purpose of the statute, it should not be read as imposing the loss of

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No. 03-2-41552-9SEA.

[1336] State v. Fawcett, 49 P. 346, 349 (Wash. 1897).

one's vote for failure to adhere to a ballot instruction as long as the voter's intent was clear. Also, relying on decisions of the Supreme Court, the ACLU argued that discarding the votes violated the Fourteenth Amendment because the state's interest was merely one of administrative convenience and was not a sufficient basis for rejecting votes. [1337]

On December 18, 2003, the King County Superior Court entered a one paragraph order, without legal citations, holding that the failure of the election officials to count the disputed ballots was erroneous and directing that "otherwise valid ballots with write ins but without corresponding oval filled in be counted." The effect of the ruling was that Phelps ended up beating incumbent Becker by more than two dozen votes.

[1337] E.g., Burdick v. Takushi, 504 U.S. 428 (1992).

PARTISAN GERRYMANDERING

Pennsylvania

Vieth v. Jubelirer

The ACLU, with the Brennan Center, filed an amicus brief in the Supreme Court on behalf of the appellants in Vieth v. Jubelirer,[1338] a case involving partisan gerrymandering in Pennsylvania. The term "gerrymandering" is generally understood to be a pejorative and has traditionally referred to districts, usually bizarrely shaped, drawn to give an unfair or disproportionate advantage to a particular political group or party.[1339] The practice is named after Governor Elbridge Gerry of Massachusetts, who in 1812, drew a bizarre, salamander shaped district to enhance the political fortunes of the Republican Party.[1340]

The history of redistricting since Gerry is replete with examples of partisan gerrymandering, although modern day computers have greatly facilitated the process. With redistricting software, and with detailed population data furnished by the census down to the block and precinct levels, it is now possible to draw a statewide redistricting plan in a matter of hours. With voter turn-out and election

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[1338] 541 U.S. 267 (2004).

[1339] Kirkpatrick v. Preisler, 394 U.S. 526, 538 (1969) (gerrymandering is "the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes") (Fortas, J., concurring).

[1340] Davis v. Bandemer, 478 U.S. 109, 164 n.3 (1986) (Powell, J., concurring in part and dissenting in part).

results downloaded into a computer, it is also possible to calculate with a reasonable degree of certainty how districts will perform, i.e., whether they will be safe for Democrats, safe for Republicans, help incumbents stay in office, or likely throw them out.[1341]

In 2002, Democrats in Georgia, who controlled the legislature and the governor's office, used a broad array of redistricting techniques to maximize the opportunities for members of their party. If a seat had to be lost in an area because of a decline in population, the lost seat was one held by a Republican. Republicans were paired where possible to insure that one of them would not return to the legislature. Districts were frequently drawn totally without regard to compactness, but completely with regard to Democratic performance. The state reintroduced multi member districts, a device which had previously been objected to under the Voting Rights Act because it had been used to dilute black voting strength.[1342] For example, rather than drawing four single member districts in an area where one of the districts might elect a Republican, a four member "Democratic performance district" was drawn instead. Black population percentages were reduced as much

[1341] Martinez v. Bush, 234 F. Supp. 2d 1275, 1352 (S.D. Fla. 2002 (three-judge court) ("the 'sea change' of advancing technology . . . has substantially increased the extent of successful political gerrymandering that is achievable") (Hinkle, J., concurring).

[1342] Georgia v. United States, 411 U.S. 526, 529-30 (1973) (affirming an objection by the Attorney General to the state's 1970 house redistricting plan because of its use, inter alia, of multi-member districts).

as possible in majority black districts, without sacrificing black incumbents, to create opportunities for white Democrats in adjoining districts. Democratic leaning districts in the rural and inner-city areas were underpopulated to protect Democratic incumbents and impair the reelection prospects of Republicans. As a three-judge court later concluded, the redistricting was performed "in a blatantly partisan and discriminatory manner, taking pains to protect only Democratic incumbents."[1343]

Democrats in Georgia were not alone in resorting to partisan gerrymandering following the 2000 census. The Republican Party has engaged in similar tactics when presented with the opportunity. In Michigan, the Republican controlled legislature paired six Democrat incumbents in three districts, and as a result sent nine Republicans and only six Democrats to the U.S. House of Representatives after the 2002 election. In the previous Congress, the Michigan delegation to the house was split nine to seven in favor of Democrats.[1344]

In Florida, a court found that in "a state with a notoriously close division of Democratic and Republican voters statewide, 18 of the 25 congressional districts have been drawn to cover areas in which voters have exhibited a clear voting

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[1343] Larios v. Cox, 300 F. Supp. 2d 1320, 1347 (N.D. Ga. 2004). See also, Georgia v. Ashcroft, 195 F. Supp. 2d 25, 96 (D.D.C. 2002) (three-judge court) (noting the "blatantly partisan nature of the redistricting process" in Georgia).

[1344] O'Lear v. Miller, 222 F. Supp. 2d 850, 853 (E.D. Mich.) (three-judge court), aff'd, 537 U.S. 997 (2002); "How to Rig an Election," The Economist, April 27, 2002, at 47.

preference for Republicans."[1345] A similar pattern was found to be present for the Florida state house and senate.

Rep. Thomas M. Davis III, of Virginia, Chair of the National Republican Congressional Committee, said that "Democrats rewrote the book when they did Georgia, and we would be stupid not to reciprocate." Commenting in December 2001, on the upcoming redistricting process in Pennsylvania, Davis promised that redistricting there "will make Georgia look like a picnic."[1346]

In Pennsylvania, Democrats were a slight majority of registered and actual voters, but Republicans were able to draw a plan creating GOP majorities in 13 (68%) of the state's 19 congressional districts.[1347] The new plan split 84 local governments among different congressional districts. By contrast, the 1992 plan split only 27 local governments. Additionally, and according to the district court, nine districts were overpopulated without any legitimate justification, other than maximizing political control.[1348] It is undisputed that Democrats had no input in the final version of the plan, which was signed into law by Governor Schweiker on January 7, 2002.

[1345] Martinez, 234 F. Supp. 2d at 1350-51 (Hinkle, J., concurring).

[1346] Thomas B. Edsall, "Democrats Hold Edge Over GOP in redistricting; Gains Still Possible for Republicans," Washington Post, December 14, 2001, at A55.

[1347] Vieth v. Pennsylvania, 188 F. Supp. 2d 532, 536 (M.D. Pa. 2002) (three-judge court).

[1348] Id. at 536.

The plan, with its significant reduction of Democratic leaning districts, was challenged as being a partisan gerrymander, but the challenge was dismissed on the grounds that as long as the plaintiffs could register and vote and campaign, they were not "shut out of the political process," and as a consequence the challenged plan had "no actual discriminatory effect on them."[1349] The challenged plan was, however, subsequently invalidated on one person, one vote grounds, and a new plan, with the same partisan impact, was enacted by the legislature. [1350] That plan was also challenged as a political gerrymander, and the challenge was again dismissed.[1351]

After the Supreme Court agreed to review the case, amicus filed their brief and urged the court to reverse and adopt a standard that a plan violated the Constitution if it "intentionally creates, or perpetuates, substantial disparities in a voter's or group of voters' influence on the political process." The court, however, by a 5-4 vote splintered among five different opinions, affirmed the decision of the district court. Four members of the court were of the view that partisan gerrymandering claims were not justiciable. The other five members held that such claims were justiciable, but they did not agree on the legal standard for adjudicating

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[1349] Id. at 547.

[1350] Vieth v. Pennsylvania, 195 F. Supp. 2d 672 (M.D. Pa. 2002) (three-judge court).

[1351] Vieth v. Pennsylvania, 241 F. Supp. 2d 478 (M.D. Pa. 2003) (three-judge court).

such claims.[1352] The decision essentially left partisan gerrymandering claims alive in theory but dead in practice.

[1352] Vieth, 541 U.S. at 306.

BALLOT ACCESS CASES

Arkansas

Green Party of Arkansas v. Priest

In 2001, President Bush appointed Representative Asa Hutchinson of Arkansas to lead the Drug Enforcement Administration. Hutchinson's confirmation created a vacancy in Congress, and the Governor of Arkansas called a special election to fill it. The Green Party of Arkansas, which the state had not yet recognized as an official political party, sought to run a candidate in the special election. However, because Arkansas' party recognition procedure made it impossible for political parties to gain recognition in an odd-numbered year, it was impossible for the Green Party to participate in the special election.

The ACLU challenged as unconstitutional Arkansas' party-recognition scheme on behalf of the Green Party and two individual plaintiffs.[1353] Because the Green Party sought to run a candidate in the special election set for November 20, 2001, the plaintiffs also sought a preliminary injunction.

District Judge George Howard, Jr. heard the motion on September 13 and ruled from the bench in the plaintiffs' favor, finding that the state's scheme was not justified by any compelling state interest and failed even the test of rationality. The ruling required Arkansas to give unrecognized political parties a meaningful

[1353] Green Party of Arkansas v. Priest, Civ. No. 4:01-cv-00586-GH (E.D. Ark.).

opportunity to participate in special elections. The Green Party's candidate in the election to fill Hutchinson's seat appeared on the ballot but was soundly defeated.

Georgia

Silver v. Executive Committee of the Democratic Party of Georgia

In 1972, J.B. Stoner, arch-segregationist and perennial candidate, succeeded in getting the federal court to require Georgia to allow candidates an alternative way to get on a ballot other than paying a filing fee. Stoner, a lawyer representing himself, successfully argued that he was financially able to pay the $2,150 filing fee to run for U.S. Senator but was unwilling to do so because he needed the money to conduct his campaign. The court ordered an interim plan into place allowing candidates to qualify by paying a reduced fee, petitioning, or filing an affidavit of poverty.[1354] Some eight years later, Stoner was convicted for participating in the 1958 bombing of Bethel Baptist Church in Birmingham, Alabama.[1355]

The legislature subsequently enacted a statute which gave candidates several ways of getting on the ballot, including by filing a pauper's affidavit. The statute did not, however, provide any standards for determining whether a candidate could not

[1354] Stoner v. Fortson, 359 F. Supp. 579 (N.D.Ga. 1972)(three-judge court).

[1355] "White Supremacist J.B. Stoner Dead at 81," Atlanta Journal Constitution, April 27, 2005.

actually pay a fee or for rejecting an affidavit based on a belief that a candidate could pay the qualifying fee.

In 1986, James Silver sought to file as a candidate in forma pauperis in Georgia's Fourth Congressional District election. The filing fee would have been $2,253. Although the Democratic Party had previously approved pauper applications similar to that of Silver's, it changed its policy and disqualified him. The executive director of the party informed Silver that the rules had changed because of a 1984 state court lawsuit in which the court recommended "that in the future the appropriate officials at least review the information contained in the Pauper's Affidavits in an elementary manner."[1356]

The ACLU filed a suit on behalf of Silver alleging that the new pauper qualification policy of the Democratic Party, as well as the state court order, were unprecleared voting changes subject to Section 5.[1357] The complaint also asserted the new policy would have an adverse racial impact in violation of Section 2 and the Constitution.

The defendants, who were the Democratic Party and the secretary of state, opposed relief. The secretary of state conceded the state court order had not been

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[1356] Tibbs v. Hicks, No. 84-CV-22554 (Superior Court of Clayton County), Order of August 30, 1984, p. 5.

[1357] Silver v. Executive Committee of the Democratic Party of Georgia, No. C86-1628A (N.D. Ga.).

submitted for preclearance, but argued it was "not a change that the State has enacted or sought to administer, and is, therefore, not subject to Section 5 preclearance." In fact, the state had implemented the order by preparing ballots and conducting the primary pursuant to it. Furthermore, the law was clear that state court orders embodying changes in voting are subject to Section 5. Additionally, the secretary argued that if the Democratic Party violated state law concerning paupers' affidavits, "the remedy is not an injunction under Section 5, but an action in State courts to enforce the State statute."[1358]

The court did not credit the secretary's arguments. At a hearing held in chambers 12 days before the primary election, the parties reached an agreement. The court signed a consent order which recited that plaintiff had a substantial likelihood of prevailing on the merits, but that plaintiff may have "rested on his rights to the detriment of the defendants."[1359] Silver's name would be placed on the ballot, but not on the absentee ballots which had already been printed, and many of which already had been mailed to applicants.

Section 5 thus played an important role in blocking the implementation of voting changes that would have restricted access to the ballot, particularly by those

[1358] Brief of the Secretary of State, p. 6.

[1359] Consent Order of July 31, 1986, p. 1.

with limited financial resources. Silver ran in the Democratic primary, but lost the nomination to Ben Jones.

Duke v. Cleland

David Duke, a member of the Louisiana state legislature and an avowed white supremacist, pursued the Republican Party's nomination for president in 1992, and was on the ballot in Republican primaries in 13 states. Duke had previously run as a Republican candidate for U.S. Senate in 1990, and although he was defeated in the primary, he received 44% of the total vote and a majority of the votes cast by whites. He then ran as a Republican candidate for governor of Louisiana in 1991, and defeated the incumbent Republican, Buddy Roemer in the primary, but lost in the general election, with approximately 39% of the vote.

Under Georgia law, the names of declared candidates "who are generally advocated or recognized in news media throughout the United States as aspirants for that office and who are members of a political party or body which will conduct presidential preference primary," are to be listed on the party's primary ballot.[1360] Duke was listed as a Republican presidential candidate by the secretary of state, but his name was struck from the list by the Republican members of the state's

[1360] O.C.G.A. § 21-2-193.

bipartisan Presidential Selection Committee, which has the duty under state law of selecting candidates to appear on presidential preference primary ballots.

There is no question that Duke was excluded from the Republican Party's ballot because of his political views and beliefs. According to committee member and Republican Party chair Alec Poitevint, there was no room on the Republican ballot for Duke because he "is a fraud and charlatan. . . . By claiming to be a Republican, and by stealing traditional Republican campaign themes like low taxes, welfare reform, and school prayer, Duke is practicing Hitler's 'big lie.'"[1361]

Duke and three Georgia voters, represented by the ACLU, challenged Duke's removal from the Republican ballot as depriving them of the rights of free speech, association, equal protection, to run for office, to vote, and due process in violation of the First and Fourteenth Amendments.[1362] The litigation, which was controversial, took a long and convoluted path through the courts. It was not finally resolved until 1996, long after the presidential preference primary - from which Duke had been excluded - had been held.

The court of appeals concluded that Duke's exclusion from the ballot by the Presidential Selection Committee was state action, but was nevertheless constitutional. It recognized that Duke had a First Amendment right to express his

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[1361] Georgia Republicans, Press Release, December 16, 1991.

[1362] Duke v. Cleland, Civ. No. 1:92-CV-116-RCF (N.D.Ga.).

"political beliefs free from state discrimination no matter how repugnant his beliefs may be to others," but held the Republican members of the state selection committee "did not have to accept Duke as a republican presidential candidate. Duke does not have the right to associate with an 'unwilling partner.'" It said the same analysis applied to Duke's supporters in light of the state's "compelling interest in protecting political parties' right to define their membership."[1363]

Aside from the First Amendment and state action issues raised by the Duke litigation, Duke's success garnering support from white voters underscores the continuing, divisive presence of race in modern day politics, especially in Louisiana and elsewhere he campaigned across the South.

Kansas

Natural Law Party of Kansas v. Thornburgh

In August 2002, the ACLU brought suit on behalf of the Natural Law Party of Kansas in a challenge to Kansas's unique restrictions on political party names.[1364] Under a provision of state law dating back more than 100 years, political parties in Kansas could have only two words in their name, one of which had to be "party." The law was designed by an early Republican legislature to prevent the Democratic

[1363] Duke v. Massey, 87 F.3d 1226, 1234 (11th Cir. 1996).

[1364] Natural Law Party of Kansas v. Thornburgh, Case No. 02-2390-JWL (D. Kan.).

Party from running fusion candidates with the Populist Party under the Democratic-Peoples' Party label. The modern day effect of the law was to diminish the effectiveness of third parties which have more than one word in their name by preventing them from running candidates under their party's name.

The parties agreed to settle the case shortly after it was filed, and the Kansas legislature repealed the law in the spring of 2003.

Minnesota

Candidacy of Independence Party Candidates v. Kiffmeyer

On September 21, 2004, less than two months before the November general election, the Independence Party of Minnesota was notified by the secretary of state that 18 of its 21 legislative candidates, and all 5 of its congressional candidates, would be denied a place on the general election ballot for failure to garner sufficient votes in the primary as required by state law. That same day, party officials filed a petition with the state supreme court seeking an order directing the secretary of state to place names of the party's candidates on the ballot. The court directed that briefs be filed and oral argument heard six days later. The ACLU filed an amicus brief supporting the petition of the Independence Party.[1365] On September 27, the court

[1365] Candidacy of Independence Party Candidates v. Kiffmeyer, 688 N.W. 2d 854 (Minn. 2004).

ordered the candidates' names be placed on the ballot and later issued a full opinion holding the ballot access statutes to violate the First and Fourteenth Amendments.

By any measure, the ballot access statutes were inconsistent and convoluted, and indeed, though the state attorney general defended the secretary's decision, the court noted that the state "acknowledge[d] that there is no rational state purpose served by the primary threshold law."[1366] Under state law, a political party gains "major political party" status by getting 5% of the vote in a general election. This status allows a party's candidates to gain access to the general election ballot without having to undergo a petition process. The party maintains that status until it fails to gain that level of support at another general election.[1367] In 2004, the Independence Party had major party status and could hold primaries to nominate its candidates for the general election ballot.

However, another statute required that in order for a party's nominees to be placed on the general election ballot, a least one of them had to receive a specified threshold vote in the primary balloting. The threshold was that one candidate had to garner votes of at least 10% of the average number of votes the party's candidates received for state constitutional offices in the previous election within the same

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[1366] Id. at 861.

[1367] Minn. Stat. § 200.02, subd. 7 (2002).

electoral area.[1368] For example, if the average votes for governor, etc. received by the Independence Party within a congressional district had been 1,000, and one Independence candidate received at least 100 votes in the primary, then all Independence Party nominees within that district (for state house and senate, county commissioner, etc.) would get their names on the general election ballot.

But state law also provided that if the candidates of a major political party failed to meet the vote threshold standard, they could gain ballot access by a nominating petition process. One of the incongruities of the statutory scheme was that the petition deadline was 56 days before the primary.[1369] In striking down the law, the court noted that incongruity as one aspect of the scheme's irrationality.

The court acknowledged that states have the authority to require candidates to demonstrate some level of support in order to qualify for ballot access. But the court noted the 10% threshold varied by legislative district and by party. For example, in one legislative district the Green Party was able to satisfy its threshold with only 35 votes, but the Independence Party was required to receive over twice as many votes in the same district. The court concluded that "[i]n the absence of any suggested rational purpose for the law, we have no difficulty concluding that . . . the primary threshold law violates petitioners' constitutional rights to vote and to

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[1368] Minn. Stat. § 204D.10, subd. 2 (Supp. 2003).

[1369] Minn. Stat. § 204B.09, subd. 1(a)(2002).

associate for the advancement of political beliefs under the First and Fourteenth Amendments."[1370]

Virginia

Libertarian Party of Virginia v. Quinn

In 2001, the ACLU represented the Libertarian Party and six individual plaintiffs in a successful challenge to Virginia's newly enacted ballot labeling procedure.[1371] Among other things, state law required that candidates be identified on the ballot by the name of their party only if they were nominated by a recognized political party. All other candidates, regardless of their actual political affiliation, had to be identified by the term "Independent." The definition of "political party" recognized only the Democratic and Republican parties and left no way for other political parties to gain recognition between election cycles. Thus, there was no way for candidates affiliated with new and emerging (i.e., "unrecognized") political parties to be identified on the ballot by the name of their party.

The plaintiffs alleged that the scheme violated the Constitution, and Virginia's attorney general chose not to defend the law. The parties then signed a consent decree, the terms of which essentially allowed any organized political party to gain

[1370] Candidacy of Independent Party Candidates, 688 N.W. 2d at 861.

[1371] Libertarian Party of Virginia v. Quinn, Civil No. 3:01CV468 (E.D. Va.).

recognition for the purpose of having its candidates appear on the ballot with a proper label.[1372] This made it possible for new and emerging political parties to have their candidates appear on the ballot with an accurate party label, and Libertarian Party candidates for state offices have appeared on the ballot in Virginia with an accurate party label ever since.

[1372] Id., Order of August 15, 2001.

PROTECTING THE RIGHT TO VOTE FOR PERSONS WITH DISABILITIES

Maryland

Poole v. Lamone

In 1994, Maryland approved an optical scan voting system which required poll attendants to read the ballot aloud for a blind person and then mark the ballot on the voter's behalf before inserting it into a scanner. Two years later, William Poole, a blind voter in Baltimore County, and the founder of the advocacy group, Blind Dignity, repeatedly attempted to vote a secret ballot without assistance in the March 5, 1996, presidential primary election but was unsuccessful. He then filed a lawsuit pro se in the Circuit Court of Baltimore County, but the court refused to enjoin his denial of access to voting.

Poole then developed an overlay template which he and two other blind voters were permitted to use during the November 1996, general election, and state election officials provided a braille ballot key that allowed them to vote secretly and independently.

The county then implemented a telephone system for blind voters in November 1998, but Poole refused to use it because of concern that the secrecy of his ballot could not be guaranteed. The county abandoned the phone system for the 2000 elections.

These events, and the issue of the right of voters with visual impairments to cast a ballot secretly and independently, were widely covered in the media. However, in spite of the media attention, Baltimore County did not upgrade its voting systems for blind or visually impaired voters, even though inexpensive systems were available.

In 2001, Maryland enacted legislation that required all jurisdictions to use the same type of voting equipment by 2006. The law explicitly required the new voting systems to provide "[a]ccessibility for all voters with disabilities recognized by the Americans with Disabilities Act."[1373] The law also allowed counties to petition state authorities to delay implementation locally. Because the City of Baltimore had recently purchased new voting equipment that did not facilitate voting by people with visual impairments, and did not want to be forced to replace it immediately, Baltimore petitioned the state for an exemption, but the petition was denied.

In 2002, Poole filed another pro se law suit, this time in federal court, to be allowed to vote without assistance. The federal court issued an order allowing Poole to vote, and invited the ACLU to represent him and expand the claims in the litigation.

The ACLU subsequently filed an amended complaint asserting that the failure of Baltimore County to provide access for the visually impaired violated

Maryland law, the U.S. Constitution, the Americans With Disabilities Act of 1990, and the Rehabilitation Act of 1973.[1374] The National Federation of the Blind of Maryland and others joined as plaintiffs. With 5% of the county's voting age population having some visual impairment, and 1% being blind, the estimated number of affected persons (28,663) in Baltimore County was substantial.

In September 2003, all parties agreed that "the voting system heretofore used in Baltimore County is not adequate to provide blind and severely visually impaired voters with a means of casting a ballot without the assistance of a sighted individual." The parties stipulated that the optical scan voting system certified in 1994, by the State Board of Elections and used from 1996 through 2002, with the limited exceptions of Poole's template system in 1996 and the "phone in" system in 1998, "did not provide a mechanism in Baltimore County that would have allowed blind or severely visually impaired voters to vote without the assistance of a sighted individual." During that period, any blind or severely visually impaired individual "would have had to disclose his or her choices to another person."[1375]

As the trial date of October 2003 approached, the state's planned purchase of an accessible system was delayed by a Johns Hopkins University study that

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[1373] Md. Code Ann., Election Law §9-102d(10).

[1374] Poole v. Lamone, Civ. No. 02-3610-MJG (D. Md.).

[1375] Id., Joint Stipulation of Parties, September 11, 2003.

criticized the new system. The state also commissioned its own security study of the planned system, which led it to decide to purchase electronic voting equipment that could be used by visually impaired persons without the assistance of others. Though the county did not provide relief in time for the March 2004 primary, the equipment was in place for the November 2004 election. The Maryland ACLU continues to monitor implementation on behalf of plaintiffs.

Missouri

Prye v. Blunt

The Missouri state constitution prohibits any person from voting who "by reason of mental incapacity" has a legally appointed guardian.[1376] The ACLU in conjunction with the Bazelon Center for Mental Health Law and the Illinois-based Guardianship and Advocacy Commission, challenged that statute in 2004 on behalf of a plaintiff who required a guardian for certain transactions, but was fully capable of understanding the voting process and voting on his own.[1377]

Born in 1952, the plaintiff was one of the first black students to attend desegregated Central High School in Memphis, Tennessee, in the late 1960s. His commitment to ending discrimination intensified sharply while at Central, after he

[1376] Mo. Const. Art. 8, Section 2.

[1377] Prye v. Blunt, Civ. No. 2:04-CV-04248-ODS (W.D. Mo.).

witnessed some white teachers celebrating the April 4, 1968, assassination of Dr. Martin Luther King Jr. The Lorriane Motel, where Dr. King was shot, was just one mile away from the school. After graduating from Yale University, attending Harvard Law School, and receiving a Master of Laws in taxation from New York University (NYU), the plaintiff taught courses at NYU, Vermont Law School, and the University of Illinois School of Law. At age 49, he was diagnosed with a serious mental illness. A guardian was appointed and in 2004, the plaintiff came to live in Missouri.

The plaintiff challenged the state law which prohibited him from voting, relying upon the Americans with Disabilities Act (ADA), the Rehabilitation Act of 1973, and the Constitution. The Missouri district court acknowledged the importance of voting as preservative of all other rights, but refused to enjoin the state's restriction on voting before the 2004 election. It rejected the plaintiff's equal protection claims and held that the ADA and the Rehabilitation Act did not protect his right to vote. After the election, the plaintiff, joined by the Missouri Office of Protection and Advocacy Services and other individuals, and with the ACLU's assistance, filed an amended complaint, challenging Missouri's blanket denial of the right to vote to persons who have been adjudged incapacitated. Lead plaintiff Prye passed away in January 2006, but the case he initiated is ongoing on behalf of other plaintiffs.

In related work, the ACLU also consulted with the Bazelon Center on similar cases in California, where several veterans' hospitals denied access to representatives of the state protection and advocacy organization who sought to provide voter registration information and assistance to persons with disabilities. Designated protection and advocacy organizations have a statutory obligation to advocate for persons with disabilities, but one California hospital took the position that only the League of Women Voters would be allowed access. After correspondence with hospital administrators, access was granted and no litigation was required.

IMPLEMENTING THE HELP AMERICA VOTE ACT

New Mexico

Kunko v. New Mexico

The ACLU submitted an amicus brief in October 2004, to the New Mexico Supreme Court on behalf of the National Congress of American Indians in a lawsuit challenging a county voter registrar's interpretation of state law implementing the Help America Vote Act (HAVA).[1378] The issue was whether first time voters who registered at a voter registration drive would be required to show identification at the polls on election day. The New Mexico Secretary of State had said the identification requirement would not apply to those voters, but a lone official from Chaves County disagreed.

The ACLU's amicus brief supported the secretary of state's position, arguing that the county official's interpretation would adversely affect Native American voters and would therefore violate Section 2 of the Voting Rights Act. The New Mexico Supreme Court agreed in a decision issued just days before the 2004 election in which it required Chaves County to follow the secretary of state's directions.

[1378] Kunko v. New Mexico, No. 20,888 (N. Mex. Supreme Court).

Rhode Island

Rhode Island Parents for Progress v. Board of Elections

On November 1, 2004, the ACLU filed suit in Rhode Island state court challenging a decision by the State Board of Elections regarding provisional ballots under the Help America Vote Act (HAVA).[1379] The Board of Elections had directed local election officials not to count any provisional ballots cast by first-time voters who registered by mail and who did not show identification at the polls on election day. The ACLU challenged that direction on the grounds that HAVA requires election officials to count provisional ballots notwithstanding a lack of identification if the voter is otherwise qualified to vote under state law.

Shortly after the state court heard the plaintiffs' motion for a temporary restraining order, but before it issued a ruling, the State Board of Elections held an emergency meeting in which it reversed its position and sided with the ACLU.

[1379] Rhode Island Parents for Progress v. Board of Elections, C.A. 04-5902 (R.I. Superior Ct.).

CHALLENGING CENSUS BUREAU DETERMINATIONS

In re the 1990 Census

During its preparations for the 1990 census, the U.S. Census Bureau informed the ACLU and other civil rights organizations that it was considering altering the manner in which it would publish data to be utilized in apportionment. Believing the proposed change would make it significantly more difficult to draw election plans containing legislative districts that would afford minority voters the opportunity to elect their representatives of choice, the ACLU opposed the change and the Census Bureau agreed to abandon the idea.

Beginning in 1950, the Census Bureau suppressed certain information for privacy reasons when data was reported for five or fewer individuals in a reporting jurisdiction. For example, in reporting income levels, if only five white persons in a city had incomes between $25,000 and $50,000, that information was suppressed. As a result, the total number of persons in that category was reported, but the racial breakdown was not. This procedure removed the ability to identify an individual using racial data. In addition, socioeconomic data was only reported jurisdiction-wide - by city or county, for example - and never in smaller units.

In December 1975, Congress enacted legislation requiring the Census Bureau to report data in smaller units called blocks, which contained population data by

race and voting age in order to assist states in apportionment matters.[1380] This information was subsequently used by minority communities and voting rights advocates to determine the feasibility of drawing legislative districts that might better afford minority communities the equal opportunity to participate in the political process. To protect individual privacy, data for race and age from these smaller census block units was never combined with other information such as income, education, occupation, etc. This procedure seemed to work well, as there were no law suits against the Census Bureau for invasion of privacy resulting from the gathering or use of apportionment data.

However, as the 1990 census approached, the bureau proposed, over the opposition of the states, either to suppress the block data if a block had five or fewer persons of one race in it, round the data, or in the bureau's language, "perturb" the data by switching households between blocks.

The ACLU met with census representatives and explained the difficulties that this procedure would pose for the states, as well as for voting rights advocates. While acknowledging the legitimate need to protect privacy, the ACLU explained that the block data would not operate to invade individual privacy. In July 1987, the bureau notified the ACLU that it was abandoning its proposal and that the block data would be reported as it had been in 1980.

[1380] Public Law 94-171

PROTECTING THE RIGHTS OF STUDENT VOTERS

Arkansas

Copeland v. Priest

Just days before the 2002 general election, the ACLU brought a class action lawsuit on behalf of student voters at Ouachita Baptist University in Arkadelphia, Arkansas.[1381] The suit arose out of a state court lawsuit brought by local Democratic Party operatives seeking to disfranchise the mostly conservative students on the grounds that they did not legally "reside" in their college community. With no opposition from the local voter registrar, who was also a Democrat, the state court judge ruled in favor of the Democratic plaintiffs and ordered the registrar to remove from the voter rolls anyone registered at a university address who was not a member of the university staff.

Representing four plaintiffs, including the daughter of Arkansas Governor Mike Huckabee, the ACLU sought a temporary restraining order in federal court to prohibit the registrar from implementing the state judge's order in violation of the students' constitutional rights. The federal court issued an order restoring the students' voting rights less than a week before the election and held a short trial on the merits in mid-November. The court ruled in favor of the plaintiffs in October 2003, and the defendants appealed. The defendants, however, agreed to drop their

[1381] Copeland v. Priest, Civ. No. 4-02-CV-00675 (E.D. Ark.).

appeals in early 2004, and as a consequence the judge's ruling remains in effect.

Maryland

Saunders v. Davis

In 2004, Seth Saunders, a sophomore at the College of William and Mary in Williamsburg, Virginia, tried to register to vote. Following in the political footsteps of Thomas Jefferson, an alumnus of William and Mary, he was one of several students who planned to run for one of three open seats on the five member Williamsburg City Council in an election in May 2004. College students make up about half of the city's population of 12,000.

When he applied to register, Saunders was asked to fill out a special form, the "Williamsburg Voter Residency Questionnaire," which queried students about where their motor vehicles were registered, their community activities, church membership, and whether a parent listed them as a dependent on their income tax forms. The questionnaire was also a new voting practice, but had never been precleared. The city's voter registrar denied Saunders the right to register, saying he should register in Hanover County, where his father, who claimed him as a dependent, resided.

In February 2004, the ACLU filed suit on behalf of Saunders, challenging the city's rejection of voter registration applications from college students as violating

the Constitution, Section 5, and Virginia law.[1382] The suit contended that the city applied standards, as well as a presumption of non-residency, to students that were not applied to other applicants. The court denied relief in time for the May city council elections, precluding Saunders' city council bid, but the registrar permitted Saunders and another student to register in October 2004, and the case was dismissed as essentially moot.

Students have a relatively low level of participation in the electoral process. The registrar's treatment of students in Williamsburg helps explain why.

Texas

Prairie View, Texas Chapter of NAACP v. Kitzman

Prairie View, Texas Chapter of NAACP v. Waller County Commission

Prairie View A & M University (PVAMU) is a historically black college located in Waller County, Texas, and the only college of any description in the county. Prior to the November 2003 election, the Waller County district attorney published a letter to the editor in the local newspaper stating he would prosecute any person who voted in county elections who did not meet his definition of a

[1382] Saunders v. Davis, Civ. No. 4:04 CV 20 (E.D. Va.).

resident.[1383] Illegal voting, he noted, was a felony punishable by 10 years imprisonment and a fine of $10,000. The only group in the county he identified as potential illegal voters were students. "Students," he wrote, "do not, on any campus, have lawful rights to a special definition of 'domicile' for voting purposes."

Efforts to deny students at PVAMU the right to vote were not new to Waller County. In 1979, the Supreme Court had affirmed the decision of a lower court that it was unconstitutional for Waller County election officials to deny PVAMU students the same presumption of residency as other members of the Waller County community.[1384] Despite that decision, PVAMU students were indicted in March 1992, for "illegally voting" based on alleged lack of legal domicile. The charges were eventually dropped and the students' arrest records were expunged.

State officials expressed their disagreement with the Waller County district attorney. The secretary of state issued an advisory opinion on January 22, 2004, that "[n]o more or less can be required of college students during the voting registration process than any other Texas voter." The state attorney general also issued an opinion on February 4, 2004, that "students in Texas may no longer be subjected, whether by statute or practice, to any presumption with respect to 'residence' not also applied to all voters in Texas," and that while local prosecutors may investigate

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[1383] Letter to the Editor, Waller Times, November 5, 2003.

[1384] Symm v. United States, 439 U.S. 1105 (1979).

election related crimes, they "are conferred no authority to prevent somebody from registering to vote or to prevent voter registrars from acting on voter registration applications." The Department of Justice weighed in on the matter and wrote a letter to the county district attorney that the "United States fully expects Waller County to abide by the terms and requirements of the permanent injunction ordered by the federal district court."[1385]

Law suits were filed by the local chapter of the NAACP and students at PVAMU, represented by the Lawyers' Committee for Civil Rights Under Law, and assisted by the ACLU, to allow them to vote in the 2004 election "free from threat of improper prosecution."[1386] Given the unambiguous position taken by the state, the law suit was quickly settled and Waller County election officials were required to apply the same presumption of residency to students as to nonstudents. The county district attorney even agreed to have a university student serve as liaison to his office.

[1385] Joseph D. Rich, Chief, Voting Section, to County District Attorney Oliver S. Kitzman, January 24, 2004.

[1386] Prairie View Chapter of NAACP v. Kitzman, No. H-04-459 (S.D.Texas), and Prairie View Chapter of NAACP v. Waller Countv Commission, No. H-04-0591 (S.D.Texas).

INDEX OF CASES

Those cases that appear with an asterisk were either brought, or participated in, by the ACLU Voting Rights Project, and were either filed or continued after June 29, 1982, the date of the last reauthorization of the expiring provisions of the VRA.

APPENDIX A
The Permanent & Expiring Provisions of the VRA

Reauthorization of the 1965 Voting Rights Act: What Expires & What Does Not

In August 2007, three crucial sections of the Voting Rights Act will expire unless Congress votes to renew them. These include:

- Section 5 - The requirement that states and local jurisdictions with a documented history of discriminatory voting practices and low voter participation submit planned changes in their election laws or procedures to the U.S. Department of Justice or the District Court in Washington, D.C. for preclearance. A bipartisan Congressional report in 1982 warned that without this provision, discrimination would reappear "overnight."

- Section 4(b) – The specific "coverage formula" which defines which jurisdictions are subject to, or "covered by," Section 5 and other provisions of the act.

- Section 203 – The requirements that certain American citizens who are limited in their ability to speak English can receive assistance when voting.

- The authority to send federal examiners and observers to monitor elections.

These provisions are explained in greater detail, below:

THE VRA 0F 1965: WHAT DOES EXPIRE

1. Section 4 Coverage Formula, 42 U.S.C. § 1973b

Section 4(b) of the Act, 42 U.S.C. § 1973b(b), contains a formula defining jurisdictions subject to, or "covered" by, special remedial provisions of the Act. The special provisions are discussed below. Jurisdictions are covered if they used a "test or device" for voting and less than half of voting age residents were registered or voted in the 1964, 1968, or 1972 presidential elections.[1387] Coverage is determined by the

[1387] The 1975 Amendments to the Voting Rights Act, modified the formula slightly, stipulating that the rates of voter registration and turnout during the 1972 Presidential election should be measuredas a function of voting age citizens, rather than residents.

Attorney General and the director of the census, and is not judicially reviewable. Coverage, and with it the application of the special provisions, is set to expire in August 2007.

2. Section 5 Preclearance, 42 U.S.C. § 1973c

Section 5, 42 U.S.C. § 1973c, know as the "preclearance" requirement, is one of the special provisions of Act whose application is triggered by the coverage formula in Section 4(b). Section 5 requires covered jurisdictions to get approval, or preclearance, from federal authorities (either the attorney general or the federal court for the District of Columbia) prior to implementing any changes in their voting laws or procedures. The jurisdiction has the burden of proving that a proposed change does not have the purpose and would not have the effect of denying or abridging the right to vote on account of race or color or membership in a language minority. Jurisdictions covered by Section 5 are: Alabama, Alaska, Arizona, California (5 counties), Florida (5 counties), Georgia, Louisiana, Michigan (2 towns), Mississippi, New Hampshire (10 towns), New York (3 counties), North Carolina (40 counties), South Carolina, South Dakota (2 counties), Texas, Virginia. U.S. Department of Justice, Section 5 Covered Jurisdictions (January 28, 2002). Section 5, unless extended, will expire in August 2007.

3. Assignment of Federal Examiners and Poll Watchers by the Attorney General, 42 U.S.C. §§ 1973d, e, f & k

The attorney general can assign federal examiners to covered jurisdictions pursuant to Sections 6(b), 7, 9, and 13(a) of the Act, 42 U.S.C. c § 1973d, e, and k, to list qualified applicants who are thereafter entitled to vote in all elections. The attorney general is also authorized by Section 8 of the Act, 42 U.S.C. § 1973f, to appoint federal poll-watchers in places to which federal examiners have been assigned. These provisions are set to expire in August 2007.

4. Bilingual Voting Materials Requirement, 42 U.S.C. § 1973aa-1a

Certain states and political subdivisions are required by 42 U.S.C. § 1973aa-1a to provide voting materials in languages other than English. While there are several tests for "coverage," the requirement is imposed upon jurisdictions with significant language minority populations who are limited-English proficient and where the illiteracy rate of the language minority is higher than the national rate. Covered jurisdictions are required to furnish voting materials in the language of the applicable minority group as well as in English. Jurisdictions required to provide bilingual election procedures for one or more language minorities include the entire states of California, New Mexico,

and Texas, and several hundred counties and townships in Alaska, Arizona, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, and Washington. 67 Fed. Reg. 48872 (July 26, 2002). The bilingual voting materials requirement is scheduled to expire in August 2007.

THE VRA 0F 1965: WHAT DOES NOT EXPIRE

1. The Ban on "Tests or Devices," 42 U.S.C. § 1973aa

The Voting Rights Act, 42 U.S.C. § 1973aa, bans the use of any "test or device" for registering or voting in any federal, state, or local election. A "test or device" includes literacy, understanding, or interpretation tests, educational or knowledge requirements, good character tests, proof of qualifications by "vouchers" from third parties, or registration procedures or elections conducted solely in English where a single language minority comprises more than 5% of the voting age population of the jurisdiction. 42 U.S.C. § 1973b(c) and (f)(3). "Language minorities" are defined as American Indians, Asian Americans, Alaskan Natives, and those of Spanish heritage. 42 U.S.C. § 1973aa-1a(e). The ban on tests or devices is nationwide and permanent.

2. The "Results" Standard of Section 2, 42 U.S.C. § 1973

Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, prohibits the use of any voting procedure or practice which "results" in a denial or abridgement of the right to vote on account of race or color or membership in a language minority. Section 2 applies nationwide and is permanent.

3. Voter Assistance, 42 U.S.C. § 1973aa-6

By amendment in 1982, the Voting Rights Act, 42 U.S.C. § 1973aa-6, provides that any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or union. The voter assistance provision is nationwide and permanent.

4. Court Appointment of Federal Examiners, 42 U.S.C. § 1973a

In any action to enforce the voting guarantees of the fourteenth or fifteenth amendments a court may, pursuant to Section 3(a) of the Act, 42 U.S.C. § 1973a, appoint

federal examiners to register voters. The federal examiner provision is nationwide and permanent, although it is rarely, if ever, used today.

5. Civil and Criminal Penalties, 42 U.S.C. §§ 1973i and 1973j

Sections 11 and 12 of the Act, 42 U.S.C. §§ 1973i and 1973j, authorize the imposition of civil and criminal sanctions on those who interfere with the right to vote, fail to comply with the Act, or commit voter fraud. These provisions are permanent and nationwide.

6. Pocket Trigger, 42 U.S.C. § 1973a(c)

Section 3(c) of the Act, 42 U.S.C. § 1973a(c), the so-called "pocket trigger," requires a court which has found a violation of voting rights protected by the fourteenth or fifteenth amendments as part of any equitable relief to require a jurisdiction for an "appropriate" period of time to preclear its proposed new voting practices or procedures. The preclearance process provided for in § 1973a(c) is similar to that described in the discussion below of Section 5 of the Act, 42 U.S.C. § 1973c. There is no expiration date for the pocket trigger.

7. Presidential Elections, 42 U.S.C. § 1973aa-1

By amendments in 1970, Section 202, 42 U.S.C. § 1973aa-1, the Act abolished durational residency requirements and established uniform standards for absentee voting in presidential elections. These provisions are permanent and nationwide.

END

APPENDIX B

States Covered Under Special Provisions of the VRA

While most of the Voting Rights Act is permanent, the expiring provisions of Section 5 and Section 203 apply to only certain jurisdictions. A total of 36 states are covered under these provisions, which Congress must vote to renew before they expire in August 2007:

Section 5: Preclearance

Nine States With Complete Coverage:

1. Alabama
2. Alaska
3. Arizona
4. Georgia
5. Louisiana
6. Mississippi
7. South Carolina
8. Texas
9. Virginia

Seven States With Partial Coverage

1. California: 4 out of 58 counties
2. Florida: 5 out of 67 counties
3. Michigan: 2 townships
4. New Hampshire: 10 towns and townships
5. New York: 3 out of 63 counties
6. North Carolina: 40 out of 100 counties
7. South Dakota: 2 out of 66 counties

Section 203: Language Minority Provisions

Approximately 500 Local Jurisdictions Across 31 States are Covered:

Alaska, Arizona, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Washington State.

10 States have overlapping coverage under Sections 5 and Section 203:

1. Alaska
2. Arizona
3. California
4. Florida
5. Louisiana
6. Michigan
7. Mississippi
8. New York
9. South Dakota
10. Texas

For a more detailed listing see: http://www.votingrights.org/states

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APPENDIX C

American Indian Populations & Coverage Under Section 5 & 203

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

State	Jurisdiction Covered by Sec. 203	Covered by Sec. 5
1. Alaska	6 census areas or boroughs (Bethel, Dillingham, Kenai, North Slope, Wade Hampton, Yukon-Koykuk)	All (6)
2. Arizona	9 counties (Apache, Coconino, Gila, Graham, Maricopa, Navajo, Pima, Pinal, Yuma	All (9)
3. California	2 counties (Imperial and Riverside)	None
4. Colorado	2 counties (La Plata, Montezuma)	None
5. Florida	3 counties (Broward, Collier, Glades)	Collier (1)
6. Idaho	5 counties (Bannock, Bingham, Caribou, Owyhee, Power)	None
7. Louisiana	1 parish (Allen)	All (1)
8. Mississippi	9 counties (Attala, Jackson, Jones, Kemper, Leake, Neshoba, Newton, Scott, Winston)	All (9)
9. Montana	2 counties (Big Horn and Rosebud)	None
10. Nebraska	1 county (Sheridan)	None
11. Nevada	5 counties (Elko, Humbolt, Lyon, Nye, White Pine)	None
12. New Mexico	11 counties (Bernallilo, Catron, Cibola, McKinley, Rio Arriba, San Juan, Sandoval, Sante Fe, Socorro, Taos, Valencia)	None
13. North Carolina	1 county (Jackson)	Jackson (1)

State	Jurisdiction Covered by Sec. 203	Covered by Sec. 5
14. North Dakota	2 counties (Richland and Sargent)	None
15. Oregon	1 county (Malheur)	None
16. South Dakota	18 counties (Bennett, Codington, Day, Dewey, Grant, Gregory, Haakon, Jackson, Lyman, Marshall, Meade, Mellette, Roberts, Shannon, Stanley, Todd, Tripp, Ziebach)	Shannon, Todd (2)
17. Texas	2 counties (El Paso and Maverick)	All (2)
18. Utah	1 county (San Juan)	None
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	81 Local Jurisdictions	31 currently covered

APPENDIX C - Continued

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

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