

The Unintended Consequences of Section 5 of the Voting Rights Act

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Acknowledgments

This monograph is an imperfect and incomplete attempt to show, through a series of vignettes, how one of the most significant laws passed during the twentieth century has, in practice, come to have effects very different from—and often quite opposed to—those originally intended. Many scholars and attorneys have produced superior works that have had a major influence on the writing of this monograph. Abigail Thernstrom, in particular, was one of the first to recognize the problems that the Voting Rights Act has brought. Her scholarship has been invaluable.

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Introduction

A Noble Beginning

On August 6, 1965, President Lyndon Johnson's motorcade left the White House a few minutes before noon and headed toward Capitol Hill. With him in his limousine were his daughter Luci and a few of his closest advisors, including Joe Califano, his domestic policy advisor, and Marvin Watson, his chief of staff. Johnson was on his way to sign the Voting Rights Act, a bill he would later identify as the most important legislation of his political career.¹

The bill was born from the bloodshed that took place five months earlier when six hundred peaceful black protestors marching for the right to vote attempted to cross the Edmund Pettus Bridge in Selma, Alabama. As they started to cross, a regiment of state troopers descended upon them with clubs and tear gas, hitting men and women alike in an orgy of violence. Broadcast throughout the country on the network evening news, images of the incident stirred the soul and conscience of the nation.

In his White House diary, Johnson noted that he arrived at the House of Representatives side of the Capitol building and went immediately to the Speaker's chambers, where he was met by House and Senate leaders.² From there, with his daughter on his right and Vice President Hubert Humphrey on his left, he entered the Capitol rotunda to deliver what some consider the most momentous speech of his administration. It probably wasn't lost on anyone in attendance that day that a bust of Abraham Lincoln was positioned directly behind the president's left shoulder as he spoke. Johnson never mentioned Lincoln, but it would have been appropriate if he had. Johnson's speech, like many of Lincoln's, was suffused with tones of struggle, hope, and redemption.

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The speech marked the fulfillment of a vision Johnson had from his days in the Senate: the enfranchisement of blacks in the Deep South. Dick Goodwin, a White House aide, remembered that in early 1964 Johnson told him he intended to pursue a broad civil rights agenda once he was elected president: “In the Senate I did the best I could. But I had to be careful. I couldn’t get too far ahead of my voters. Now I represented the whole country, and I have the power. I always vowed that if I ever had the power I’d make sure every Negro had the same chance as every white man. Now I have it. And I’m going to use it.”³

Johnson’s speech lasted a little over twenty minutes, and from the opening sentence those in attendance knew that politics in the South would never be the same. He began: “Today is a triumph for freedom as huge as any victory that has ever been won on any battlefield.”⁴

For Johnson, this was not hyperbole. The promise of the Fifteenth Amendment—the freedom to vote regardless of race, color, or previous condition of servitude—had been denied to blacks since the end of the Civil War. And so, as Johnson and his supporters in Congress saw it, the Voting Rights Act was the last battle of that horrible conflict: “It was only at Appomattox, a century ago, that an American victory was also a Negro victory. And the two rivers—one shining with promise, the other dark-stained with oppression—began to move toward one another.”⁵

Congress had taken only four months to debate and enact the legislation. The act was conceived shortly after the 1964 election, when Johnson instructed his attorney general, Nicholas Katzenbach, and others to write the “goddamndest” Voting Rights Act they could devise.⁶

Johnson explained that the

heart of the act is plain. Wherever, by clear and objective standards, states and counties are using regulations, or laws, or tests to deny the right to vote, then they will be struck down. If it is clear that state officials still intend to discriminate, then federal examiners will be sent in to register all eligible voters . . . And under this act, if any county anywhere in this nation does not want federal intervention it need only open its polling places to all of its people.⁷

Near the end of his speech, Johnson spoke to the South. Without actually making a direct reference to Southerners, he recognized that there were some vehemently unsupportive Americans who wanted to maintain the status quo, noting,

There is always room for understanding toward those who see the old ways crumbling. And to them I say simply this: it must come. It is right that it should come. And when it has, you will find that a burden has been lifted from your shoulders, too.⁸

After he concluded his remarks, Johnson walked to the President's Room, a small, ornately furnished chamber where, exactly 104 years earlier, Abraham Lincoln had signed a bill granting freedom to all slaves who had been forced into the military service of the Confederacy. Johnson sat at the desk in the middle of the room and signed the bill; he gave the first pen to the vice president and the second one to Senator Everett Dirksen, the GOP minority leader who played a pivotal role in the bill's fate by cajoling thirty-one of the chamber's thirty-two Republican senators to support its passage.

The *New York Times* carried seven stories about the Voting Rights Act the next day, one of which best encapsulated the real significance of the act: "Vast Rise Is Seen in Negro Voting; Rights Leaders Expect Up to a Million to Join Rolls."⁹ The story proved to be remarkably accurate.

The individuals in the Johnson administration who painstakingly crafted the Voting Rights Act of 1965 had one central objective: ending the barriers to voting for millions of blacks living in southern jurisdictions. The act successfully accomplished this by banning literacy tests, providing federal voting registrars, and criminalizing harassment of black voters in targeted jurisdictions.

Although parts of the act apply to the entire nation and are permanent, the unique oversight provisions of the Voting Rights Act were specifically aimed at those (mostly southern) jurisdictions where blacks had encountered the most pernicious obstacles to registration. These "emergency"

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oversight provisions, however, were to be temporary—set to expire after five years. Congress and the Johnson administration understood they were on shaky legal ground here. After all, shifting election procedural control from the states to the federal government was an unprecedented—and perhaps unconstitutional—extension of federal authority.

The trigger mechanism in the statute for identifying recalcitrant jurisdictions was Section 4. It swept in any state or county which used a voting test or device such as a literacy test on November 1, 1964, and in which less than 50 percent of the persons of the voting-age population were registered to vote. This brought all of seven states (Alaska, Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia) and parts of four others (Arizona, Hawaii, Idaho, and North Carolina) into oversight coverage.¹⁰

Once the problem jurisdictions were identified, Section 5 of the act forbade them from enacting any change to voting standards, practices, or procedures without the consent of officers in one of two branches of the federal government—either the U.S. attorney general or the District Court for the District of Columbia. It made perfect sense then to include this “preclearance” provision in the act, given the long history of southern chicanery in avoiding the earlier orders of federal judges to register black voters.

Despite remarkable achievements, the act has always had its critics. From the day President Johnson signed it into law, litigants have challenged some of the its key provisions as violative of the Constitution. Although all of the early constitutional challenges were unsuccessful, one case, *South Carolina v. Katzenbach*, filed in 1966, highlighted some of the legal tensions between the act and principles of traditional federalism.

In *Katzenbach*, the state of South Carolina claimed that Section 5 of the Voting Rights Act was an illegal encroachment on prerogatives the Constitution reserved for the states.¹¹ This was not a frivolous claim then, nor is it laughable today. Many legal observers noted that Section 5 was a significant departure from the way responsibilities between the federal and state governments were allocated at the time the Constitution was ratified. Section 5 did something no other bill in the history of the nation had ever done before: For a limited period of time, it required every political subdivision targeted by the act to get permission from the federal government before any change to election procedures could take place. In other words, the federal government was no longer limited to challenging in the courts a

racially discriminatory change in election procedures or practices after it had gone into effect; the federal government now had the power to prevent such changes from going into effect at all.

In *Katzenbach*, the Supreme Court upheld the constitutionality of Section 5 by a vote of eight to one, noting that while Section 5 “may have been an uncommon exercise of congressional power,”¹² there are times and conditions that can warrant such oversight, such as the purposeful denial by government actors of eligible citizens’ right to vote for no other reason than their race. Nonetheless, Justice Hugo Black—a liberal Southerner—dissented in the case by observing that, with Section 5, “some of the States cannot pass state laws or adopt state constitutional amendments without first being compelled to beg federal authorities to approve their policies, [and this] so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless.”¹³ Significantly, one of the reasons the Court cited in upholding Section 5’s constitutionality was its limited lifespan.

Probably all nine justices, including Justice Black, would be amazed at how far Black’s native South has come since 1965 in racial attitudes and in the political position blacks have attained. Throughout the Section 5 jurisdictions originally targeted by the Voting Rights Act (and the states and counties subsequently added in later years), blacks are now an integral part of our participatory democracy—not only as equal participants in elections, but also as elected members of school boards, as county commissioners and statewide officeholders, and as members of the U.S. Congress. Georgia congressman John Lewis, the iconic civil rights hero of the 1965 Selma march, said it best:

We have changed. We have come a great distance . . . It’s not just in Georgia, but in the American South. I think people are preparing to lay down the burden of race . . . There has been a transformation. . . . It’s altogether a different world.¹⁴

Yet as the American South continues to lay down the burden of race and integrate blacks fully into its political life, the key provisions of the Voting

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Rights Act to enfranchise blacks are stuck in a 1965 time warp. Today, in virtually all of the jurisdictions now covered by Section 5, blacks register to vote and participate in elections in numbers equal to—and often exceeding—those of white voters.¹⁵ Black candidates typically receive at least one-third of their votes from white voters; and, in Texas and Georgia, for instance, blacks and Hispanics are regularly elected to statewide office with majority white support. No longer do whites regularly vote together as a block to defeat black candidates. Moreover, black and Hispanic candidates, like white candidates, almost always succeed or fail based on their partisan affiliation, and very rarely because of their race.

Not only have racial attitudes dramatically changed for the better since the Voting Rights Act's passage, but by the late 1980s three unforeseen events were turning the VRA on its head.

The first was the development of powerful and affordable microprocessors that allowed computer software companies to create programs that combined geographic mapping information with U.S. Census and other political data. This meant that an individual drawing a voting district could touch a computer screen with a stylus and instantly get information never before available. Now a computer could display the racial and ethnic makeup of any census block in the country and recreate how these census blocks voted in dozens of previous elections. This facilitated the creation of voting districts constructed with extremely small units of race-specific geography strung together over disparate land areas—in other words, racial gerrymandering.

The second development was the acceleration of suburban population growth throughout the nation. In covered jurisdictions like Dallas, Houston, Atlanta, Charlotte, and Richmond, to name just a few, blacks and Hispanics had begun to move out of homogeneous ghettos and barrios and into more multiracial suburban neighborhoods. U.S. Census Bureau data confirm that, regardless of how one chooses to measure residential segregation, there has been a clear trend toward lower residential segregation for blacks in particular throughout most major urban centers.¹⁶

Finally, the amendments to the VRA and legal developments since its passage made this once simple law into something increasingly muddled and contradictory. Congress amended the act in 1970, 1975, and 1982, causing other minority groups to fall within federal oversight and thus

extending Section 5's preclearance requirements to places like New York City and even a few small townships in New Hampshire.¹⁷ Meanwhile, the Supreme Court's VRA jurisprudence evolved away from protecting the rights of individuals, and instead began promoting the electoral effectiveness or "fair representation" of racial and ethnic groups. This had the effect of protecting minority incumbents rather than the voting rights of minority voters, and expanding the preclearance provision to virtually all election procedures and practices.

Added together, these three developments transformed the Voting Rights Act and ensured that it would have significant unintended consequences. What began in 1965 as a shield to protect the right to vote for blacks in the Deep South, by 1982 had become a sword to create favorable election outcomes for minority office-seekers. In less than twenty years, the VRA evolved into a means for engineering election outcomes in which minority voters elect minority candidates in proportion to their percentage of the population, free from the hassle of forming multiracial coalitions. Simply put: The quest to achieve racially proportional representation resulted in racially gerrymandered voting districts.

Congress, the courts, and both Republican and Democratic administrations share the blame for this transformation. "The Voting Rights Act, as properly interpreted, should encourage the transition to a society where race no longer matters: a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life," Justice Sandra Day O'Connor wrote in a 2003 voting rights case, *Georgia v. Ashcroft*.¹⁸ Sadly, however, the VRA today thwarts the achievement of this goal. It is less of a law to protect individuals' right to vote and more of a gerrymandering tool to further the electoral prospects of incumbent politicians of all races. Over the years, the Department of Justice and the courts have strip-mined the VRA into a shell of its original design by requiring the maximization of blacks and Hispanic representatives in strict proportion to their percentages in the general population.

Lyndon Johnson's proudest legislative achievement has degenerated into an unworkable, unfair, and unconstitutional mandate that is bad for our two political parties, bad for race relations, and bad for our body politic.

This monograph attempts to make the case that Section 5—that temporary, emergency provision of the Voting Rights Act—is now inhibiting, among other things, the nation’s racial “integration and color-blindness” in voting.¹⁹ But, for different reasons, both Democratic and Republican politicians have grown comfortable with the status quo of Section 5 and are reluctant to let it expire. Indeed, on July 20, 2006, Congress reauthorized Section 5 for another twenty-five years, and President Bush enthusiastically signed this extension into law one week later.²⁰ This is too bad, because its effects are both silly and pernicious.

Since its passage, innumerable law review articles, social science studies, magazine essays, and books about various aspects of the Voting Rights Act have been written. But here we approach the topic in a way different from past efforts. Rather than focusing on the forty-plus years of VRA case law or analyzing the act’s legislative history, this book highlights the real-world consequences of Section 5. It presents case studies from four jurisdictions that must comply with Section 5: the states of Texas and Arizona; Cumberland County, Virginia; and the town of North, South Carolina. It is my hope that these four narratives will reveal how Section 5 of the VRA has

- caused minority voters to become pawns in partisan redistricting battles;
- diminished competitive elections, resulting in safe-seats-for-life for incumbents of both parties;
- driven the creation of bug-splat-like voting districts that split apart geographic communities of interest;
- contributed to the ideological polarization of voting districts by insulating white Republican officeholders from minority voters and issues specific to minority communities and, conversely, minority elected officials from white voters;
- wasted huge amounts of state and local governments’ time and money; and

- resulted in the improper wielding of enormous power in the cause of racial proportionality by the voting section of the Department of Justice.

Chapter 1 is a case study of how the Voting Rights Act affected congressional redistricting in Texas in 1991, when the Democrats controlled the legislature and the governor's mansion, and in 2001, when Republicans controlled them. It makes clear how both parties have figured out how to transform the VRA into a partisan political weapon that guarantees racialization and litigation in redistricting. In this chapter, and in chapters 2 and 3, I draw on extensive personal interviews with state and local officials and others involved in politics at the grassroots level.

Chapter 2 tells the story of how compliance with Section 5 of the Voting Rights Act thwarted the efforts to create competitive election districts in Arizona in 2001.

Chapter 3 uses the example of two small jurisdictions in the South to examine how Section 5 is administered by an ideologically driven voting section at the Department of Justice, resulting in unnecessary legal burdens for financially strapped cities and counties.

The conclusion offers some additional observations, especially in light of Congress's reauthorization of Section 5 in 2006. Finally, I include an appendix that examines all of the original provisions of the Voting Rights Act, with an emphasis on Section 5, and briefly describes the amendments of 1970, 1975, 1982, and 2006. In addition, it highlights important Section 5 and constitutional Supreme Court cases that have contributed to the act's evolution.

1

Texas Now and Then: How Both Parties Use the Voting Rights Act for Partisan Ends—and Make Messy Politics Even Messier

State Senator Eddie Bernice Johnson and U.S. Congressman Martin Frost, both Democrats from Dallas, knew that a political showdown between them was imminent after the Census Bureau released its population data for 1990. The astonishing numbers showed that Texas had grown so rapidly during the 1980s, despite the collapse in oil and real estate, that it was going to be reapportioned three new congressional districts, bringing its total U.S. House delegation to thirty members, behind only California's fifty-four and New York's thirty-one.¹

“Eddie Bernice,” as she was known by her senate colleagues, was a black nurse who began her career working in a Veterans’ Administration hospital psychiatric ward. She thought she should have had a congressional district drawn for her from Dallas’s large black community ten years earlier, during the congressional reapportionment of 1981, but had run into a brick wall built by a nearby incumbent, Congressman Martin Frost. Frost, a Jewish technocrat trained at Georgetown University Law School, needed those black democratic voters in his district—not hers—to protect him from a well-financed Republican challenge in the GOP-trending Dallas-Fort Worth metroplex. So Eddie Bernice waited not so patiently in the Texas senate until the next round of redistricting in 1991.

Now things were coming to a head. Even though Frost had spread around hundreds of thousands of dollars in campaign contributions to friendly Texas state legislators to protect his district from competition during

redistricting, Eddie Bernice wasn't about to let him thwart her ambition again.² She had fought hard to become the chairperson of the state's senate congressional redistricting subcommittee, she was going to get a new black congressional district drawn in Dallas, and she was going to represent it.

So it was no surprise to her fellow legislators that the first congressional district map Eddie Bernice drew for herself during the legislative session of 1991 was 50 percent black and 15 percent Hispanic, and that much of it overlapped her current senate district lines. And once Frost had a look at what Eddie Bernice had done to *his* district, he knew he was going to lose the 1992 election unless he could find a way to get some of those black voters back into it.³ President Bush had beaten Democratic presidential nominee Michael Dukakis by twelve points in 1988 in the district Eddie Bernice had drawn for Frost—clearly a GOP district if ever there was one. The release of that map triggered the war between these veteran Democrats, with Frost and Johnson fighting over black neighborhoods, precinct by precinct, street by street.

As it turned out, however, Eddie Bernice had two trump cards in this high-stakes game: her race and the federal Voting Rights Act. In the end, Eddie Bernice came away with the lion's share of black voters in Dallas because she had an unlikely ally, namely George H. W. Bush's Department of Justice (DOJ), whose assistant attorney general for civil rights, John Dunne, ordered his voting section to push a dozen or so states into "max-black" redistricting schemes, just like the one Eddie Bernice was proposing.⁴ She and others told Frost that they had it on authority from the voting section that her 65 percent minority district was a *requirement*. That is, unless Texas drew such an ultrasafe majority-minority district in the Dallas area that it was all but guaranteed to elect a black representative, the DOJ wouldn't grant it "preclearance," the Holy Grail provision of the 1965 Voting Rights Act that requires Texas and certain other jurisdictions around the country to get permission from the federal government before they can make any election-related changes.⁵ According to Eddie Bernice, the Voting Rights Act mandated that she get a seat in Congress.

A truce between Frost and Johnson was finally brokered when Lieutenant Governor Bob Bullock—a chain-smoking protégé of LBJ—started swapping whites, blacks, and Hispanics among all the Dallas-area Democrats. Eddie Bernice gave up most of the Hispanics in her district, and Frost

harvested some blacks out of Fort Worth and a few white Democrats here and there to ensure his reelection. When it was all over, a three-judge panel of federal judges—assembled to hear a lawsuit brought by disgruntled Republicans over the district lines—said the shape of the new Thirtieth Congressional District resembled “a microscopic view of a new strain of disease.”⁶ Even though this was considered one of the most bizarrely shaped congressional districts in the country, the GOP lawsuit was unsuccessful in part because they argued the plan was a political gerrymander that did not produce enough minority districts.

Meanwhile, two hundred miles south in Houston, another war had broken out between aspiring Democrats—and once again the role of race, and the VRA, would prove decisive. This fight pitted Gene Green, a white moderate state senator, against Roman Martinez, a Hispanic state representative who was a member of the state redistricting committee. Both Green and Martinez had their eyes on another new “required” congressional district—this one to be drawn for Hispanics in sprawling Harris County.⁷ And just as in Dallas it had demanded a new district for blacks, the Voting Section at the DOJ was also demanding that the state create a new Hispanic district—two, actually: one in Houston, and another one near the Mexican border.⁸

But while Johnson and Frost each wanted more minorities in their separate, respective districts, Martinez and Green were fighting over the same district, and they did not both view minority voters the same way.⁹ During this skirmish, Martinez publicly pledged that Hispanics “are going to come out of this a lot better than we did 10 years ago,” when the efforts to create a Hispanic congressional district failed. Martinez boldly told the press that Houston was going to have a Hispanic congressional district, and that it was going to be represented by a Hispanic.¹⁰ Green, meanwhile, quietly marshaled his legislative allies to limit the number of Hispanics to be placed in the new district. Both men knew that nearly one-half of Houston-area Hispanics were ineligible to vote, and the remaining ones had extremely low voting registration rates. So if the new district was at least one-third white, Green knew he had a good chance of winning it.¹¹ Watching all of this infighting from Washington, D.C., was white Democratic congressman Mike Andrews, part of whose Houston-area Twenty-Fifth Congressional District was being lopped off to create this new Hispanic district, with race also being

used to maintain the nearby black district once represented by Barbara Jordan. Further cause for Andrews to be anxious was a suggestion by Ron Wilson, a black state representative with congressional ambitions, that a second black Houston-area district should be drawn mostly out of Andrews's district.¹²

Another truce was brokered by Lieutenant Governor Bullock, resulting in, among other things, a new Hispanic district that was 61 percent Hispanic, 10 percent black, and 33 percent white. The district was so convoluted in shape—as it attempted to include Hispanics, but not neighboring blacks or too many working-class whites—that a writer for the *Houston Chronicle* likened its shape to the winged Aztec god Quetzalcoatl.¹³

When the dust settled on Election Day in 1992, Frost and Johnson were both elected, as was every incumbent Republican and Democrat throughout North Texas. Green, who had managed to squeak by Hispanic Houston city councilman Ben Reyes in the Democratic primary runoff election, won the general election, as did Andrews and Houston's black congressman, Craig Washington. In fact, every incumbent representative throughout the state was reelected except scandal-plagued Democrat Albert Bustamante, who was defeated by GOP Hispanic Henry Bonilla.

The top officials in the Republican Party in Texas were dejected and angry.¹⁴ They had thought—not unreasonably as the election turned out—that race and the VRA would be their allies, but in Texas things hadn't worked out that way. These DOJ-mandated "max-black" and "max-Hispanic" districts were supposed to pack minorities into such safe majority-minority districts that the surrounding ones, bleached of reliable Democrats, were sure to elect Republicans, especially since Republican candidates were garnering more votes than Democrats throughout the state.¹⁵ However, this theory did not reign true in Texas. The Democrats still controlled the legislature, and with it the ability to draw legislative lines to protect Democratic incumbents.

In the rest of the country, where the GOP had control of more state legislative bodies, the Republicans' VRA theory was working better. Even though Republicans fared badly in the 1992 presidential, gubernatorial,

and U.S. Senate races (where VRA-influenced redistricting didn't matter), they picked up ten new seats in the House (where it did). "Max-black" had worked its charm for the Republican Party in six districts in the Deep South, two of which were in Georgia, the epicenter of future litigation over the constitutionality of "max-black" redistricting. In all, a net of thirteen new blacks were elected to Congress in 1992, the largest increase since Reconstruction, bringing the total of black Representatives to thirty-nine. Hispanics, meanwhile, also dramatically increased their numbers in Congress to a total of seventeen representatives, up from ten.¹⁶

The 1994 election results two years later were much more favorable for the GOP, with Republicans taking control of the U.S. Senate and House for the first time in forty years. But nowhere were the GOP gains as dramatic as in the South, specifically in those states like Texas that had to "preclear" their redistricting schemes with the federal government. Granted, President Clinton and his policies were particularly unpopular in the steadily-trending-Republican South, so some Republican gains were to be expected. But the GOP gained a whopping sixteen House seats there, giving them virtual parity with the Democrats, a result simply unthinkable a few years earlier.

Back in Texas, the courts worked throughout the 1990s and into the new decade to sort out the many challenges to its redistricting schemes brought under the authority of the Voting Rights Act.¹⁷ For example, in 1991, even before a redistricting plan had been proposed, Hispanics sued the state, claiming that minorities had been undercounted during the 1990 census.¹⁸ While that case was being litigated in a South Texas state court, Republican legislators filed three separate federal lawsuits, claiming that the new legislative and congressional districts were in violation of the Voting Rights Act.¹⁹ The GOP plaintiffs in these cases argued that the legislature hadn't created enough safe black and Hispanic districts. Finally, in 1994—after the legislature produced a redistricting plan for the state, and an election was held using these new lines—a group of grassroots activists sued the state, claiming their constitutional rights had been violated because the new lines separated voters on the basis of race.²⁰ As new lawsuits were being filed, and old ones were being won or lost, dismissed outright, or combined with others, the Voting Rights Act was cited by each and every litigant as a key authority for their complaints.²¹

The 1994 litigation challenging the constitutionality of the 1991 Texas map—one of the most creative racial gerrymanders anywhere in the country, according to the *Almanac of American Politics*²²—was eventually resolved by the U.S. Supreme Court, and new lines were drawn by the lower court that remained in effect until 2001.²³ Since the new court-drawn lines were not very different from the ones passed by the legislature, by decade's end the Democrats still controlled nineteen of the thirty seats, making Texas one of the last bastions of Democratic strength in the South and Southwest.

Then, all that changed in 2003.

Try as they might, Republicans could not wrest control of the Texas legislature from the Democrats until 2002, too late, seemingly, to do anything about the congressional lines already set in place in 2001. Texas had been reapportioned two new congressional seats after the 2000 census; however, because the legislature was unable to produce a congressional plan, once again the courts were called on to do the line-drawing—thanks to the Voting Rights Act.

The redistricting map the court produced was more than the GOP leadership could stomach.²⁴ Although the two new congressional seats were drawn as solid Republican-leaning ones, every other Democratic incumbent was returned to office in 2002. Even though the Republican Party swept all twenty-seven statewide contests, not a single statewide-elected Democrat was left in office. Texas was perhaps the reddest of the red states in the whole country, but in Congress the Democrats had seventeen seats and the Republicans only fifteen.²⁵

When the GOP-dominated legislature was called into regular session in early 2003, rumors were circulating that congressional redistricting would be on the agenda near the end of the five-month session. Indeed, it didn't go unnoticed that legislators were spending an inordinate amount of time drawing districts on their personal laptops during debates on other bills. The technology had become so powerful during the last decade that an ordinary laptop could produce redistricting plans with ease; no longer was it necessary to make an appointment at the cave-like offices of RDAPPL

(pronounced: red apple)—the acronym for the Redistricting Application software company—in order to draw districts.²⁶

When U.S. House Majority Leader Tom DeLay, a ten-term Texas Republican from Sugar Land, Texas, was quoted as having a commitment from Texas House Speaker Tom Craddick and Lieutenant Governor David Dewhurst to bring a new congressional redistricting bill to the floor of both chambers for a vote that session, Martin Frost must have known he was doomed. Because he had seniority in the Democratic Party leadership and was a prodigious fundraiser, he had a bull's-eye on his back, and everyone knew it. The only way for the Democrats to stop a new congressional plan from going forward was to deny the legislature a quorum—they knew they did not have the votes to stop it legislatively.²⁷

So about fifty Democrats denied the legislature its quorum by hiding in a suite of rooms at the Holiday Inn across the state border in Ardmore, Oklahoma, nearly three hundred miles north of Austin, and returning by chartered bus only when it was clear that redistricting was off the table for the regular session of the legislature. Undaunted, Governor Rick Perry called a second and then a third special legislative session on congressional redistricting, both of which were quickly labeled an attempt to “Perry-mander” the state.²⁸

In a last-ditch effort to stop the remap of the state at the third special session, eleven Democratic senators went AWOL again in two chartered planes, camping out in the Marriott Hotel in Albuquerque, New Mexico. Nevertheless, their will broke down after six weeks on the lam when one of their members—Houstonian John Whitmire, soon to be dubbed “John Quitmire”—broke ranks and returned to Austin. His presence on the floor of the Texas senate allowed a quorum to consider a bill. It was all but certain now that the Democrats were going to lose half a dozen congressional seats from Texas in the next election—enough to ensure GOP control of the U.S. House for the rest of the decade.

It did not take long for the lawsuits challenging the new map to be filed, and just as was the case in the 1990s, the 1965 Voting Rights Act was the cited legal authority for the challenge. First, the Democrats claimed that, because state senate rules were changed without permission from the U.S. attorney general or the D.C. District Court during debate on redistricting, the resulting map violated Section 5. Next, they argued that any

mid-decade redistricting attempt required permission from the DOJ even before a plan was produced. The three-judge panel assembled to hear the case disagreed. It wrote that only a redistricting plan actually passed by the legislature is subject to judicial review under the Voting Rights Act: “In the instant case, what will directly affect the voters of this state is a redistricting bill, not the mere consideration of such a bill or the process by which it comes to the floor of the Texas Senate.”²⁹

It was an unwelcome ruling for Frost and the Democrats, but they held out hope that other provisions of the VRA could be used somehow to protect their jobs. In a reference to Texas’s war for independence from Mexico, in which the rebels had lost at the Alamo but ultimately prevailed at San Jacinto, Frost told the press, “It is clear that any of the proposed Republican maps will face intense legal scrutiny and likely be overturned in federal court later this year. This is not the battle of the Alamo. This decision is merely the buildup to the battle of San Jacinto, which we will win later this year.”³⁰

It turned out to be the wrong metaphor. After a lengthy trial in which Frost claimed that Section 2 of the Voting Rights Act—the same section used by Republicans a decade earlier to argue for the creation of *more* minority districts—protected his district from being redrawn into one that could be won by a Republican, the court ruled against Frost and said the new Republican-drawn map was legal.³¹ This was, indeed, the Alamo, since Frost and three other white Democrats lost their seats in the election of 2004. The Texas congressional delegation was now composed of twenty-one Republicans and eleven Democrats.

The next stop for the Democrats was the U.S. Supreme Court.

The Supreme Court took two central issues for review when it agreed to consider the fairness of the Texas congressional remapping. First, did the new plan violate the Constitution because it allegedly configured voting districts for the sole purpose of gaining a partisan advantage? And, second, did the plan violate any of the provisions of the Voting Rights Act?

The controversy over the Texas plan was further inflamed when, a few months before the Court heard oral arguments in the case, a 2003 internal

Department of Justice memo written by career staffers in the voting section of the civil rights division was leaked to the *Washington Post*. Those staffers—five lawyers and two analysts—had concluded that the new Texas plan was in violation of Section 5 of the Voting Rights Act because it “retrogressed”—or, more simply, “diminished”—the electoral position of blacks and Hispanics throughout the state.³² John Ashcroft, then attorney general, and the political appointees in the civil rights division—as well as, incidentally, a career lawyer higher in the chain of command—rejected the memo’s findings and allowed Texas to implement the new plan.³³

The leaked memo received a lot of media play, and there were dozens of indignant editorials and op-eds criticizing the “politicization” of the Bush Department of Justice, with its “end run around the law, around fairness, and around decency.”³⁴ None of the stories and editorials, however, carefully examined the accuracy of the memo. The implication was always that dispassionate, unbiased, white-lab-coat-type civil servants spoke truth to Republican-apparatchik power and were, of course, steamrolled.

On the day of oral argument, the Supreme Court gallery was a “who’s who” of Texas politicians, with only Tom DeLay, the now-indicted “architect” of this redistricting scheme, absent. Early on, it became apparent from the questioning that the Democrats’ claims of political gerrymandering were not going anywhere. On the other hand, Justice Kennedy hinted from his questioning that he might have found a violation of Section 2 of the Voting Rights Act.³⁵

The oral arguments foretold the outcome of the case. The Supreme Court found that only one district—the Twenty-Third Congressional District (CD 23), represented by Henry Bonilla (a Hispanic but, damningly, also a Republican)—was in violation of Section 2. A bare majority of the Court, in an opinion written by Justice Kennedy, found that CD 23 diluted the voting strength of Hispanics, and ordered the state to fix that problem by adding more Hispanic voters into the district. The opinion noted that CD 23 “undermined the progress of a racial group that has been subject to significant voting-related discrimination and that was becoming increasingly politically active and cohesive.”³⁶ On the other hand, the Court found that the redrawn district of Martin Frost was not a violation of the Voting Rights Act, as the internal DOJ memo had asserted. Frost and the plaintiffs had argued that because blacks made up 26 percent of the population of

CD 24, and exerted a pivotal role in the Democrat primary, that district could not legally be made more Republican.³⁷

Tom DeLay paid a steep personal price for his efforts to gain more Republicans in Texas. His fundraising on behalf of GOP legislators in 2002 resulted in his being admonished by the Ethics Committee of the House of Representatives and later indicted on charges of contributing money to the very same state legislators who, once in office in 2003, created the new map. DeLay resigned from the House in 2006, leaving the Republicans unable to field a candidate in time for the November elections. Democrat Nick Lampson, who had lost his East Texas district in 2004 when the DeLay plan was adopted, won the election in DeLay's former district.

There are no good guys or bad guys in this chapter. Texas politicians in both parties did what they do best, or worst: fight for political power, using any weapon at hand. What is bad is that both parties have figured out ways to transform the Voting Rights Act into such a partisan political weapon. As a result, the messy business of politics has gotten even messier, and racial gerrymandering and protracted litigation are now permanent features of the redistricting landscape. This is miles away from what the VRA was designed to do when President Johnson signed it into law in 1965. But the unintended consequences of the Voting Rights Act do not end here. The act has been so distorted that it frequently protects, not minority voters in the Deep South, but incumbent officeholders far afield, blocking good-government efforts such as a citizen initiative in Arizona designed specifically to make elections more competitive. We turn to this phenomenon in the next chapter.

2

Safe-Seats-for-Life in Arizona: Using the Voting Rights Act to Kill Competitive Elections

In 2000, Arizona voters passed Proposition 106, a citizen-led initiative that took legislative redistricting away from incumbent politicians and placed it in the hands of an independent bipartisan commission. The effort to create such a commission was the brainchild of Jim Pederson, a Phoenix-based shopping center magnate, who spent \$600,000 of his own money to promote it. Even though the measure passed comfortably with 56 percent of the vote, some observers were unsure if voters really cared that much about who controlled redistricting, and if instead they were just in a punishing mood over the legislature's handling of an alternative fuels tax incentive. In any event, beginning with the elections of 2002, Arizona joined a small group of states that no longer let legislators draw voting districts.

Pederson's campaign was called "Fair Districts, Fair Elections," and he made no secret of the fact that, as a Democrat in red state Arizona, he and other Democrats had very little chance of success at the ballot box so long as Republicans controlled the redistricting process. The proposition's central theme was the need to create legal, logical, compact, and competitive districts that kept together communities of interest, drawn by "the people" and not "the incumbents." Since it safely controlled the legislature, the Arizona Republican Party naturally hated the idea and raised money in an attempt to defeat it. Even the Republican National Committee got into the fray and sent \$75,000 to the "no" campaign—dubbed, "It's Not Fair."¹ It was money down the drain.

The new entity established to do the line-drawing was called the Arizona Independent Redistricting Commission. It was to be funded by

the legislature with \$6 million and made up of two Republicans and two Democrats, chosen by their party leaders, who would then jointly choose a tie-breaking independent. Even though the commissioners were to be unpaid, hundreds of people wanted to serve.²

One of them was Andi Minkoff, a former high school civics teacher.³ A self-described Democratic political junkie, Minkoff's resume is filled with details of her participation in dozens of volunteer projects, ranging from State of Israel bond drives to emergency medical services for Phoenix. Minkoff's nickname is "Gingi" after the redheaded *Gilligan's Island* character Ginger who, her friends in Israel say, she resembles.

After an intense round of vetting by Democratic Party leaders, Minkoff was chosen to serve as one of the two Democrats on the commission. She was elated. After years of complaining that there was not a viable choice for her at the ballot box in her legislative and congressional districts, she would have an opportunity to do something about it—draw competitive districts where each party had a fighting chance to win an election.

Her elation did not last very long, however. Within a day of her appointment, she got her first ugly dose of racial politics. Word had spread throughout the Hispanic political community that Democratic Party leaders had chosen Minkoff and another white individual—a businessman—to serve on the redistricting committee, thereby disrespecting the party's most reliable voting bloc. Groups including the *Chicanos Por La Causa* and the League of United Latin American Citizens called for Minkoff to resign and began firing off letters to newspapers and flooding the legislature with phone calls, claiming that one-quarter of the state's population had been shut out of the political process. "A sign should be posted on [the commission's] door that reads, 'Whites only,'" said Mary Rose Wilcox, a Hispanic Maricopa County supervisor. "We are asking that the Arizona state government start this process over."⁴

Minkoff was troubled by this criticism, but felt that she could do as good a job fulfilling the mandate of Proposition 106 as anyone. In particular, she believed a commissioner's race and ethnicity were irrelevant to the job at hand. Wilcox and other Hispanic community leaders next wrote to the Justice Department, demanding that it rescind its earlier approval of the creation of the commission, citing the Voting Rights Act. This tactic did not work—at least not yet.⁵

22 UNINTENDED CONSEQUENCES OF SECTION 5

Soon the Republicans had made their two appointments, and the four newly selected partisan commissioners chose a business executive from Tucson—independent Steve Lynn—to be the chairman. The commission hired two lawyers, one Democrat and one Republican, along with a staff and, finally, outside election consultants.

As its first order of business, the commissioners held over thirty public meetings in every corner of the state, soliciting input on how they should go about the job of drawing legislative and congressional district lines. The transcripts of these meetings, along with letters, faxes, and emails from hundreds of citizens, filled up dozens of binders, eight feet high.⁶

The binders would eventually be sent to the voting section of the Department of Justice in Washington, D.C., so it might determine if Arizona had complied with the Voting Rights Act. Arizona had not originally been targeted in 1965, but in 1970, along with Texas and Alaska and a number of counties scattered throughout the country, the state became subject to Section 5, the preclearance provision that requires all covered jurisdictions to seek permission from the Department of Justice or the District Court for the District of Columbia before a redistricting plan can go into effect.⁷

All of the commissioners, regardless of their party affiliation, were truly earnest in their attempt to create the kind of competitive districts mandated by Prop 106. But it became apparent from the beginning of the process that the requirements of the Voting Rights Act were going to be an overwhelming impediment.

For nearly two decades, the application of the Voting Rights Act to redistricting has evolved from being a sword to vindicate minority voting rights to a partisan shield for protecting incumbents. Nowhere is this more apparent than in Arizona.

During the 1990s, when Democrats controlled much of the redistricting in the Deep South and Southwest, it was the Republicans who, believing they were shortchanged their fair share of legislative seats, cited the Voting Rights Act as the basis for their legal challenges. By 2000, however, the tables had been turned. Now the Republicans controlled most southern and southwestern

legislatures, and it was the Democrats who rallied behind the Voting Rights Act in dozens of courtrooms in an attempt to hold on to their seats.

Arizona's new state constitutional requirement to create as many politically competitive districts as practicable hit a legal brick wall almost from the beginning. The experts the commission hired to construct these districts, and the attorneys who kept a watchful eye on the VRA, kept reminding the commissioners that the retrogression and vote-dilution standards of the Voting Rights Act must not be violated, or lawsuits would be inevitable.

As it happened, even before the congressional map was released to the public, incumbent Phoenix congressman Ed Pastor, a popular Hispanic Democrat who represented the fourth district, threatened to file a VRA lawsuit and protest to the DOJ over rumored changes to his district. Pastor was reacting to the possibility that the percentages of Hispanics in his district would be reduced in order to create a new Democratic-leaning "downtown" district that the commission thought would add greater balance to the Arizona congressional delegation.⁸

The downtown district's biggest promoter was Democratic state senator Ken Chevont, a gay rights activist whose senate district covered much of the same area as Pastor's and who wanted to have a congressional district he could run in. Yet even though the creation of a downtown district might have meant another Democrat in the U.S. House, Pastor hated the idea, since the loss of Hispanic voters in his district might jeopardize his own job.⁹

So did the Arizona Republican party leadership, which wanted to move as many Hispanics into Pastor's district as possible, so as to keep the surrounding districts as white and safely Republican as it could.¹⁰ Congressman Pastor had Danny Ortega, his longtime lawyer, spread the word that he would object to the DOJ and file a lawsuit if the Hispanic percentages in his new district dropped below 58 percent. "The more you toy with competitiveness, the more trouble [the district] will have with the Department of Justice," Ortega promised.¹¹

Sensing a Section 5 "retrogression" objection from the DOJ, the commission kept Pastor's Hispanics at 58 percent, just as the congressman wanted.¹² He was happy, and so were the Republicans, but newspaper editorials and letters to editors painted a different picture. The *Arizona Republic* summed it up best when it wrote, "So much emphasis on drawing districts based on race and ethnicity is leaving precious little room for any partisan competition."¹³

This was not to be the end of the matter. Once the map was finalized and released to the public, the downtown district promoters—now calling themselves the “Coalition for a Downtown Competitive District”—filed suit, claiming Pastor’s district was “packed” with too many Hispanics.¹⁴ No one was exactly sure just who was behind the “Coalition for a Downtown Competitive District,” but many suspected it was Ken Chevront, who, as it turned out, was the individual responsible for appointing Andi Minkoff to the commission.¹⁵

The coalition made the legal claim that the state’s new constitutional competitiveness requirement had been violated, since a more competitive map could have been produced. But during trial, the attorneys for the commission presented evidence that federal voting rights law would be violated if more competitive districts were implemented. They were persuasive and won the case. The coalition did not appeal, and the Department of Justice approved the new map.¹⁶

Democratic Party political director Paul Hegarty was upset: “This is a map that is more protective than what was created in the Capitol basement. . . . We have fewer competitive districts than before Prop. 106 was passed.”¹⁷

Andi Minkoff was not happy, either. “As I see it, we basically have one competitive [congressional] district,” she said. “I think we let people down who voted for this proposition.”¹⁸

Like drawing congressional districts, the job of creating competitive districts for Arizona’s own state legislature while complying with the requirements of the Voting Rights Act proved virtually impossible. Even though the congressional plan produced only one competitive district out of eight, it was configured in a way that allowed for the creation of a second Hispanic majority-minority district, since Arizona had been reapportioned two new congressional seats after the 2000 census. Because Ed Pastor and the Hispanic advocacy groups were pleased with this outcome, the Department of Justice granted Arizona Section 5 preclearance.¹⁹

But the Department of Justice was not happy with the commission’s legislative plan.²⁰ Once again, Prop 106’s requirement to create competitive

districts collided with the minority protection provisions of the Voting Rights Act.

Following the mandate of Prop 106, the commission's experts were instructed to divide the state into quadrants that eventually were tailored into thirty grid-like squares, each representing one of Arizona's legislative districts. These squares were then shrunk or expanded in size to accommodate an equal population for each district. Although this was only the first step in what would be a much more refined process, the commission decided to put this first chopped-up plan on its website.²¹

"It was a disaster," said Minkoff, "but we expected it to be."²² The commission tried to explain that this wasn't a "map" as much as a "grid," but this proved to be of little comfort to incumbents worried about their districts.²³

After another round of outreach hearings, the commission produced a draft map that kept communities of interest together and satisfied, for the most part, the other requirements of Prop 106. But Minkoff was not pleased with the low number of competitive districts that the draft map created and pressed the redistricting experts who were hired by the commission to do more. After a number of tries, the experts finally told her that the most they could do to create competitive districts and stay within the bounds of law was to "tinker" with the fringes.²⁴ Commission lawyer Lisa Hauser noted that, as soon as the experts applied the requirements of the Voting Rights Act to the plan, the number of competitive districts "dropped like a stone."²⁵

Everyone serving on the commission trying to draw competitive districts came to understand that, in a state like Arizona where Hispanic population growth is exploding, if the law requires nearly one-third of the state's residents to have safe, noncompetitive districts, it is impossible to create competitive districts for the rest of the population as well.²⁶ It's even more difficult when Hispanics live in mostly Hispanic neighborhoods, since "cracking" those neighborhoods would be a clear violation of the law.²⁷

Undeterred, Minkoff asked the Democratic attorney on the commission, José Rivera, to accompany her to a meeting of the movers and shakers in the Hispanic community, where she begged them to accept lower concentrations of Hispanic voters so that more competitive districts could be drawn. She found a sympathetic ear with Pete Rios, a Democratic state representative. Minkoff hoped that if enough other Hispanic politicians got behind the commission's plan, so would the Justice Department.²⁸

Although she was not completely successful, in the end, with the help of Rios, the final map reduced the percentages of Hispanics in some of the Hispanic majority-minority districts by a few points. But it was not enough to satisfy the Democrats, who had anticipated many more competitive districts than the plan created.²⁹ They filed a lawsuit in a state court challenging the legislative plan, claiming the state's new constitutional requirement of district competitiveness had been violated.³⁰

Meanwhile, the Department of Justice had sent what is known among VRA experts as a “nasty-gram”—formally, a denial of preclearance—to the commission, seeking additional information about Hispanic “retrogression” in the districts that had been reduced. On top of this denial of preclearance, it was discovered during a court conference for the competitiveness lawsuit that Election Data Services—a Washington, D.C., firm that had been hired by the commission to help create new district maps—had used faulty data that didn't distinguish between active and inactive registered voters.³¹ These data were critical in determining if the new legislative districts were competitive enough to meet the state's constitutional requirement. This disclosure, and its implication that much of the earlier analysis would need to be redone, meant that the final boundaries would not be in place in time for candidate filing.

Steve Lynn, the independent on the commission, knew events were getting out of control.³² At this rate, with so many things still up in the air, the filing dates for office and even the primaries might need to be postponed. Their backs to the wall, Lynn and the commission went to federal court and asked a three-judge panel to approve for the 2002 election cycle the legislative districts the commission had constructed.

The panel seemed inclined to help, but the judges were not going to do anything until they heard the Department of Justice's analysis of the state's redistricting plan.³³ That happened two days later in the antechamber of a federal courtroom, just minutes before a status conference. Two lawyers from the voting section of the Justice Department delivered the bad news to Lisa Hauser and fellow commission lawyer José Rivera: The DOJ had rejected the legislative plan on the grounds that it was retrogressive.³⁴ In other words, the new plan put minority voters in a less advantageous position to elect their preferred candidates than the old plan did.

In a letter signed by Assistant Attorney General Ralph Boyd Jr., the Justice Department spelled out the retrogression violations, including a Tucson-area district that dropped from 55 percent Hispanic voting-age population to 45 percent; a district in eastern Phoenix that dropped from 30.2 percent to 25.7 percent; and a 65 percent Phoenix district that was split to create one district with 51.2 percent Hispanic voting-age population and another with 50.6 percent.³⁵ Even though only a handful of districts were criticized, the ripple effects meant the entire map needed reworking.

Boyd's letter pointed out that not only had the commission's action had a negative effect on the position of Hispanic voting strength, but its action "may also have been taken, at least in part, with a retrogressive intent."³⁶ Chairman Lynn denied this, telling reporters, "There was no intent . . . and never will be any intent to cause retrogression on the part of the commission."³⁷

With time running out, the commission did as it was instructed by the Department of Justice: It added Hispanics back into the identified districts and made other minor adjustments to reach the levels required by the DOJ. Now that justice was satisfied, the court allowed this "interim" map to be used for the 2004 election. Political handicappers believed the map's thirty districts had nineteen Republican-leaning and eleven Democratic-leaning districts. Of the eleven leaning Democratic, nine were Hispanic majority-minority. One of the commission's consultants believed that only five of the districts were competitive. Andi Minkoff thought only four were.³⁸

And so, after spending over \$6 million of the taxpayers' money to create a legislative and congressional redistricting plan that would bring real competition to the election process, nothing much had changed from the old days when legislators huddled together in the capitol basement to swap precincts with one another in order to protect their jobs.

How significant was the Voting Rights Act in preventing the creation of competitive districts in Arizona? Steve Lynn, Lisa Hauser, and Andi Minkoff all agree it was enormous. Minkoff is especially adamant. Without the distortions created by the Voting Rights Act, she believes she could have drawn eight to ten competitive districts instead of the four now in place.³⁹

3

Wasting Everyone's Time and Money: Cumberland County, Virginia, and the Town of North, South Carolina

Cumberland County, Virginia, lies about forty miles west of Richmond and fifty-five miles east of Charlottesville—too far to make it a bedroom community for either city. Because of its location and size (it has only nine thousand residents living in three hundred square miles), Cumberland is considered a rural county, and indeed farming is an important component of the local economy. Most of the houses sit on at least two acres, giving residents plenty of space and privacy. A three-bedroom, two-bath home built less than ten years ago costs only about \$100,000.

It was this space and privacy that attracted Juanita Urban to the area. She and her recently retired husband moved to Cumberland County in the late 1970s from a congested Washington, D.C., suburb. A self-described “professional volunteer,” Juanita worked in various jobs at her church and other community endeavors.¹ But in November 1991, at the urging of friends, she ran for county supervisor. She won the election by defeating a man who had served on the board for twenty-four years—no small feat for a woman who was not born and raised in “Virginia’s Heartland.”

The year Juanita Urban began her term, the Cumberland County Board of Supervisors was comprised of three members representing single-member districts. This kind of representation scheme is fairly typical of many counties in Virginia and throughout the South. But there was a unique problem with it in Cumberland County. One of the three elected supervisors was chronically absent from the monthly board meetings, resulting in far too many one-to-one tie votes. Urban thought this was unfair, so she and her fellow supervisors decided to expand the board in

1994 by adding two new districts, thus reducing the likelihood of votes being tied, and, in her own words, “providing better representation to everyone.”²

Ironically, because of that decision, Juanita and her fellow supervisors soon became entangled in a never-ending legal tug-of-war with the voting section of the Department of Justice over the implementation of the VRA.

The Department of Justice and the courts have always measured compliance with Section 5 of the Voting Rights Act by the standard of “retrogression.” As was discussed in greater detail in the introduction, this means that any changes to election procedures and laws (including redistricting) must not retrogress or diminish the position of blacks or Hispanics in their exercise of the electoral franchise. From the passage of the VRA in 1965 until today, retrogression has been measured by comparing the likely effects of the proposed election changes to what is currently in place. In other words, the old plan or procedure is deemed to have established a benchmark or baseline with which the new plan is to be compared.³

Cumberland County’s Section 5 retrogression problems did not begin in 1994, the year it expanded the board. The addition of the two new county supervisor positions was quickly approved by the Department of Justice because the new plan added one “safe” majority-black district—District Three—while the old three-member board was comprised of all whites.⁴ But by voluntarily creating a new safe black district, Cumberland County now established District Three as a “protected” benchmark black district.

The first election using the new five-member-board plan was held in November 1995. Eddie M. West, who is black, easily beat his white opponent by a margin of 70 percent to 30 percent for the new District Three position. West’s 397 votes to his opponent’s 173 was especially significant, since the total black population in District Three was only 57.9 percent, and election turnout of blacks in most of rural Virginia still lags the turnout of whites. In any event, it was apparent to several observers in the county that West attracted a significant number of white voters. The remaining four districts elected whites.⁵

About three years into Eddie West's term, however, the "waste" hit the fan in Cumberland County, and elections there have not been the same since.

This "waste" matter is politely called "biosolids"—human excrement that is trucked into the county from around the state. These biosolids have been processed to meet certain quality and safety standards, and then they have been distributed free of charge to Virginia farmers. The program was established by the Virginia legislature and soon became enormously popular with the state's farmers; use of free biosolids on their fields instead of commercial fertilizer saves them about \$150 per harvested acre of land.⁶

There is one big problem, though, with using biosolids as a commercial fertilizer substitute: It stinks. And badly. So when word spread throughout the county that biosolids were to be imported for use on county farms, the Board of Supervisors' phones started ringing. Eddie West and his fellow supervisors told their concerned constituents that they had no statutory power to stop the state of Virginia from delivering this biosolid fertilizer and spreading it on local fields. As long as the farmers wanted it—and they wanted it—the county could not do anything to stop them.

As the stink spread during the hot Virginia summer months, so did the anger and frustration of the county's voters. Try as they might, the supervisors could not convince the residents that their hands were tied over the biosolids issue.

In the November 1999 election, every incumbent county supervisor was voted out of office, including Eddie West. He was defeated by Phil Scarborough, a white Republican. According to Juanita Urban and others, race had nothing to do with the election results: The incumbents lost because of "waste, and nothing but waste."⁷

But the voting-section bureaucrats at the Department of Justice did not accept that claim when it came time to redraw the voting districts for county supervisors in 2001 after the 2000 census. And so began Cumberland County's Voting Rights Act preclearance problems.

The job of submitting the new county decennial redistricting plan to the Department of Justice in 2001 fell to Cumberland County attorney Darwin

Satterwhite. Satterwhite, a Phi Beta Kappa graduate of the University of Virginia, is a serious man—not grim by nature, but someone who most decidedly performs his job in a determined, methodical way. He attended every meeting of the Cumberland County Redistricting Committee and made sure all of the proceedings complied with the state's guidelines for redistricting before submitting the new plan to the Department of Justice.⁸

According to Urban, the redistricting committee included just about anybody who wanted to be a member. She remembers recruiting people to serve on the committee and being frustrated that no one seemed to care about it.⁹ In the end, though, nineteen people were appointed—including the chairs of the Democratic and Republican parties; the chairwoman of the local NAACP; a citizen from each of the five supervisor districts and each of the supervisors themselves; and five county officials.

Over the course of four months in 2001, Cumberland County held two Redistricting Committee meetings and two public hearings. There are no records of citizen input at any of the meetings or the hearings, because no citizens bothered to attend, even though public notices and news articles were published in the *Farmville Herald*, the county's area newspaper. So the committee itself went about the business of drawing new districts to comply with state and federal requirements.¹⁰

The 2001 census data indicated that the population of District Three had grown 9.7 percent over the last ten years, while that of District One had declined. This population deviation was too high to fall within the Virginia state constitution's plus-5 percent or minus-5 percent allowable range for voting districts. So the board redrew all five districts so that no district deviated in population by more than 2 percent. When District Three was created in 1994, the total black population was 936, 57.9 percent of the district. For the 2001 plan, the total black population was increased by the committee to 982, an increase of 46 people; but since the overall population of the county also grew, the proportion of blacks in the district fell slightly, to 56 percent.¹¹

No one on the Cumberland County Redistricting Committee involved in the remapping objected to this plan. Not Delma Branch, an African American who served as a representative from District Three; not Joanne Vaughn, the chairwoman of the local branch of the NAACP; and not Robert Scales, another African American who served as chairman of the county

Democratic Party. The only ones who objected were the career staffers at the Department of Justice in Washington assigned to review Cumberland County's submission.

Sixty-one days after Darvin Satterwhite submitted his eighty-one-page preclearance request to the Department of Justice, he received a four-page letter from Joseph D. Rich, the acting chief of the Voting Section at the Department of Justice. Rich wanted more information about how Cumberland County went about redrawing its districts, especially District Three. Among the extensive data Rich needed were the election returns, by district, "in which a black candidate participated, from 1991 to the present."¹² Satterwhite responded nine weeks later with an eight-page letter providing the Department of Justice with every requested item, including the election results from 1995 and 1999. Over the next six months, the Department of Justice and Satterwhite exchanged another four letters in which more and more detailed questions were asked and more and more detailed information was provided.

But this still did not prove to be enough for the Department of Justice. Nearly one year after Darvin Satterwhite submitted Cumberland County's new redistricting plan, Ralph F. Boyd Jr., the assistant attorney general for civil rights under then attorney general John Ashcroft, shot it down. According to Boyd's letter, in the existing, or benchmark, plan, blacks constituted about 56 percent of the total population of District Three and, under the proposed plan, their share would be reduced to 55.3 percent.¹³

In addition to objecting to the overall percentage decline in District Three, Boyd further explained that his division had created two "illustrative plans" on their own computers. These plans, he claimed, were actually better than the one the Cumberland Redistricting Committee created, because not only did they meet the county's population deviation goals without pitting incumbents against each other, but they were able to increase the total black population in District Three. In one of the hypothetical plans created by the Department of Justice, the black population percentage was held at 56.8 percent; in the other it was increased to 57.1 percent.¹⁴

Furthermore, the DOJ made clear that not only did the county remove more population from District Three than was necessary, but the areas from which the county did choose to remove people were those with a significantly higher level of black population concentration than in the district as a whole. The new plan also removed from the district some of the black voters who, in the 1995 and 1999 elections, had given the black-preferred candidate “substantial support.”¹⁵ But what the DOJ once again failed to recognize was that the black-preferred candidate in 1999 was a white Republican perceived by voters as someone who could stop the spreading stench of the biosolids.¹⁶

Juanita Urban remembers Satterwhite’s utter dismay and disappointment over the objection letter. All of his explanations to Department of Justice were rejected, and it was back to the drawing board for the Redistricting Committee.¹⁷

No one knows how many phone conversations took place between Satterwhite and the Department of Justice staffers during the next five weeks, or what was said in them—it is not in the official Section 5 file at the DOJ. But Urban remembers conversations with her colleagues on the board in which the 1999 defeat of supervisor Eddie West was of great concern to those staffers. According to Urban, it did not matter to them that *everyone* had been thrown out of office that year over the biosolids issue—all they wanted was to guarantee that going forward, biosolids or no biosolids, an African American would be elected in District Three.¹⁸

Urban also remembers Satterwhite telling her that the only time the Department of Justice would schedule a face-to-face meeting with him to get the matter resolved was at 4:30 p.m. on a Friday in late July.¹⁹ And there seems to be no record of what the Department of Justice ultimately told Satterwhite he needed to do to get a plan approved. One thing, however, is certain: A few weeks after Satterwhite had his meeting, Cumberland County, Virginia, submitted a revised redistricting plan in which District Three had a 57 percent black population. Ten white voters were taken out of District Three, and sixty-three black voters were added. After thousands of dollars in legal bills, a dozen or so meetings, hearings, a long series of letters and reports extending nearly two years, and trips to Washington, D.C., preclearance was finally granted when less than 1 percent of District Three’s population was adjusted.²⁰

The first election to take place after the new lines were approved was in November 2003. Phil Scarborough, the white Republican who had defeated Eddie West during the 1999 biosolids uproar, was defeated by Van H. Petty, a black Democrat. In fact, once again, all but one of the incumbents were thrown out. One of the newly elected supervisors, twenty-four-year-old Jeremiah Heaton, declared that the voters were upset over rumors that the Board of Supervisors was negotiating with a biosolid processing company to locate a new facility in Cumberland County.²¹

So, just as in 1999, the voters took it out on the incumbents.²² And the fact that Petty defeated Scarborough, like the fact that Scarborough had defeated West, had nothing to do with race, and everything to do with “waste.”²³ Yet in the Cumberland County, Virginia, case, the Department of Justice’s voting rights section apparently did not consider that local issues might lead to the election of one candidate over another. The implication is that candidates win, or candidates lose, because of their race or ethnicity. That may have been true in Cumberland County in 1965, but it is no longer the case today.

The town of North, South Carolina, is named after John F. North, a Confederate veteran, who, in 1892, donated one hundred acres of land to the South Bound Railroad Company. The company built a rail depot and town on the donated land, and every day for over fifty years two trains stopped in North to load baled cotton that had been grown in the fields outside of town. The railroad ceased operations decades ago, and no trains stop in town now; but passenger and freight trains still cut across Main Street over a dozen times each day, and cotton is still an important part of the local economy.

The town has always been small. In 1893, about four hundred people lived in North; today the number is just over eight hundred. Even with such a modest population, the town is able to support an elementary and a combined middle and high school. Townspeople gather at the food counter of the CITGO service station to talk about crop prices or real estate sales, or swap general town gossip. The town motto is “All points lead to North, South Carolina.”²⁴

Don and Carolyn Royster moved to North in the early 1980s. Don, then recently retired from the Air Force, joined the First Baptist Church of North as a part-time minister. He stayed in that job for fourteen years. Now for some unknown reason, North's town boundaries cut right across the Roysters' backyard, but they don't include the family's 1,400-square-foot home. Even though only part of the Roysters' land is in the town of North, the town levies a property tax on it. But because the Roysters' home is not incorporated into the town itself, they are not allowed to vote in town elections. And since their house is not in the town's limits, they do not get police protection and must rely on the county's sheriff department for security. These matters—no right to vote on taxes and no police protection—were long-standing sources of irritation to them both, especially Mr. Royster.²⁵

So in September 2002, Mr. and Mrs. Royster submitted a one-page form to North's mayor, H. Bruce Buckheister, asking the town to annex their house. The mayor and town council voted on the matter and agreed. But because Section 5 of the Voting Rights Act requires every jurisdiction in South Carolina to get permission from the U.S. Department of Justice or the District of Columbia federal court to annex property, the town sent a letter informing the DOJ of the proposed annexation of the Roysters' home.²⁶ After nearly one year of phone calls, investigations, and letters to various officials at the Department of Justice voting section, the town's request for the Roysters to be annexed and allowed to vote was denied. Why? According to the DOJ, Mr. and Mrs. Royster would be a threat to minority voting rights under Section 5 of the VRA. The Department of Justice asserted that the town had a history of allowing whites to be annexed, but not blacks.²⁷

But, in fact, the record makes clear that both reasons the Department of Justice offered to exclude Mr. and Mrs. Royster from North were wrong.

As Bruce Buckheister tells it, being the mayor of a small town like North has no glamour and lots of aggravations.²⁸ The town is always broke. People complain about taxes, yet want more town services. So, it goes without saying, any opportunity to add property to the town's tax rolls is a welcome—and unusual—event. But Mayor Buckheister had no idea of the

difficulty he and the town would encounter from the Department of Justice in what they believed was a simple annexation matter.

Because North cannot afford an attorney, the mayor, with the help of only one full-time clerk, personally handles all manner of legal issues for the town, including submissions to the Department of Justice in Section 5 matters. Up until the Roysters' request, this had not been an issue. There are only two polling places in town, and those never changed; and the town council is elected at large, so there are no voting districts to adjust. But Buckheister knew he needed permission from the Department of Justice to add the Roysters to the voting rolls after annexation. For guidance on this, he relied on the State of South Carolina's handbook for municipalities.²⁹

After the council members voted to annex the Roysters' property, the mayor sent a copy of the ordinance, the request for annexation by the Roysters, and a plat map showing the exact location of the lot to the Department of Justice. He closed the letter with, "If there is any other information needed for your records, please let me know."³⁰ He had no idea just how much more information the DOJ would want.

Two months later, Buckheister received his first letter from the voting section at the Department of Justice. According to the initial research conducted by the section, North had annexed a small property on September 18, 1987, and had failed to seek preclearance from Department of Justice for its actions. The DOJ explained that, until the 1987 matter was cleared up, it would be unable to proceed to the Roysters' request. It further requested that Buckheister provide

all documents that set forth the town's annexation policies, procedural and substantive, including the criteria for annexation. Include a description of all meeting [sic] and discussions, whether formal or informal, since 1985 involving any councilmember [sic], other town officials, or planners/consultants regarding the town's annexation policies and any information or recommendations that the council may have received concerning these policies. Provide the name and daytime telephone number of any minority person or organization commenting on the town's annexation policies and criteria, the substance of these comments or suggestions, the action, if

any, taken by the town in response, and the reasons for the town's action.

A detailed description of all requests for annexation, whether formal or informal (e.g., petition or request that was never made final), that have been denied since 1985, or of any area that has been formally or informally considered of [sic] discussed for annexation by town officials since 1985, but was not annexed, even if it was not the subject of a formal request. On a current town map, depict the area involved in each instance, and provide a detailed description of the process involving the request or consideration/discussion, including the following: (a) the name, race, address, and telephone number of the person(s) making the formal or informal request; (b) a description of the property, with an indication of its zoning or intended use(s) (e.g., residential, commercial, industrial, agricultural); (c) all documents relating to the potential annexation, including notes, memoranda, summaries, minutes, tapes, and transcripts of all discussions, meetings, and hearings, whether formal or informal, regarding the annexation; (d) the total population, by race or projected population, with an estimate by race, if the property is expected to be developed residentially; (e) any correspondence between councilmembers [sic], other town officials or employees, planners/consultants, and members of the public regarding the potential annexation; (f) any investigation or analysis concerning the feasibility of the annexation, and the reasons for not annexing the area; and (g) copies of all newspaper articles, editorials, letters to the editor, and advertisements, as well as any other publicity, which address or describe the potential annexation.

Election returns for the Town of North, by voting precinct, for all state, county, school district, and municipal elections from 1993 to present in which a black candidate participated. For each such election, indicate the position sought and incumbent(s), if any; the number of positions to be filled; the name and race of each candidate; the number of votes each candidate received, by precinct; and the number of registered voters, by race and precinct, at the time of each election. If such registration

data are unavailable, provide an estimate of the black population percentages by precinct at the time of the election.³¹

In response to this letter, Buckheister called Heather Moss, a civil rights analyst in the Voting Section at the Department of Justice, to explain how most of the information the DOJ had requested simply did not exist. As Buckheister remembers the conversation, the exchange between them became testy.

“She treated me like I was a bigot,” Buckheister recalls.³² “She was rude and acted as if I was lying to her about everything.” The phone conversation between Moss and Buckheister is mentioned in a Department of Justice “memorandum of telephonic communication” dated February 25, 2003. It notes that Buckheister did not understand why the government needed all of this information for the simple annexation of two persons. Additionally, the memo notes that, in response to the Department of Justice’s inquiry about blacks once being denied annexation to the town, Buckheister said he spoke to a former council member who told him there was an informal discussion in the late 1980s about annexing a mostly black area to the south of the town. Buckheister was told that the residents in this area never made a formal request to be annexed after the early discussion because the cost to them of tapping into municipal water and sewer services was too great.³³

In any event, sixty days after his phone call to the Department of Justice, Bruce Buckheister sent in all of the information he could find that the department had requested. The submission came to nineteen pages. It included, among other items, new data from the Orangeburg County director of elections indicating that as of October 1, 2002, there were 592 people in North registered to vote, of which 304 were black and 285 white, with 3 voters classified as “other.”³⁴ As it turned out, the 1987 annexation included only farmland, not people, so no voting issues were involved.³⁵

Buckheister thought his job was over after he sent this letter. It wasn’t.

When Buckheister received yet another letter from the Department of Justice asking for even more information, he got mad. The department was not

satisfied with his explanation about the annexation request the town received from some black citizens in the 1980s, and it was not satisfied with his explanation that the town did not have a formal annexation policy in place.³⁶ He wrote back, "How many ways do I have to say: 'We have researched our records and have found no records of any request for annexation that have not been honored.'" He closed with, "I feel like we are being asked repeatedly what kind of fish we did not catch after we decided not to go fishing."³⁷

Meanwhile, Department of Justice investigators were busy during this period calling residents in North and throughout Orangeburg County to verify the information Buckheister had sent them. In each memorandum of telephonic communication in the Department of Justice's file on North, everyone concurred that no formal annexation requests from black residents had ever been offered. Typical was a telephone call from Heather Moss, the Voting Section investigator, to Ruby Livingston, the former town clerk:

Ms. Livingston also stated that she recalls around 1990 or 1992 that a group of residents to the south of town from the Oliver Road area asked about annexing. Ms. Livingston stated that she does not recall a petition. . . . Ms. Livingston stated that she does not recall any annexation petitions that were denied.³⁸

A few days prior to talking to Ruby Livingston, Moss called Ray Gunter, a former council member:

Mr. Gunter stated he is 70 years old and so it takes him some time to remember things, but he believes that he was a town councilmember [sic] around 1979 and served two terms.

Mr. Gunter stated that during his term he recalls someone petitioning to annex to the town. Although, he stated that he could not recall for certain, he thought that they might have backed down because they did not want to pay town taxes. Mr. Gunter stated that he believes that the town wanted them to annex.³⁹

In other words, everything Mayor Buckheister told the Department of Justice was confirmed by other residents of North. Yet, in spite of this, three

weeks after Moss spoke to Mr. Gunter, R. Alexander Acosta, assistant attorney general for civil rights, wrote to Mayor Buckheister, formally objecting to the annexation of the home of Don and Carolyn Royster. Acosta's letter set forth the reasons for the Section 5 objection:

The evidence gathered during our review indicates that white petitioners have no difficulty in annexing their property to the town. In fact, they receive help and assistance from town officials. In contrast, there is evidence suggesting that town officials provide little, if any, information or assistance to black petitioners and often fail to respond to their requests, whether formal or informal, with the result that annexation efforts of black persons fail.⁴⁰

The Department of Justice based much of its objection on the story of Louise Greene, a black woman who claims she presented a formal annexation petition to then mayor Neal Livingston. According to Greene, Livingston told her the request would not likely be honored. It was Greene's impression the reason was because many of the petitioners were black. Yet no one has been able to produce the Greene petition. In fact, the only thing anyone ever presented to the DOJ as "proof" of the annexation request is a list of names someone thought may have been on the purported petition.⁴¹

The Department of Justice never provided Mayor Buckheister with any direct evidence. It didn't have to. Under Section 5 of the Voting Rights Act, it was the burden of the town of North to prove it wasn't discriminating. But, as Mayor Buckheister wrote in one of his many replies, how can you prove you're not discriminating?

As for the claim that adding two white voters to the election rolls would somehow jeopardize the voting rights of the black citizens of North, there is no evidence of that either. After all, two additional white voters would have increased the total white population from 428 to 430, hardly enough to change the outcome of an election. Indeed, to this day, what makes Buckheister so upset about this matter is his honest belief that the people of North long ago moved past racial animus in their dealings with one another. He tried to explain to the Department of Justice that from 1996 to 2001 an African American woman, Sybil Jamison, served on the town

council and that she was elected, at large, by all the voters of North—not in a single-member district drawn to elect a black candidate. Jamison was in a position to promote the annexation of new black residents if they wanted to become part of the town. What Buckheister finds particularly ironic is the fact that, when one of the council members resigned last year, the town did not even have to have a special election to replace her. Why? Only one person filed to fill the vacancy—Rose Binyard, an African American. On top of all of this, more blacks were registered to vote in town elections than whites.⁴²

In 2005, Mr. and Mrs. Royster sold their house and moved into a retirement home in nearby Orangeburg. The new owners of the Roysters' old home are paying town taxes, but, like the Roysters, cannot vote in town elections or get town police protection.

Postscript: I was amused to learn that the Justice Department's objection to the town of North's proposed annexation was the leading example cited in the bestseller *The Covenant with Black America* as proof that "discrimination against minority voters still exists"—and that Section 5 must be reauthorized.⁴³

Conclusion

An Ignoble Extension

On July 27, 2006, just about ten days shy of the forty-first anniversary of the Capitol Hill ceremony at which President Johnson signed the Voting Rights Act into law, and one year before its temporary provisions were scheduled to expire, President George W. Bush signed its reauthorization for twenty-five years in a formal ceremony at the White House, attended by dignitaries from various civil rights organizations and members of Congress. With the chairman of the NAACP at his side, Bush said, “In four decades since the Voting Rights Act was first passed, we’ve made progress toward equality, yet the work for a more perfect union is never ending. We’ll continue to build on the legal equality won by the civil rights movement to help ensure that every person enjoys the opportunity that this great land of liberty offers.”¹ Two weeks earlier, the House of Representatives had passed the bill 390 to 33 after four amendments designed to “modernize” it had failed. A few days later, the Senate vote was 98 to 0, with no amendments being debated.² The opponents of reauthorization—and there were more of them than the final tally suggests, based on the support for the modernizing amendments—were hardly surprised at the outcome. Not only were all of the draconian features of the act extended until 2032, but two useful Supreme Court opinions that made the administration of the act less prone to racial gerrymandering—*Georgia v. Ashcroft* and *Reno v. Bossier Parish School Board (Bossier II)*³—were overturned as well. In the more important of the two cases, *Georgia v. Ashcroft*, the Court’s opinion allowed for the unpacking—or percentage reductions—of “safe” majority-minority voting districts in order to create more “opportunity” and “influence” districts.⁴ In these less racially driven districts, minority-preferred candidates may not

always win, but minority voters would have greater influence on the outcome of elections in more districts. With the reauthorization of the act, new language was added that was designed to make the *election* of minority candidates of choice—and, thus, race-driven redistricting decisions—a near requirement.⁵

In 1965, Congress relied on empirical data to prove that blacks in the Deep South were systematically disenfranchised by a hostile government apparatus. In response, the VRA was tailored to address those specific findings by removing the key barriers to black voter participation—such as literacy tests and official harassment—and Section 5 was temporarily put in place to prevent these targeted jurisdictions from finding novel ways to avoid the new law.

During the hearings and debates of 2005–6, however, Congress had no data or evidence of disenfranchisement like it had in 1965. In fact, this time Congress had data and evidence to the contrary of what it had forty-one years earlier. According to a massive study conducted for the Project on Fair Representation at the American Enterprise Institute, which was made a part of the Congressional Record and widely cited during the debate on the amendments in the House of Representatives, the data in 2006 make clear that there is no quantifiable difference in minority voting rights in covered jurisdictions versus noncovered jurisdictions. Moreover, the study found that the covered Section 5 jurisdictions often afford greater opportunity to blacks and Hispanics than many jurisdictions not covered by Section 5. In other words, the VRA had accomplished exactly what it was designed to accomplish—the enfranchisement and effective participation of minorities in the Deep South and elsewhere.⁶

The AEI study showed that in 2006 in most of the covered states, average minority voter registration and turnout were higher than the national average. In Georgia, Mississippi, and South Carolina, for instance, blacks registered at higher rates than whites. While the gap between white and Latino voter participation persisted in Texas and Arizona, it was smaller in these states, which are covered by Section 5, than in noncovered states with comparable Latino populations. The AEI study also examined the number of black and Hispanic elected officials in states covered and not covered by Section 5 and found that minorities achieved greater success as candidates in Section 5 states than outside of them.⁷

Upon what, then, did Congress and President Bush rely to justify the reauthorization of Section 5? According to the bill's stated findings, "Vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process."⁸ As evidence of this discrimination, the bill cites two primary factors. First, it points to the

hundreds of objections interposed, requests for more information submitted followed by voting changes withdrawn from consideration by jurisdictions covered by the Voting Rights Act of 1965, and Section 5 enforcement actions undertaken by the Department of Justice in covered jurisdictions since 1982 that prevented election practices, such as annexation, at-large voting, and the use of multi-member districts, from being enacted to dilute minority voting strength.⁹

Second, it cites the continued filing of Section 2 cases that originated in covered jurisdictions.¹⁰

Are these two reasons compelling enough to justify reauthorizing Section 5 for another twenty-five years? Hardly. As the testimony of Acting Assistant Attorney General Bradley J. Schlozman reveals, the raw number of objections interposed by the Department of Justice to voting changes or procedures in the Section 5 jurisdictions is an insufficient datum to support reauthorization.¹¹ In fact, the total number of annual objections as a percentage of total submissions is now so low as to be persuasive evidence that reauthorization is *not* justified.

Specifically, the DOJ's data for 1982–2005 show that of the 105,452 submissions it reviewed, only 753, or 0.7 percent, received objections. For 1996–2005, of the 54,090 submissions reviewed, only 72, or 0.153 percent, drew objections. In 2004, only three objections out of 5,211 submissions were made by the DOJ. Conversely, objection rates exceeded 4 percent from 1965 to 1970.¹²

So the number of Section 5 objections is insufficient to justify reauthorization—and so is the filing of Section 2 lawsuits. Based on a recent study submitted to the U.S. House Subcommittee on the Constitution by the Voting Rights Initiative at the University of Michigan Law School,¹³ more

lawsuits brought under Section 2 have ended with a determination of liability in noncovered jurisdictions than in covered ones. The University of Michigan study finds that of the 209 Section 2 lawsuits that ended with a determination of liability, 98, or 46.9 percent, originated in jurisdictions covered by Section 5 of the Voting Rights Act, and 111, or 53.1 percent, had been filed in noncovered jurisdictions. For example, since 1990, there have been more court findings of Section 2 violations in New York or Pennsylvania than in South Carolina.¹⁴

The stories I have detailed in this monograph are representative of dozens that can be found in the Department of Justice's Section 5 records. Like those described in the narratives I have included from Arizona, Texas, South Carolina, and Virginia, many other incidents in many other states show how the application of Section 5 has often become silly and expensive. But, more significantly, I hope these stories also highlight how Section 5 has been used by both political parties to reduce minority voters into little more than pawns in partisan redistricting battles. Inevitably, this "sordid business" of "divvying us up by race," to quote Chief Justice John Roberts in *LULAC v. Perry* (2006), drives racial-identity politics and leads to—indeed, *requires*—the creation of racially gerrymandered voting districts.¹⁵ All of this ultimately inhibits neighborhood-based election districts in which the race and ethnicity of voters and their representatives become inconsequential. The results of Section 5, then, are not only merely silly and expensive, but pernicious.

So why did Congress renew Section 5, and why did President Bush enthusiastically sign it into law? Two reasons: fear and politics. As Rahm Emanuel (D-Ill.) noted in an interview with *New York Magazine*, Democrats and Republicans are subject to

a weird, self-interested math [that] comes into play [with the VRA]. Black Democrats don't want to appear retrograde; whites don't have the courage to stand up and try to fix it without blacks standing alongside them; and Republicans like the

outcome that they're getting, which enables them to have perpetually lily-white suburban southern districts. And then there's so much animus—not between the parties, but between white Democrats and black Democrats, in lots of parts of the South. So any effort to “fix” the thing is a nonstarter. But I'd be a better congressman if my district were more diverse, and Democrats would have better chances of winning if there were more “swing” districts.¹⁶

Sooner or later the U.S. Supreme Court will decide if Section 5 is constitutional in light of the remarkable changes that have occurred in the covered jurisdictions. Already one challenge to the act's constitutionality has been filed in Texas.¹⁷ Striking down Section 5 of the Voting Rights Act is not a course of action the Supreme Court will follow lightly. After all, any judicial narrowing of the breadth of the preclearance provision will be portrayed by the media as a rollback in minority voting rights. But in truth it will be the opposite: A statute that was once a legitimate exercise of congressional power to ensure nondiscrimination in voting today exceeds Congress's power, and is now being used to require racial segregation and discrimination.

Appendix

The Voting Rights Act of 1965, Its Amendments, and Its Case Law

The Voting Rights Act of 1965 has eighteen different sections and approaches six thousand words in length, yet its goal was a simple one: ending the official barriers to voting by blacks in southern jurisdictions. Although all of the sections of the act point to this goal, Section 4 and, to a lesser extent, Section 5 contain the most important provisions for achieving this.

Sections 4 and 5 were designed by the framers of the act to “cover” specific areas of the country where barriers to black voting were the most pernicious. Both were recognized to be short-term measures designed to remedy the “emergency” of black disenfranchisement in the South, and both were scheduled to expire in 1970. Instead of expiring, sections 4 and 5 were amended and extended by Congress in 1970, 1975, and, finally, in 1982, the last time for twenty-five years. They were scheduled to expire on August 6, 2007, but were again extended, until 2032, in July 2006. Section 2 was designed along the lines of the Fifteenth Amendment of the U.S. Constitution, which gave all citizens the right to vote regardless of race, color, or previous conditions of servitude. It applied to every state and jurisdiction and was permanent.

Section 4

Section 4 of the Voting Rights Act is known as the “trigger” mechanism, since in it was posited the formula for identifying the jurisdictions to be

“covered” by the act. In order to be swept into coverage by Section 4, a state or jurisdiction had to have two factors in place. The first was the use of a literacy test or other similar device as part of the jurisdiction’s voter registration process. Although many jurisdictions throughout the country used literacy tests, southern registrars in particular used fraudulent ones specifically to keep blacks from registering to vote. Some required an applicant to interpret a complex section of the state’s constitution, or read from a newspaper written in a foreign language; in any case, the results in most of the South were the same: Blacks failed, while whites passed. The second factor in determining which jurisdictions were covered were their voter registration rates as of November 1, 1964, and their election participation rates in the November 3, 1964, presidential election. Any state or political subdivision of a state in which fewer than 50 percent of persons of voting age were registered on November 1, 1964, or fewer than 50 percent of persons of voting age actually voted on November 3, 1964, were to be covered.

In other words, if a jurisdiction used a literacy test *and* if registration or turnout was below 50 percent, then that jurisdiction or state was swept into coverage. Once enacted, this formula applied to the entire states of Alaska, Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia, and to parts of four others, Arizona, Hawaii, Idaho, and North Carolina. The framers of the act believed that the combination of a literacy test and low registration and participation was proof of racial discrimination. For the most part, they were correct.

Because these states and counties fell into coverage, any literacy tests or similar devices they employed in local, state, or federal elections were now prohibited. Coupled with other provisions, such as one that sent federal registrars to add eligible blacks to the voting rolls, the banning of literacy tests in these covered jurisdictions was the single most important feature of the 1965 act.

Section 5

In the original 1965 statute, Section 5—widely known as the “preclearance” provision—was considered little more than an oversight mechanism to enforce the prohibition on literacy tests and other registration devices in the

newly covered jurisdictions. After 1969, however, because of the Supreme Court's opinion in *City of Mobile v. Bolden* (see below), Section 5 turned away from being a simple oversight mechanism and became a tool to ensure something far more elusive— fair and “effective” representation for blacks. Because of this evolution, Section 5 today has become the single most controversial provision of the Voting Rights Act.¹

Section 5 required any of the covered jurisdictions to seek permission from one of two federal authorities *before* changing “any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting” from those that were in effect on November 1, 1964. First, a jurisdiction could seek permission from the United States District Court for the District of Columbia for a declaratory judgment in a formal lawsuit; or second, it could request administrative permission from the U.S. attorney general. If neither had objections, the proposed change would be allowed to go into effect.

The framers of Section 5 understood from years of litigation that the covered jurisdictions in the Deep South were adept at devising new ways of frustrating black voter registration even after a discriminatory scheme had been struck down by the courts. Section 5 shifted the burden of proof *from* the federal government to show in a court of law that a voting change was harmful to minority voters, *to* the covered jurisdiction to prove that a proposed change to an election practice was not discriminatory.

Section 2

Aside from the administrative ones at the end, Section 2 is the shortest section of the statute, at only forty-four words. Coming at the beginning of the legislation, it functions more or less as a preamble to the act. Section 2 closely follows the contours of the Fifteenth Amendment to the Constitution, ratified in 1870 as one of the two important Reconstruction amendments and itself only thirty-four words in length:

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2 of the Voting Rights Act reads:

No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

There are some noteworthy differences between the two, however. The term “political subdivision”—defined as any “subdivision of the state which conducts registration for voting” was added, thus including counties and parishes, as was the term “voting.” Both “voting” and “vote” were defined in Section 14 as

includ[ing] all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this Act, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

The significance of this definition is twofold: First, as some legal scholars have noted, the inclusion of the word “effective” opened a judicial Pandora’s box that eventually led to the belief that voting policies should afford proportional racial office-holding; and, second, the Voting Rights Act would cover political party primaries, not just general elections.

Legislative Amendments of 1970, 1975, 1982, and 2006

As radical as the Voting Rights Act was considered by many at the time of its passage, congressional support for it was broad and deep, except in the South. The final bill that came out of the House and Senate conference passed in the Senate by a margin of 79 to 18, and in the House by 328 to 74. As discussed in the introduction, just a few years after passage, blacks in the covered jurisdictions were registering to vote and were participating

in elections in record numbers. By every reckoning, this was one of the most significant triumphs in twentieth-century American legislative history.

By its fifth anniversary in 1970, white southern politicians who had built their careers on their support of segregation must have known that the Voting Rights Act would eventually force them to abandon “segregation now . . . segregation forever.”² Even arch-segregationist governor George Wallace of Alabama was outpolled in the first round of balloting in the 1970 gubernatorial primary. Although he went on to win the runoff election, Wallace must have foreseen the future strength of black voters.

Scheduled to expire in 1970, sections 4 and 5 were amended by Congress and extended in 1970, 1975, and 1982. With each subsequent extension, the act’s political reach grew in ways that the original framers and supporters may never have envisioned. Its legislative intent devolved from being a shield for black voters against southern racists in 1965, to being a sword that, in reality, mandated racial electoral outcomes in 1982. These amendments, coupled with aggressive administrative enforcement from the Department of Justice and a federal judiciary determined to legislate from the bench, began the slow degeneration of the act to a state of utter confusion.

1970 Amendments. Just as it did in 1965, congressional debate in 1970 over the expiring provisions of the Voting Rights Act fell along regional lines. The most notable difference between 1965 and 1970 was the Nixon administration’s proposal to replace the act with a nationwide suspension of literacy tests, something the Johnson administration likely would not have proposed. Senators Philip Hart (D-Mich.) and Hugh Scott (R-Penn.) brokered a compromise that extended the expiring provisions and suspended literacy tests nationwide for another five years.³

Congress updated the trigger dates for Section 5 coverage: The 1968 presidential election, rather than the one in 1964, would be used to measure the percentage of registered voters and how many people actually voted state-by-state for the purposes of determining Section 5 coverage. This resulted in coverage for jurisdictions that had very few blacks and never had barriers to registration in the first place, including towns in Connecticut, Massachusetts, Maine, and New Hampshire, and counties in Arizona, California, New York, and Wyoming. All of the states and jurisdictions covered by the 1965 formula would now be supplemented by these new jurisdictions.⁴ What began as a

perfectly tailored statute to enfranchise blacks in the Jim Crow South had started to become something else altogether.

1975 Amendments. The amendments of 1970 were minor compared to those added in 1975. First, Congress extended the expiring provisions of the act to 1982 and permanently forbade the use of literacy tests as part of the registration process anywhere in the country. But the most important change came when Congress added “language minorities” for special protection. This was accomplished by applying the original below-50 percent formula for registration and turnout to jurisdictions in which elections were conducted only in English, and where more than 5 percent of the voting-age population were members of a “language minority” group. The groups included Native Americans, Asian Americans, Alaskan Natives, and Hispanics. In essence, the English-only election materials used in these jurisdictions became analogous to the southern literacy test. This had the effect of adding the entire states of Alaska, Arizona, and Texas, as well as a few scattered counties from California to Florida. Going forward, bilingual election ballots and other materials were now mandated in the new jurisdictions.⁵

There were other changes as well. The inclusion of language minorities meant the act no longer was directed exclusively to blacks and thus had to be broadened by adding to its scope the enforcement of the Fourteenth as well as the Fifteenth Amendment. Clearly the Fifteenth Amendment’s protection of voting rights based on color and previous condition of servitude wouldn’t apply to Hispanics. The Fourteenth Amendment’s “equal protection of the laws” clause cast a wide enough net to cover the newly protected “language minorities.”

1982 Amendments. The 1982 amendments dramatically transformed the Voting Rights Act. As a result of the Supreme Court opinion in *City of Mobile v. Bolden* (a further discussion of which follows), Congress amended Section 2 by adding a “results” test to it. Prior to this amendment, a Section 2 violation required intent to discriminate by the jurisdiction. The new results test allowed a finding of a Section 2 violation even if there were no *intent* on the part of a jurisdiction to discriminate, but, instead, the electoral practice produced a racially discriminatory *result*. The new Section 2 provides:

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.⁶

But determining whether an electoral standard, practice, or procedure results in a denial or abridgement to vote is a subjective inquiry, so the Senate Judiciary Committee issued the *Senate Report* to provide clarification for future courts when determining a violation under Section 2.⁷

Even though Section 5's "temporary" preclearance provisions had been in place for seventeen years, Congress extended them for another twenty-five until August 6, 2007. Additionally, Congress established a new set of standards that allow jurisdictions to "bail out" of Section 4, and, thus, preclearance coverage under Section 5.⁸

2006 Amendments. Even though it was not scheduled to expire until 2007, Congress reauthorized all of the major provisions of the Voting Rights Act a year early. Renamed the "Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006," the bill extended Section 5 (and Section 203) for twenty-five years and overturned two U.S. Supreme Court cases—*Georgia v. Ashcroft* and *Bossier Parish, Louisiana v. Reno* (I and II), both of which had the effect of lessening the use of race during redistricting. (A more detailed explanation of these cases follows.)

During the lengthy hearings on this reauthorization, most members of Congress admitted that the position of minorities in the covered jurisdictions had dramatically improved. Nonetheless, Congress found that a "second generation" of barriers to minority electoral participation had been erected, as evidenced by four factors:

(A) the hundreds of objections interposed, requests for more information submitted followed by voting changes withdrawn from consideration by jurisdictions covered by the Voting Rights Act of 1965, and section 5 enforcement actions undertaken by the Department of Justice in covered jurisdictions since 1982

that prevented election practices, such as annexation, at-large voting, and the use of multi-member districts, from being enacted to dilute minority voting strength;

(B) the number of requests for declaratory judgments denied by the United States District Court for the District of Columbia;

(C) the continued filing of section 2 cases that originated in covered jurisdictions; and

(D) the litigation pursued by the Department of Justice since 1982 to enforce sections 4(e), 4(f)(4), and 203 of such Act to ensure that all language minority citizens have full access to the political process.⁹

Although numerous witnesses presented data and arguments that impeached these four claims, the House voted 390 to 33 and the Senate 98 to 0 to extend the act until 2032.

Voting Rights Case Law: Section 5 and Constitutional Cases

As much as congressional amendments transformed the VRA well beyond anything its framers envisioned, so, too, have the courts. Beginning just a few years after passage, the Supreme Court dramatically reshaped Section 5 into a mechanism to ensure the *effectiveness* of a ballot cast by a black voter, from merely the ability to cast one at all. From that case in 1969 until a decade ago, most Section 5 case law continued to expand the protection of minority officeholders from white competition.

In many Sunbelt cities like Houston, Dallas, Atlanta, and Charlotte, as blacks left low-income inner-city neighborhoods, Hispanic immigrants moved in. By 1993, seeing the bug-splat congressional districts that inevitably followed this dispersal, the Court began tapping the brakes on racial districting. By 2003, the Court concluded that minorities might be better represented in a few districts where they can influence a number of elections than in only one district where they control the outcome.

South Carolina v. Katzenbach. Less than a year after passage, the Voting Rights Act was under challenge. South Carolina objected to nearly every major provision Congress crafted, arguing that the suspension of literacy tests and other devices used in the registration process were constitutionally protected state prerogatives.¹⁰ Although only South Carolina challenged the law, other covered states joined in support as *amici curiae* (friends of the Court). These included Georgia, Alabama, Louisiana, Mississippi, and Virginia. Twenty-one others joined as *amicus* in support of the United States.

The Court found constitutional each provision of the act that was under challenge by a vote of eight to one. The majority opinion argued that the enforcement clause of the Fifteenth Amendment gave Congress “full remedial powers” to prevent racial discrimination in voting, and that the act was a “legitimate response” to the “insidious and pervasive evil” which had denied blacks the right to vote since the adoption of the Fifteenth Amendment in 1870.¹¹

Despite the eight-to-one ruling, the opinion recognized the uniqueness of the act, especially the encroachment of Section 5 on traditional federalism principles, noting,

This may have been an uncommon exercise of congressional power, as South Carolina contends, but the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate. . . . Congress knew that some of the States covered by § 4(b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees. Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself. Under the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner.¹²

The Court noted its satisfaction that the provisions under challenge were to remain in effect for only five years. None of this, however, was enough for Justice Hugo Black, who dissented:

Section 5 goes on to provide that a State covered by § 4(b) can in no way amend its constitution or laws relating to voting without first trying to persuade the Attorney General of the United States or the Federal District Court for the District of Columbia that the new proposed laws do not have the purpose and will not have the effect of denying the right to vote to citizens on account of their race or color. . . . [B]y providing that some of the States cannot pass state laws or adopt state constitutional amendments without first being compelled to beg federal authorities to approve their policies, [it] so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless. One of the most basic premises upon which our structure of government was founded was that the Federal Government was to have certain specific and limited powers and no others, and all other power was to be reserved either “to the States respectively, or to the people.” . . . Moreover, it seems to me that § 5, which gives federal officials power to veto state laws they do not like, is in direct conflict with the clear command of our Constitution that “The United States shall guarantee to every State in this Union a Republican Form of Government.” I cannot help but believe that the inevitable effect of any such law which forces any one of the States to entreat federal authorities in far-away places for approval of local laws before they can become effective is to create the impression that the State or States treated in this way are little more than conquered provinces.¹³

Allen v. State Board of Elections. It did not take long for some southern jurisdictions to try to minimize the growing electoral power of black voters. In 1966, for instance, the state of Mississippi passed a series of laws that blatantly weakened the position of black voters in the electoral process by allowing a few counties that had previously had a single-member plan of district representation to adopt an at-large system. Mississippi defended its law by arguing that Section 5 did not apply to such changes, since the new

state law addressed the structure of elections, not barriers to voter registration. The Supreme Court disagreed.

The *Allen* case dramatically broadened the scope of Section 5 jurisprudence. In a seven-to-two opinion, Chief Justice Earl Warren noted that “the right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot.”¹⁴ This was a bold step for the Court to take—no longer would Section 5 simply be a shield to protect black voters from barriers to registering and voting at the polls. Now it could be used to invalidate a law or practice, such as annexations and redistricting changes, that might “dilute” minority voting rights. Warren wrote that with at-large elections, “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.”¹⁵

Justice John Marshall Harlan authored a partial concurrence and dissent. First, he argued that

Section 4 is one of the Act’s central provisions, suspending the operation of all literacy tests and similar “devices” for at least five years in States whose low voter turnout indicated that these “tests” and “devices” had been used to exclude Negroes from the suffrage in the past. Section 5, moreover, reveals that it was not designed to implement new substantive policies but that it was structured to assure the effectiveness of the dramatic step that Congress had taken in 4.¹⁶

In other words, for Harlan, the *Allen* opinion rewrote the act to allow a “revolutionary innovation in American government that goes far beyond”¹⁷ what was envisioned by the act’s framers.

The administrative impact of the *Allen* ruling was evident in the increase of Section 5 submissions. From passage to 1968, the Department of Justice reviewed 189 Section 5 submissions; however, shortly after *Allen* was decided, the number of redistricting reviews had swelled to over 1,100. Today, the Department of Justice regularly reviews over 4,000 submissions each year.¹⁸

But this increase tells only a minor part of the story. With *Allen*, the Voting Rights Act came to be a tool for political empowerment of blacks and, later, beginning with the 1972 amendments, Hispanics. Once the Supreme Court stretched Section 5 into a mechanism to prevent “dilution,” the floodgates were opened. Now the Department of Justice and the courts were in the business of judging the “fairness” of all voting procedures and practices. Justice Harlan’s dissent pinpointed the dangerous ground on which the VRA now operated:

It is not clear to me how a court would go about deciding whether an at-large system is to be preferred over a district system. Under one system, Negroes have some influence in the election of all officers; under the other, minority groups have more influence in the selection of fewer officers. If courts cannot intelligently compare such alternatives, it should not be readily inferred that Congress has required them to undertake the task.¹⁹

Allen marked the beginning of Section 5’s transformation. By 1980, the transformation was complete. In the eyes of Judge J. Harvie Wilkinson III, “The Voting Rights Act of 1965, whose noble purpose was to ensure that all Americans were free to cast their ballots, has been allowed by courts to become a runaway train of racial separatism.”²⁰

Beer v. United States. Since 1954, the City of New Orleans had chosen to elect five city council members from single-member districts and two members at large. During the 1961 round of redistricting, none of the five single-member districts the city drew had a majority of registered black voters, and no black member was elected to the city council while this plan remained in effect.²¹

That changed after the 1970 redistricting, when the city drew one council district in which there was a majority of black registered voters and one in which blacks were a majority of the overall population, but not registered voters. New Orleans filed for Section 5 preclearance of this plan with the Department of Justice, which rejected it. The attorney general argued that because 65 percent of city’s registered voters were white and 35 percent were black, the new plan had the effect of abridging black voting rights

because it “dilute[d] black voting strength by combining a number of black voters with a larger number of white voters in each of the five districts.” The attorney general also noted that the new lines did “not reflect numeric population configurations or considerations of district compactness or regularity of shape.”²²

Undeterred, the city then turned to the D.C. District Court for a declaratory judgment but ran into the same problems there. The court ruled that the new plan would also abridge black voting rights because if blacks “could elect city councilmen in proportion to their share of the city’s registered voters, they would be able to choose 2.42 of the city’s seven councilmen, and, if in proportion to their share of the city’s population, to choose 3.15 councilmen.”²³ Furthermore, because the city retained its two at-large council members, the court also found this to be a violation of Section 5.

The Supreme Court’s opinion, finally issued in 1976, disagreed. According to the Court, compliance with Section 5 was not about protecting or promoting a theoretically feasible redistricting plan that could create more minority seats. Rather, it was designed to apply only to proposed changes to already existing voting procedures. In other words, since New Orleans at the time of the 1970 redistricting didn’t have any majority-black districts, Section 5 couldn’t be used to mandate their creation. The Court wrote that “the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.”²⁴ This retrogression standard, although clearly understood in the *Beer* case, became fuzzy and difficult to apply to an ever-changing society over the years, as black-white racial dynamics throughout the South improved.

City of Rome, Georgia v. United States. In 1966, the city of Rome, Georgia, changed the manner in which it elected representatives to its nine-member city commission. Instead of requiring a winning plurality vote to gain office, the city switched to a majority system and consolidated nine election wards into three numbered posts within three election wards. Rome also made sixty annexations during the decade after the passage of the Voting Rights Act. In 1974, these changes were submitted to the attorney general for preclearance, whereupon most were denied.²⁵

When the case reached the Supreme Court in 1979, the Justice Department argued that the city's election changes were discriminatory in *effect* even though they had been made without discriminatory *purpose*. The majority-vote requirement harmed the electoral opportunity for blacks because it forced a runoff election between a white and a black candidate, whereas a plurality system made it easier for a black candidate to win office. The DOJ also claimed the annexations were discriminatory because they had the effect of lowering the percentage of the city's black population. Rome argued that Section 5 of the act should not be interpreted as prohibiting voting practices that have only a discriminatory effect. It further claimed that the statute itself exceeded Congress's authority to enforce the Fourteenth and Fifteenth Amendments, in that all the amendments prohibit *purposeful* racial discrimination in voting, not discriminatory *effects*.²⁶

The Court struck down the city's changes, ruling that the harmful effects of a change in a voting practice or annexation were grounds enough to deny preclearance under Section 5, and noting that "Congress plainly intended that a voting practice not be precleared unless both discriminatory purpose and effect are absent."²⁷

Justices Lewis Powell, William Rehnquist, and Potter Stewart dissented for various reasons. Rehnquist and Stewart found that Rome had been free of any purposeful discrimination in voting for at least seventeen years, yet,

Despite this record, the Court today continues federal rule over the most local decisions made by this small city in Georgia. Such an outcome must vitiate the incentive for any local government in a State covered by the Act to meet diligently the Act's requirements. Neither the Framers of the Fifteenth Amendment nor the Congress that enacted the Voting Rights Act could have intended that result.²⁸

Thus, *Rome v. United States* upheld the constitutionality of the effects test in determining preclearance under Section 5.

Shaw v. Reno and Miller v. Johnson. The power of the Department of Justice and the lower courts to expand the scope of the VRA's Section 5

provision began to narrow in the 1990s. In 1991, the state of North Carolina submitted its congressional redistricting plan to the attorney general for preclearance. The plan had only one majority black district and was rejected on the grounds that a second majority district could have been created in another part of the state. The North Carolina legislature complied by creating another majority black district, but with boundaries that stretched 160 miles along U.S. Interstate Highway 85. The new district lines spread out from the interstate to sweep up pockets of black residents in towns from ten different counties. One North Carolina legislator remarked that “if you drove down the interstate with both car doors open, you’d kill most of the people in the district.”²⁹

Five North Carolina residents—one of whom was a retired judge on the U.S. Court of Appeals for the Armed Forces—sued the state, claiming it had created an unconstitutional racial gerrymander in violation of the Fourteenth Amendment. They alleged that

the two districts concentrated a majority of black voters arbitrarily without regard to considerations such as compactness, contiguousness, geographical boundaries, or political subdivisions, in order to create congressional districts along racial lines and to assure the election of two black representatives.³⁰

A three-judge court in North Carolina dismissed the claim outright, finding no support in the Voting Rights Act or the Constitution “that race-based districting is prohibited by Article I, Section 4, or Article I, Section 2, of the Constitution, or by the Privileges and Immunities Clause of the Fourteenth Amendment.”³¹ The Supreme Court, however, differed and sent the case back for a full trial on the merits.

The Supreme Court found that the plaintiffs had a claim against North Carolina under the Equal Protection Clause of the Fourteenth Amendment. They wrote that a redistricting scheme is unconstitutional if it is “so irrational on its face that it can be understood only as an effort to segregate voters into separate districts on the basis of race, and that the separation lacks sufficient justification.”³² The Court noted that a covered jurisdiction’s attempt to comply with Section 5 “does not give it *carte blanche* to engage in racial gerrymandering.”³³

Additional language from the Supreme Court's opinion indicated that the expansion of group rights in the voting arena had, perhaps, gone too far. The Court wrote:

By perpetuating stereotypical notions about members of the same racial group—that they think alike, share the same political interests, and prefer the same candidates—a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority minority districting is sometimes said to counteract. It also sends to elected representatives the message that their primary obligation is to represent only that group's members, rather than their constituency as a whole.³⁴

Nearly two years after sending the case back to the North Carolina courts for further consideration, the Supreme Court had it and a similar case from Texas once again.³⁵ This time the Supreme Court struck down one North Carolina and three Texas majority-minority districts as unconstitutional gerrymanders. The opinion sent shockwaves through the racial advocacy groups. Theodore Shaw (no relation) of the National Association for the Advancement of Colored People (NAACP) Legal Defense and Educational Fund reacted to the decision by remarking that “what's at stake here is nothing less than whether we are going to have a racially integrated Congress and racially integrated state legislatures, even racially integrated city councils.”³⁶ This decision, he stated, would mean “the Congressional Black Caucus will be able to meet in the back seat of a taxicab.”³⁷

In *Miller v. Johnson* the Supreme Court went an extra step in defining the contours of racial gerrymandering. In 1991, the Georgia legislature submitted a congressional redistricting plan to the Department of Justice that was rejected because it had only two black majority-minority districts. At the urging of the American Civil Liberties Union and the NAACP, the DOJ forced the state to adopt a “max-black” plan that included a third majority black district. Using the doctrine they laid out in *Shaw*, the Court struck down Georgia's plan as a racial gerrymander and noted that in future redistricting litigation

a plaintiff must show, whether through circumstantial evidence of a district's shape and demographics or more direct evidence

of legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations.³⁸

Reno v. Bossier Parish, Louisiana (I and II). The Bossier Parish, Louisiana School Board redrew its twelve single-member voting districts after the 1990 census in order to comply with the wide population disparities among its districts.³⁹ Like the “Police Jury” (county commissioner) redistricting plan upon which it was identically modeled, the school board plan did not contain any district in which blacks formed a majority of the population. Although the Police Jury plan was granted preclearance by the Department of Justice, the school board's plan was rejected based upon new information not available when the DOJ precleared the Police Jury lines.

The new information that came to the DOJ's attentions was a hypothetical redistricting plan offered to the school district by the NAACP. It created two majority-black school board districts in which “black residents [were] sufficiently numerous and geographically compact so as to constitute a majority in two single member districts.”⁴⁰ The Department of Justice denied preclearance for two reasons: First, it claimed the school board's plan violated Section 2 of the Voting Rights Act, which forbids a plan that limits the opportunity for minority voters to elect candidates of choice, but is distinct from the “retrogression” test of Section 5. Second, the DOJ claimed that even though the school board's plan did not actually retrogress the position of black voters, the plan was designed for that purpose—that is, the school board's intent in adopting the Police Jury's plan was discriminatory even though it didn't have that effect.

The DOJ argued in court that when a jurisdiction violates Section 2 of the Voting Rights Act in its redistricting plan, preclearance under Section 5 should be withheld. The Supreme Court in *Bossier I* disagreed in a five-to-four opinion, noting that under Section 5, preclearance may not be denied

solely on the basis that a covered jurisdiction's new redistricting plan violates Section 2. They wrote that Section 5 "freezes election procedures in a covered jurisdiction until that jurisdiction proves that its proposed changes do not have the purpose, and will not have the effect, of denying or abridging the right to vote on account of race."⁴¹ In other words, compliance with Section 5 clearly addresses only retrogression, while Section 2 addresses vote dilution. Furthermore the Court wrote,

Making compliance with Section 5 contingent upon compliance with Section 2 . . . would, for all intents and purposes, replace the standards for Section 5 with those for Section 2, thus contradicting more than 20 years of precedent interpreting Section 5.⁴²

A few years after handing down *Bossier I*, the Supreme Court tackled the second issue in *Bossier II*—whether the intent to discriminate was violative of Section 5 even though the results weren't. The DOJ lost once again. The same five-to-four court noted that Section 5 "does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose."⁴³

Georgia v. Ashcroft. *Georgia v. Ashcroft* marked the most important Section 5 case since *Beer*.⁴⁴ In 2001, the Georgia legislature redrew the state's fifty-six state senate districts after the 2000 census. The former benchmark plan, established in 1997, had eleven districts in which the total black population exceeded 50 percent and ten districts in which the black voting-age population was over 50 percent. For the 2001 plan, however, nearly all elected black state senators and representatives, as well as most white Democrats in the state legislature, pushed to "unpack" these heavily concentrated black districts so as to create a plan that would likely elect more Democrats. The new plan consisted of thirteen districts with a majority-black voting-age population, thirteen additional districts with a black voting-age population between 30 percent and 50 percent, and four other districts with a black voting-age population between 25 percent and 30 percent. The Democrats' political strategy was to try to maintain the same number of black districts while increasing the overall number of seats held by Democrats. Moreover, they hoped to create a number of "influence"

districts where “black voters would be able to exert a significant—if not decisive—force in the election process.”⁴⁵

This unpacking, however, was seen as a retrogression of black voting strength from the plan that was currently in place, so the Department of Justice denied preclearance. When the case finally was decided by the Supreme Court in 2003, it upheld the new plan, noting that a jurisdiction may choose among a number of different redistricting plans to meet the nonretrogression requirement the Court articulated in earlier Section 5 cases. For instance, in order to maximize a minority-group’s electoral success, a

state may choose to create either a certain number of “safe” districts in which it is highly likely that minority voters will be able to elect the candidate of their choice, or a greater number of districts in which it is likely, although perhaps not quite as likely as under the benchmark plan, that minority voters will be able to elect their candidates. Section 5 does not dictate that a State must pick one of these redistricting methods over the other. In considering the other highly relevant factor in a retrogression inquiry—the extent to which a new plan changes the minority group’s opportunity to participate in the political process—a court must examine whether the 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.⁴⁶

In other words, *Georgia v. Ashcroft* gives legislating bodies some flexibility to choose among different types of redistricting plans.

Notes

Introduction

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18. *Georgia v. Ashcroft et al.*, 2498, 2517.

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20. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Public Law 109-246, U.S. Statutes at Large 120 (2006): 577; hereafter, Voting Rights Act Amendments of 2006.

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