INTRODUCTION

In 1960, African-Americans in the South were substantially disfranchised by racially discriminatory registration procedures. Fewer than one out of three blacks of voting age were registered, and whites were registered at more than twice that rate. In Alabama, for example, only 14 percent of African-American adults were registered, as compared with 64 percent of white adults.¹ Not surprisingly, state legislatures in the region were all white, although a few local governments had elected a black person to public office from time to time in the years since World War II.² State legislatures, which in most cases had not been redistricted in decades, were astonishingly malapportioned. Florida, where 12 percent of the population could elect a majority of the state senate and 15 percent could elect a majority of house members, was the most egregious example; the largest senate

district had 98 times the population of the smallest, and the largest house district was 109 times the smallest.\(^5\)

By 1990 this portrait of inequality had been transformed beyond recognition. Formal barriers to registration and voting no longer existed, and in some localities African-American registration and turnout approached parity with whites. Black office holding had become routine and in some jurisdictions approached proportionality, as a result of the elimination of racially discriminatory at-large election procedures.\(^4\) State legislatures and local governing bodies routinely, and uncomplainingly, apportioned themselves according to the one person, one vote principle, with only modest deviation from absolute equality. As political scientist Bernard Grofman puts it, the principle of population equality had become the *sine qua non* of redistricting.\(^3\)

How can we account for this remarkable transformation in Southern electoral politics in a period of only 30 years? One aspect of this change is well understood: the substantial elimination of racial barriers to registration and voting was due primarily to the adoption and implementation of the Voting Rights Act of 1965.\(^6\) The elimination of malapportioned legislatures and of at-large election systems, on the other hand, resulted from a more complex process in which liti-


\(^4\) See generally QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990 (Chandler Davidson & Bernard Grofman eds., 1994). This is not to say, however, that all jurisdictions had proportionality in representation or that all discriminatory electoral rules had been eliminated.


gation in the federal courts played the central role. That process is what this essay seeks to explain.

Beginning in 1962, the Supreme Court adopted the view that the Equal Protection Clause of the Fourteenth Amendment required legislative and congressional districts to be substantially equal in population—the one person, one vote standard—to protect against what came to be called quantitative vote dilution. The extraordinary political impact of these decisions was quickly dubbed the “reapportionment revolution,” perhaps the only revolution ignored altogether by historians. The Court subsequently expanded the equal protection concept to include a prohibition on racial, that is qualitative, vote dilution, particularly as manifested in the use of at-large elections or its equivalent, multi-member legislative districts. The transformation of the electoral structure of Southern politics between 1960 and 1990 was due essentially to the implementation of these two concepts of vote dilution through hundreds of federal court orders, assisted by administrative actions of the Department of Justice, and reinforced by Congressional decisions to expand and strengthen the Voting

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7 This process was not always linear. At the outset, the implementation of court orders striking down malapportioned legislative bodies sometimes conflicted with protection of minority voting strength. See, e.g., Peyton McCrary & Steven F. Lawson, Race and Reapportionment, 1962: The Case of Georgia Senate Redistricting, 12 J. POL’Y HIST. 293 (2000). As legal scholar Robert Dixon reminds us, “[f]requently in the course of constitutional development one problem is solved or at least ameliorated only at the cost of creating or worsening another problem.” Dixon, supra note 5, at 456. Dixon argues that simple-minded focus on mathematical equality by the Supreme Court can make matters worse to the degree that multi-member districts are used to dilute minority voting strength, and he defines the term gerrymandering to include the use of at-large elections. Id. at 460-64.


9 See the absence of references to studies of reapportionment in INTERPRETING SOUTHERN HISTORY (John B. Boles & Evelyn Thomas Nolen eds., 1987); THE PAST BEFORE US: CONTEMPORARY HISTORICAL WRITING IN THE UNITED STATES (Michael Kammen ed., 1980). Studies by respected historians whose subject matter make a discussion of reapportionment relevant (but which ignore the subject) include Bartley, supra note 2, and Allen J. Matusow, THE UNRAVELING OF AMERICA: A HISTORY OF LIBERALISM IN THE 1960s (1984), and only perfunctory references are to be found in Dewey W. Grantham, THE SOUTH IN MODERN AMERICA: A REGION AT ODDS 308 (1994), and James T. Patterson, GRAND EXPECTATIONS: THE UNITED STATES, 1945-1974, 565 (1996).

10 See Burns v. Richardson, 384 U.S. 73 (1966); Fortson v. Dorsey, 379 U.S. 435, 436-37 (1965). As one trial court put it some years later, “it is settled law that apportionment schemes employing multi-member districts will constitute an invidious discrimination” where they “minimize or cancel out the voting strength of racial or political elements of the voting population.” Graves v. Barnes, 343 F. Supp. 704, 724 (W.D. Tex. 1972) (quoting Fortson, 379 U.S. at 439 (1965)).
Rights Act in 1970, 1975, and 1982. None of this, of course, could have happened without the willingness of private citizens to assert their rights in court and the ability of public interest lawyers to represent them effectively.

A number of related issues lie beyond the scope of this essay. Despite my focus on litigation in the federal courts, in the interest of space, I largely ignore the internal deliberations of judges and justices and biographical influences on their legal thought. Nor do I explore the partisan consequences of either the one person, one vote decisions or racial vote dilution cases, or join the debate over the trade-offs between descriptive and substantive representation in redistricting plans. I also leave for another time the story of the confusion in voting rights case law that developed in the 1990s, a development that appeared to place the achievements of the preceding quarter century in jeopardy.

I. RACE, POLITICS, AND THE LAW, 1960

The federal courts had not made much headway against the Southern system of white supremacy by 1960, with the single exception of eliminating the all-white party primary at the end of World War II. The role of the federal courts in implementing protections against minority vote dilution has not been investigated systematically. See Howard Ball et al., Compromised Compliance: Implementation of the 1965 Voting Rights Act (1982) (focusing on the enforcement of the preclearance requirements of Section 5 of the Act by the Department of Justice). Ball's analysis is quite different from the approach taken here and is discussed below; see also Hugh Davis Graham, The Civil Rights Era: Origins and Development of National Policy, 1960-1972 (1990) (dealing with policies other than voting rights); Abigail M. Thernstrom, Whose Votes Count? Affirmative Action and Minority Voting Rights (1987) (attacking many of the voting rights decisions of the federal courts and the enforcement of Section 5 by the Department of Justice, but without focusing on the implementation process itself); Hugh Davis Graham, Race, History, and Policy: African Americans and Civil Rights Policy Since 1964, 6 J. Pol'y Hist. 12 (1994) (dealing with policies other than voting rights); Hugh Davis Graham, Voting Rights and the American Regulatory State, in Controversies in Minority Voting: The Voting Rights Act in Perspective 177-96 (Bernard Grofman & Chandler Davidson eds., 1992) (focusing on Justice Department implementation).

12 The classic study of the civil rights decisions of the Fifth Circuit Court of Appeals, Jack Bass, Unlikely Heroes (1981), provides an example of this genre.


War II. African-American citizens in the South were subjected to arbitrary and discriminatory restrictions on their right to register and vote, including literacy tests, constitutional interpretation requirements, and poll taxes. Legal protection for minority voting rights in the South was afforded only by lawsuits brought under the Reconstruction Amendments. Prior to 1957, only private attorneys could file such litigation, but in that year Congress adopted a Civil Rights Act that created the Civil Rights Division in the Department of Justice and gave it authority to bring constitutional challenges to racially discriminatory voting practices. Even so, the Department gained only limited authority to challenge registration procedures jurisdiction by jurisdiction, and, even in these purely local cases, not all federal judges were willing to disturb the status quo. Everywhere in the South, African-American registered and turned out to vote at much lower rates than whites, and in black-majority counties the poll books often included only a handful of blacks.

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

15 See Smith v. Allwright, 321 U.S. 649 (1944). See also DARLENE CLARK HINE, BLACK VICTORY: THE RISE AND FALL OF THE WHITE PRIMARY IN TEXAS (1979). Earlier decisions eliminating the “grandfather clause,” Guinn v. United States, 238 U.S. 347 (1915), and Lane v. Wilson, 307 U.S. 268 (1939), had little practical effect on the electoral rights of minority voters. Nor was there much effect to later decisions, such as Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala. 1949), aff'd, 336 U.S. 933 (1949), which struck down restrictive registration procedures in Alabama. See also LAWSON, IN PURSUIT OF POWER, supra note 6, at 19, 44-54, 90-91, 96-97.


18 See U.S. COMMISSION ON CIVIL RIGHTS, supra note 2, app. VII, at 222-56; GARROW, supra note 1, at 6-11, 241-45.

majority of the electorate, and where whites vote as a bloc against candidates preferred by minority voters, the candidate preferences of the minority community are submerged in the larger pool of white voters.20

Even when voting patterns are racially polarized, in a simple at-large system a cohesive minority group can use single-shot voting to elect one representative if several offices are to be filled.21 By requiring all voters to cast ballots for a full slate of offices to be filled, single-shot voting becomes impossible. The same result occurs if each candidate is required to qualify for a separate place or post (i.e., Place No. 1, Place No. 2, etc.). Thus, both anti-single shot procedures and numbered-place requirements enhance the discriminatory potential of at-large elections.22

The widespread use of laws requiring runoff elections where no candidate receives a majority of the votes cast can also have a discriminatory effect in an at-large system where voting is racially polarized. If the candidate receiving a plurality of the votes wins, one minority candidate can defeat several white candidates wherever white voters split their ballots sufficiently. Requiring a runoff in the event that no candidate receives a majority of the votes cast, however, eliminates that possibility by setting up a head-to-head contest between the top two choices, so that white voters can rally behind the white candidate as a bloc.23

Advocates of white supremacy were like the proverbial lawyer who wears both suspenders and a belt: these dilutive devices served as layers of insurance for the status quo, to be called into play wherever black political participation rose to a level that threatened white monopoly of electoral offices. Nothing better illustrates this principle

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Consider again the town of 600 whites and 400 blacks with an at-large election to choose four council members. Each voter is able to cast four votes. Suppose there are eight white candidates, with the votes of the whites split among them approximately equally, and one black candidate, with all the blacks voting for him and no one else. The result is that each white candidate receives about 300 votes and the black candidate receives 400 votes.


23 See Chandler Davidson, Biracial Politics: Conflict and Coalition in the Metropolitan South 63-67 (1972); Butler, supra note 22, at 866-67.
than the adoption of a package of so-called “segregation bills” by the Louisiana legislature in 1960.24

The day after a federal court in New Orleans had ordered the desegregation of the New Orleans public school system, newly elected Governor Jimmie Davis announced to the state legislature that his administration was sponsoring a series of bills “designed to preserve segregation and at the same time maintain law and order in our state.”25 The architects of the administration package included two leaders of the Citizens Council movement in the state, Willie Rainach, a former legislator from northern Louisiana, and Leander Perez, a planter-businessman who was a virtual dictator in Plaquemines Parish, south of New Orleans. Rainach had chaired the Joint Committee on Segregation from 1954 to 1959; under the influence of his committee, the legislature had enacted a host of racially motivated statutes, and at Rainach’s urging the citizens’ councils carried out systematic purges of black voters from the state’s registration rolls.26 Perez, long the district attorney of his parish but widely known as “Judge” Perez, currently headed the state district attorneys’ association. An administration floor leader explained that the district attorneys’ association had drafted the entire legislative package.27

These segregation measures included new restrictions on voting. One bill required that the race of each candidate be designated on the ballot, presumably to allow white voters to target any black candidates.28 Another sent to the voters a new constitutional amendment designed to allow registrars greater latitude in keeping blacks off the voter list. Its principal features were a more stringent literacy test, a test of “good moral character,” and a list of petty crimes—reportedly the kind most often committed by blacks—that made citizens ineligi-

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24 At the time the major disfranchising device was a requirement that prospective registrants read and interpret to the satisfaction of local registrars any portion of the Louisiana or United States Constitutions. This device was struck down in United States v. Louisiana, 225 F. Supp. 353 (E.D. La. 1963), aff’d sub nom. Louisiana v. United States, 380 U.S. 145 (1965).
27 See Anti-Mix Bill Ok’d in House: Measure Designed to Alter Parish Set-Up, NEW ORLEANS TIMES-PICAYUNE, June 28, 1960, §1, at 16 [hereinafter Anti-Mix Bill Ok’d in House].
28 See LA. REV. STAT. ANN. § 18:1174.1 (West 1960). The Supreme Court found this law unconstitutional in Anderson v. Martin, 375 U.S. 399, 402 (1964), because “by placing a racial label on a candidate at the most crucial stage of the electoral process—the instant before the vote is cast—the State furnishes a vehicle by which racial prejudice may be so aroused,” as Justice Tom Clark stated for a unanimous Court, that it “may decisively influence the citizen to cast his ballot along racial lines.” Id.
ble to vote. According to a press account, proponents of these measures believed that "morality qualification for voting will result in the disfranchisement of a large number of Negroes."30

Other provisions were designed to dilute minority voting strength. Although no longer a member of the legislature, Rainach’s influence was so great that he was permitted to explain the administration’s segregation measures to the Senate Judiciary Committee. For example, Rainach unabashedly described the racially discriminatory purpose of requiring parish school board members to be elected by majority vote, or face a runoff: the bill “obviously was intended to block any Negro candidates from becoming members of the school board by getting a plurality vote, rather than a majority.”31

The bill also included an anti-single shot (or “full slate”) requirement.32 In light of the fact that school boards were covered by the existing state-wide anti-single shot law,33 this provision was redundant, except as an insurance policy.34 As it happens, the full slate requirement created numerous malfunctions in the electronic voting machines they state was using in increasing numbers. The state custodian of voting machines, Douglas Fowler, tried for years to persuade legislators to change the law, only to be told that “if you do this, then a Negro will be elected.”35

The state Constitution had for many years required parish governing bodies, called police juries, to be elected by districts rather than at large. Recognizing the threat that African-American candidates might succeed in winning office under a ward system, the Davis ad-

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29 1960 La. Acts 1166 ch. 613 (amending LA. CONST. art. VIII, § 1(d)). These 1960 provisions were not affected by the Supreme Court decision striking down the constitutional interpretation test set forth in the 1921 state Constitution, which, the Court found, “as written and as applied, was part of a successful plan to deprive Louisiana Negroes of their right to vote.” Louisiana v. United States, 380 U.S. 145, 151 (1965).

30 Vote Qualification Bill Passes House, PLAQUEMINES GAZETTE, June 24, 1960, at 6.


32 1960 La. Acts 999, ch. 539, 1001 (Sec. 1) (“Whenever there are two members of the School Board to be elected, each elector shall vote for two candidates. Whenever an elector shall vote for a lesser number of candidates than there are places to be filled, the ballot shall not be counted for any of the plural candidates.”).

33 1940 La. Acts 201, ch. 46 (Sec. 72) (codified as 18:351).

34 Such full slate laws were in use in several Southern states, and, because racial or ethnic minorities often used single shot voting as a means of electing candidates of their choice, were widely understood as devices to dilute minority voting strength. See City of Rome v. United States, 446 U.S. 156, 184 n.19 (1980); Dillard v. Crenshaw County, 640 F.Supp. 1347, 1361 (M.D. Ala. 1986).

ministration included in its "segregation" package a new law authorizing the creation of charter commissions "to allow voters of any parish to change their form of government to a commission form with members elected parish-wide, if Negro voters became concentrated enough in one or more wards to elect a member of their race to the present police jury." An administration floor leader reassured legislators who initially opposed the idea: "This is a segregation bill. I hated to say it, but this was designed so that, if undesirables get on parish police juries, the people could change their form of government." A year later Plaquemines Parish put this plan into effect, with Judge Perez serving as the leading member of the new Commission Council. The shift to at-large elections was to become the key element in white efforts to minimize the effects of the growing black vote in the South.

II. THE TUSKEGEE GERRYMANDER

A more complicated version of vote dilution is annexation—or, in some cases, de-annexation—that is, altering the boundaries of a city so that it significantly affects the percentage of minority voters in the city's electorate. In 1957 the Alabama legislature redrew the boundaries of the predominantly black city of Tuskegee in such a way that virtually all its black inhabitants were beyond the municipal limits, turning an 80 percent black city into a virtually all-white city and thus eliminating the threat that African-American might elect a member to the city council. The city was the home of the historic Tuskegee Institute and a veterans' hospital; the black professional staff of both institutions had been fighting mostly hostile registrars to

36 Anti-Mix Bill Ok'd in House, supra note 27, § 1, at 16 ("The Louisiana House Monday passed 76-15 its newest and hitherto undisclosed segregation bill to keep Negroes from getting on parish governing bodies."). For the bill's text, see 1960 La. Acts 1202, ch. 631. See also Senate Passes Group of Bills on Segregation, NEW ORLEANS TIMES-PICAYUNE, July 1, 1960, at 1, 3.

37 Anti-Mix Bill Ok'd in House, supra note 27, § 1, at 16 (comments to Rep. T.T. Fields). Another legislator complained that the proposal had been introduced precipitously without careful study and discussion, but agreed to support the bill because of its racial purpose. Id. ("I will vote with the administration, since it is a segregation bill, and the older members say it is all right.") (comments of Rep. Lloyd Himel).

38 Commission Council Seated; Council Officers Elected, PLAQUEMINES GAZETTE, Sept. 8, 1961, at 1, 4.

secure the right to vote since the 1930s. At the time of the de-annexation, black registration in Tuskegee had reached 40 percent of the eligible voters in the city but was significantly lower in rural areas of the county.

Sam Engelhardt, Jr., the legislative architect of what came to be known as the “Tuskegee gerrymander,” understood the process of vote dilution. Several years earlier in 1951 he had persuaded the legislature to pass a bill outlawing single-shot voting in Alabama municipalities because, as a fellow legislator Senator J. Miller Bonner explained, “there are some who fear that the colored voters might be able to elect one of their own race to the [Tuskegee] city council by ‘single-shot’ voting.” Engelhardt was a leader in the state’s White Citizens’ Council by 1957. The de-annexation plan for Tuskegee was simply the latest in his efforts to maintain white control of the political process.

Civil rights lawyer Fred Gray promptly challenged Engelhardt’s handiwork in federal court. The district and appellate courts, seeing the Tuskegee de-annexation as a type of legislative gerrymander, declined to act, in deference to current Supreme Court precedents. At that time the Supreme Court treated any challenge to apportionment or redistricting plans as non-justiciable because it presented a “political question.” As Supreme Court Justice Felix Frankfurter put it in the 1946 decision Colegrove v. Green, “[c]ourts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly.” In this instance, of course, there was no chance the Alabama legislature would remedy its racially discriminatory de-annexation of Tuskegee.

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40 ROBERT J. NORRELL, REAPING THE WHIRLWIND: THE CIVIL RIGHTS MOVEMENT IN TUSKEGEE 89 (1985). See also id. at 60-78, 91-92, 95; KOUSSER, supra note 19, at 332.
42 See NORRELL, supra note 40, at 91-92.
43 See Gomillion v. Lightfoot, 167 F. Supp. 405 (M.D. Ala. 1958), aff’d, 270 F.2d 594 (5th Cir. 1959), rev’d, 365 U.S. 339 (1960). Those precedents included disapproval of judicial inquiry into legislative intent or motive. See also BASS, supra note 12, at 99-100, 106-109; TINSLEY E. YARBROUGH, JUDGE FRANK JOHNSON AND HUMAN RIGHTS IN ALABAMA 73-74 (1981). A memo by Chief Justice Earl Warren’s law clerk, initialed MHB, regarding Gomillion, mentioned that the court below “held that the judiciary may not look behind the face of the statute to ascertain the motivation of the legislature,” and added “[i]f a statute, constitutional on its face, has the effect of creating a discriminatory classification, then the statute is bad, even if it can be demonstrated that the motives of the legislature were non-discriminatory.” Memorandum from Law Clerk to Justice Earl Warren, in EARL WARREN PAPERS 14-15 (Library of Congress 1985) [hereinafter “MHB Memo”].
44 Colegrove v. Green, 328 U.S. 549, 556 (1946).
The Supreme Court broke new ground, however, by invalidating the de-annexation in the landmark decision *Gomillion v. Lightfoot*. Justice Frankfurter, the architect of *Colegrove*, wrote the majority opinion. Frankfurter persuaded his colleagues to strike down the Tuskegee de-annexation as a violation of the Fifteenth Amendment—on the ground that it denied blacks the right to vote in municipal elections—rather than as a dilution of their voting strength in violation of the Fourteenth Amendment's Equal Protection Clause. In this way Frankfurter could take action against the infamous gerrymander while still claiming that *Colegrove* was good law. Nevertheless, in subsequent years *Gomillion* has routinely been seen as a districting case. Lawyers interested in challenging malapportioned legislative plans, moreover, saw the Tuskegee decision as a basis for persuading a future Court to enter the redistricting arena.

### III. The Courts Invade the Political Thicket

In the area of population inequality, the federal courts were part of the problem before they created a solution. Before 1962 the federal courts refused to accept jurisdiction over challenges to malapportioned legislatures under the *Colegrove* doctrine. Because most

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47 It may be that some felt that *Gomillion* was simply not the right case to address the “political question” doctrine. See MHB Memo, supra note 43, at 6:

Of course, the Ct. [sic] could write [a] very sweeping decision overruling cases such as *Colegrove v. Green* and casting considerable doubt upon the continuing efficacy of the political question doctrine. However, I seriously doubt that a majority would consent to such an opinion, and this is probably not the proper case for such a drastic departure ....

In a footnote, he observed that “a better vehicle for overruling *Colegrove* would be *Baker v. Carr*, No. 103, 1960 Term, which involves a Tenn. Reapportionment statute and which is being held for the instant case.” Id.

48 *Gomillion*, 364 U.S. at 347 (“[T]he inescapable human effect of this essay in geometry and geography is to deprive colored citizens, and only colored citizens, of their theretofore enjoyed voting rights. That was not *Colegrove v. Green*.”). Justice Frankfurter's opinion relied on evidence of discriminatory effect to infer racial purpose, a departure from common practice. Id. at 341. See YARBROUGH, supra note 43, at 74 (describing how the federal courts were reluctant at that time to inquire into legislative motive). But see *Gomillion*, 364 U.S. at 349 (Whittaker, J., concurring) (concurring in the result, Justice Whitaker would have found the de-annexation a violation of the Equal Protection Clause). See also Shaw v. Reno, 509 U.S. 630, 645 (1993) (adopting Justice Whitaker's view by treating *Gomillion* as a redistricting case).


50 See CORTNER, supra note 3, at 88.

51 The Court also refused at that time to hear numerous challenges to Georgia's county unit system for electing candidates to public office. See, e.g., Cox v. Peters, 342 U.S. 936 (1952) (per
state legislatures refused to reform themselves by equalizing the apportionment of seats, that doctrine left malapportionment a wrong without a remedy.

Lawyers representing established political leaders in Memphis, Nashville, and Knoxville filed a lawsuit challenging the egregiously malapportioned Tennessee legislative districts, which had not been redrawn since 1901 despite a state constitutional requirement. Some were Democrats, some Republicans; some were political conservatives, some were liberals. What united them was the simple desire to obtain a proportional number of seats in the legislature. The largest district in Tennessee had more than 44 times the population of the smallest district. The rural-urban disparities were not as great as in some other states because the apportionment under-represented rural areas in the Republican stronghold of East Tennessee as well as all metropolitan areas.

This case presented the Supreme Court with an opportunity in 1962 to confront the Colegrove doctrine squarely. Over Justice Frankfurter's adamant opposition, joined by that of Justice John Marshall Harlan, on March 26, 1962, the Supreme Court decided in Baker v. Carr that the plaintiffs had standing to challenge a legislative redistricting plan, that the federal courts had jurisdiction to decide such cases, and that the plaintiffs' claims were justiciable under the Equal Protection Clause of the Fourteenth Amendment. Challenges to legislative apportionment do not, the Court found, present a "political question" the federal courts need avoid. Although it remanded the case to the lower courts for trial, the Court's decision that the issue of population inequality was justiciable triggered massive litigation. During the spring and summer of 1962 redistricting lawsuits were filed in 33 states. "The rush through the door unlocked by Baker v. Carr," observed one legal scholar at the time, "has been staggering."

On the same day in March, 1962, that the Supreme Court decided Baker v. Carr, liberal Atlanta attorney Morris Abram filed suit challenging the county unit system by which primary elections for gover-

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51 See generally CORTNER, supra note 3, at 35-44, 53-58, 89-91 (discussing common concerns that motivate the push to reapportionment).
52 Grofman, supra note 5, at 80.
53 Engstrom, supra note 3, at 184.
55 Id. at 209.
56 CORTNER, supra note 3, at 158-59 (quoting Arthur L. Goldberg) (internal citations omitted).
nor and other state officers were decided.57 The only meaningful election in Georgia in 1962, as had been true throughout the twentieth century, was the primary election conducted by the Democratic Party.58 County units were allocated on the basis of malapportioned legislative districts; many of the state’s malapportioned congressional districts also used a county unit procedure to decide primary contests. The system of weighting by unit votes meant that on occasion the winner of state-wide contests was the loser in the popular vote. Other plaintiffs filed challenges to the state’s malapportioned legislative and congressional districting plans.59

The dimensions of malapportionment infecting the election of state officers, legislators, and congressmen were awesome. Many of Georgia’s 159 counties were extremely small. Echols County, the smallest, had only 1,876 people in 1960, but it had one state representative (and thus two unit votes). By contrast, Fulton County, which contained the state capital Atlanta, had a population of 556,326, but only three representatives (and thus only six unit votes). Assuming a rough correspondence between population size and the number of voters, the mathematical weight of an individual vote in Echols County was thus 98.9 times that in Fulton County.60

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58 Under rules established by state law in 1917, a gubernatorial candidate had to win a majority of “unit votes” to receive the Democratic nomination. Whoever won a plurality of the votes cast in a particular county received all of its unit vote, defined as twice the number of seats allotted the county in the state house of representatives. Emnet J. Bondurant, A Stream Polluted at Its Source: The Georgia County Unit System, 12 J. PUB. L. 86, 86-89 (1963).
59 Toombs v. Fortson, 205 F. Supp. 248 (N.D. Ga. 1962) (challenging legislative malapportionment). The House had not been reapportioned in decades despite the command of the state constitution. The Senate was also malapportioned and in multi-county districts throughout the state, counties rotated the right to elect the state senator for a single term. For this reason counties that were already under-represented on a population basis found themselves unable to elect a resident senator for two terms out of three. See Wesberry v. Vandiver, 206 F. Supp. 276 (N.D. Ga. 1962), rev’d sub nom. Wesberry v. Sanders, 376 U.S. 1 (1964) (striking down a malapportioned districting scheme).
60 Joseph L. Bernd, Georgia: Static and Dynamic, in THE CHANGING POLITICS OF THE SOUTH 294, 297-99, 315-23 (William C. Havard ed., 1972) (demonstrating that there was also a racial dimension to the county unit system); Bondurant, supra note 58, at 89-91. The dominant faction in Georgia politics, led by Eugene Talmadge and his son Herman, long depended upon putting together the votes of enough “two-unit” counties in southern Georgia to overcome opposition strength in metropolitan areas. In Atlanta and other cities, African-Americans had begun to register and vote in larger numbers after the federal courts outlawed the white primary in 1946. Because the allocation of county unit votes greatly underrepresented the urban counties where black voting strength was concentrated, the Talmadges saw the system as a barrier against “the anti-segregation pro-civil rights crowd who seek to destroy the County Unit System so they can control elections to state offices by manipulating the bloc vote centered in Atlanta.” McCrary & Lawson, supra note 7, at 296, 313. On the racial implications of the term “bloc vote,” see V.O. Key, JR., SOUTHERN POLITICS IN STATE AND NATION 636, 648 (1949); Matthews & Prothro, supra note 2, at 224-29. See also South v. Peters, 339 U.S. 276, 277-78 (1950) (Doug-
Hoping to forestall a hostile court decision, the Georgia legislature enacted a plan that revised the county unit system by creating more unit categories so as to give somewhat greater weight to more populous counties. The day after the legislature adjourned, the three-judge panel struck down the county unit system. Even as modified, the method of apportioning unit votes in primary elections for statewide, congressional, and some judicial offices violated the equal protection clause of the Fourteenth Amendment. A year later the Supreme Court found that such a county unit system in any form was unconstitutional, because the equal protection clause requires a standard of "one person, one vote."

The Court's next major apportionment decision, Wesberry v. Sanders, also arose in Georgia, where a liberal state senator challenged the malapportionment of congressional districts. The state's fifth district in metropolitan Atlanta, the second most populous in the nation, had 823,680 residents (109 percent over the ideal population), as compared with only 272,154 residents (31 percent under the ideal) in the smallest district. The Court, finding in Wesberry's favor, decided that Article I, Section 2, of the Constitution requires that "one man's vote in a congressional election is to be worth as much as another's." Writing for the majority, Justice Hugo Black went through a lengthy historical account of the framing of Article I in 1787 to justify his view that the Constitution requires population equality in congressional districts. Justice John M. Harlan was harsh in dissent, charging that "[t]he constitutional right which the Court creates is manufactured out of whole cloth," but he was right that there is little solid evidence to support the majority's interpretation.

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61 Fulton County would have 40 unit votes, for example, instead of six, meaning that the mathematical weight of individual votes in Echols County would be only 14 times greater than those in Fulton. See McCrary & Lawson, supra note 7, at 298.

62 Sanders, 203 F. Supp. 158.


64 376 U.S. 1 (1964).

65 Engstrom, supra note 3, at 188.

66 Wesberry, 376 U.S. at 8. The requirement of population was to be met "as nearly as practicable," said the Court, but in time the standard in congressional redistricting cases came to be virtually zero deviation. Id. at 7-8. See Karcher v. Daggett, 462 U.S. 725 (1983); Kirkpatrick v. Preisler, 394 U.S. 526 (1969). Deviations up to ten percent have routinely been permitted in state legislative and local redistricting plans.

67 Wesberry, 376 U.S. at 7-18.

68 Id. at 42. See Alfred H. Kelly, Clio and the Court: An Illicit Love Affair, 1965 SUP. CT. REV. 119, 135 (Philip B. Kurland ed., 1965) ("Mr. Justice Harlan, in dissent, had all the better of the historical argument.").
In Alabama, where the legislature had not reapportioned itself since 1901, young liberal lawyers from Birmingham and Mobile, representing business and labor groups disgruntled with the rural stronghold on state government, initiated lawsuits along the lines of \textit{Baker v. Carr}. \textsuperscript{69} A trial court found in their favor, ruling that the existing apportionment scheme constituted "invidious discrimination" in violation of the Equal Protection Clause.\textsuperscript{70} The modest remedy ordered by the court left most of the plaintiffs dissatisfied, but the increasing cost of the litigation prevented them from appealing to the Supreme Court. The state attorney general, moderate Richmond Flowers, also decided not to appeal. As it happened, the major expenses of appeal were borne by probate judges from two black belt counties who, with the encouragement of Governor George Wallace, decided to take the case up for the purpose of urging the justices to reverse \textit{Baker}.\textsuperscript{71}

In June, 1964, the Supreme Court completed the second phase of the reapportionment revolution by deciding in favor of plaintiffs in state legislative apportionment cases affecting fifteen states in June, 1964, with the key decision coming in the Alabama case \textit{Reynolds v. Sims}.\textsuperscript{72} Writing for a majority of six justices, Chief Justice Earl Warren reviewed the Court's earlier decisions protecting the right of black citizens to register and vote, including the elimination of the white primary, but observed that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."\textsuperscript{73}

In striking down Alabama's malapportioned legislative scheme, the Court found that the Equal Protection Clause requires a state to make "an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."\textsuperscript{74} Deviations from the ideal-sized district would have to be justified by a "rational state policy," said the Court, without making clear what might satisfy this standard.\textsuperscript{75}

The Chief Justice did not bother with what would have been a fruitless effort to demonstrate that the intent of the framers of the

\begin{footnotesize}
\begin{enumerate}
\item[69] 369 U.S. 186 (1962). See \textsc{Cortner, supra} note 3, at 160-91 (exploring differences between the positions of Charles Morgan, David Vann, and John McConnell).
\item[71] \textsc{Cortner, supra} note 3, at 189-90, 2001.
\item[72] 377 U.S. 533 (1964). See \textsc{Dixon, supra} note 3, at 261-67, 288-89 (referring to \textit{Reynolds v. Sims} as the "vehicle for the principled opinion in the "Reapportionment Decision"). \textit{Id.} at 263.
\item[73] \textit{Reynolds}, 377 U.S. at 555 (citing \textit{South} v. Peters, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting)).
\item[74] \textit{Id.} at 577.
\item[75] \textit{Id.} at 579. Factors mentioned as potentially valid reasons for departure from population equality included respect for political subdivision boundaries and "natural or historical boundary lines." \textit{Id.} at 578-81.
\end{enumerate}
\end{footnotesize}
Fourteenth Amendment included the goal of guaranteeing population equality among legislative districts. Justice Harlan, as usual in dissent, demonstrated that such an effort would have been to no avail.

Opposition to the one person, one vote standard was initially substantial. In the Senate, Everett Dirksen, a conservative Illinois Republican who served as Senate minority leader, liberal New York Republican Jacob Javits, and moderate Democrat Frank Church of Idaho, introduced constitutional amendments that, if adopted, would have permitted a deviation from equipopulous districts in one house of a state legislature, where supported by a majority of voters in a referendum. The Dirksen amendment fell only seven votes short of the required two-thirds majority in a pivotal vote on August 4, 1965, the same day the Senate approved the Voting Rights Act.

A stronger proposal by segregationist William M. Tuck of south-side Virginia that would "strip the federal courts of all power over state legislative apportionment" passed the House by a substantial margin but was defeated by liberal opponents in the Senate. After 1966 congressional opposition inexplicably evaporated.

The requirements for congressional districting plans came to be rigorous indeed. For three decades any departure from mathematical equality has had to be justified by reference to alternative criteria such as respect for political subdivision borders or natural boundaries. Few districting requirements have, in fact, sufficed to win court approval even where plans have very small deviations. Plans for redistricting state legislatures or local governing bodies, however, are

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76 See id. at 590-608 (Harlan, J., dissenting) ("I think it demonstrable that the Fourteenth Amendment does not impose this political tenet on the States or require this Court to do so.").

ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 286 (2000) (writing of the one person, one vote decisions that "Justices Frankfurter and Harlan were surely correct that neither the founding fathers nor the authors of the Fourteenth Amendment believed that an arithmetic equality of votes had to underlie all schemes of representation."). On the other hand, in practice most state legislatures at the time roughly approximated the one man, one vote principle. See Micah Altman, Traditional Districting Principles: Judicial Myths vs. Reality, 22 SOC. SCI. HIST. 159 (1998).

77 See generally CORTNER, supra note 3, at 236-40, 243-45; DIXON, supra note 3, at 374-76, 404; GARROW, supra note 1, at 132 (discussing the rise and fall of the Dirksen amendment and the passage of the Voting Rights Act).

78 Also defeated by strong liberal opposition in the Senate was a proposed moratorium on further apportionment litigation sponsored by Dirksen and majority leader Mike Mansfield of Montana. The American Bar Association proposed similar amendments. See CORTNER supra note 3, at 245-46; DIXON, supra note 3, at 385-86, 396-97.

79 See, e.g., Kirkpatrick v. Preisler, 394 U.S. 526 (1969) (rejecting Missouri's argument that a fixed numerical variance should be considered de minimis and satisfy the "as nearly as practicable standard"). In Karcher v. Daggett, the Court struck down New Jersey's congressional redistricting plan even though it had less than one percent deviation. 462 U.S. 725 (1983).
permitted greater flexibility: total district deviations of 10 percent are of "prima facie constitutional validity."

In short, the Supreme Court created a new constitutional right that had not existed previously. It was not justified by the legislative history of the Fourteenth Amendment in the Reconstruction Congress nor by court decisions prior to the Baker decision in 1962. In light of subsequent development of the equal protection standard in regard to racial vote dilution, it is worth emphasizing that in the one person, one vote cases the Court did not (and does not) require plaintiffs to prove that there was discriminatory intent directed at residents of metropolitan areas, but merely that the unequal apportionment had a harmful effect on their voting strength.

IV. THE JUSTICIABILITY OF RACIAL VOTE DILUTION

The case that first established an analytical link between quantitative and racial vote dilution was Fortson v. Dorsey. The case arose as a challenge to the constitutionality of multi-member districts for the Georgia state senate following court-ordered redistricting in the fall of 1962. In Toombs v. Fortson, the trial court ruled, not long after Baker was decided, that the Fourteenth Amendment required at least one house of the Georgia legislature to be apportioned equally by population. The court agreed to permit the legislature to postpone a remedy until after the September Democratic primary.

The architect of senate redistricting in 1962 was the newly elected governor and current president pro tem of the senate, Carl Sanders. Although he cast himself as a racial moderate, like virtually everyone in Georgia politics in those years Sanders actively supported segregation of the races. Sanders pushed successfully for a plan that provided a reasonable degree of population equality, winning over the

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80 Connor v. Finch, 431 U.S. 407, 418 (1977). See also Grofman, supra note 5, at 82 n.19 (internal citations omitted) ("Total deviation is the sum in absolute value of the deviations from ideal (average) district size of the largest district and of the smallest district.").

81 But see Blacksher & Menefee, supra note 8, at 4, 34-37 (noting that in more recent cases, the court has required plaintiffs to prove a racially invidious purpose in order to prevail); Kουsser, supra note 19, at 332-33 (noting that following Gomillion, the court took two paths, one that did not require discriminatory intent and one that did).

82 379 U.S. 433 (1965).

83 205 F. Supp. 248, 256-57 (N.D. Ga. 1962). The court also struck down the existing policy of rotating senators in multi-county districts after each two-year term, so that voters in only one of the counties were permitted to vote in each election. Id. at 257.

84 Id. at 258-59. See also McCrary & Lawson, supra note 7, at 298, 314 n.36 (providing a chronology of the events surrounding the decision).

85 JAMES F. COOK, CARL SANDERS: SPOKESMAN OF THE NEW SOUTH 92-93 (1993) (describing that although Sanders professed a belief in segregation, "he seemed to understand that the system was eroding and someday would collapse"); McCrary & Lawson, supra note 7, at 299-301, 315 nn.43-54 (comparing Sanders' views to those of his contemporaries).
rural majority by virtue of the fact that the legislature had little
choice. A consequence of this change was that metropolitan counties
stood to gain new senate seats. Sanders proposed that counties enti-
tled to more than one senator be required to use at-large elections
(also known as multi-member districts) rather than the single-
member districts used in rural areas.\(^\text{86}\)

Despite the fact that the state constitution required single-
member senate districts, the Sanders team succeeded in persuading
both senate and house to approve the use of at-large elections. Most
legislators explained their willingness to overlook the constitutional
prohibition by pointing out that at-large elections serve as a way of di-
luting black voting strength. At least one supporter attributed this
motive to the governor-elect: "Sanders wanted the [at-large] provision
to avoid the possible election of a Negro senator from Fulton."\(^\text{87}\) The
most frequently quoted legislator was Frank Twitty, a veteran of al-
most two decades in the House who was, according to one press ac-
count, "generally acknowledged to be the most forceful speaker
there."\(^\text{88}\) Twitty "stepped in to lead the floor fight for Sanders' reap-
portionment bill, and spoke for attribution. 'As far as I am con-
cerned, I am not going to vote for anything that would automatically
put a member of a minority race in the Senate.'"\(^\text{89}\) As Twitty saw it,
"without countywide races a Negro would almost certainly be elected
to the Senate from Fulton County."\(^\text{90}\)

White plaintiffs challenged the constitutionality of at-large elec-
tions in party primary elections as well as the general election.\(^\text{91}\) Ful-
ton County Superior Court Judge Durwood Pye ruled that the state

\(^{85}\) In order to comply with court-ordered redistricting, the legislature had to reapportion at
least one of its two houses. McCrary & Lawson, supra note 7, at 302-03, 315-16 nn.58-73.

\(^{86}\) Ed Rogers, Showdown Nears on Revised Bill, CORDELE DISPATCH, Oct. 4, 1962, at 1; McCrary
& Lawson, supra note 7, at 302-03, 316. Sanders was aware of the discriminatory potential of at-
large elections because in his home town, Augusta, had adopted at-large elections in 1953 for
the specific purpose of keeping the city council all white. McCrary, supra note 19, at 208-11,
222-28 nn.55-69.


\(^{88}\) McCrary & Lawson, supra note 7, at 304, 317 n.80; Reg Murphy, House Votes, 177-15, to Give
Cities the Big Voice in New Senate, ATLANTA CONSTITUTION, Oct. 3, 1962, at 1, 12. Although the
principal focus was on events in Atlanta, some rural legislators expressed concern about the
threat of black office-holding closer to home. According to one press account, "the prospect of
being in a district with counties having a heavy Negro population is causing some uneasiness
among the legislators who foresee a time when a Negro senator may represent their district."

\(^{89}\) McCrary & Lawson, supra note 7, at 304, 316 nn.79-80; House Passes Senate Amendment, 178-
6, ROME NEWS-TRIBUNE, Oct. 8, 1962, at 1.

\(^{90}\) In state court the plaintiffs argued that the Georgia Constitution required single-member
districts. In federal court they argued that conducting some senate contests at-large and some
by districts was a per se violation of the Fourteenth Amendment. The federal court declined to
enjoin the use of at-large elections because it did not have sufficient time to consider the merits
of the plaintiffs' novel federal claim. McCrary & Lawson, supra note 7, at 305, 318 nn.86-87.
constitution required senators to be elected by single-member district, and he enjoined party officials from conducting the primary on a countywide basis. As a result of Judge Pye's ruling, Leroy Johnson, a black attorney in Atlanta, won the Democratic nomination and an African-American was the Republican nominee in the 38th senatorial district in Fulton County. Under the single-member district plan, the Democrat Johnson without difficulty won the general election to become the first black elected to the state legislature since Reconstruction.

Judge Pye's order was superseded by the ratification on November 6, 1962, of a constitutional amendment authorizing at-large senate elections beginning in 1964. To prevent this outcome, white Republican plaintiffs filed a constitutional challenge in federal court. They contended that voters in Fulton and DeKalb counties, who had to cast their ballots in multi-member districts, were as a result treated differently from voters in other parts of the state who were able to elect their senators from single-member districts.

A three-judge federal court agreed: voters in Fulton county as a whole could overcome even the unanimous preference of voters within a single district, which treated voters in that district differently than voters in true single-member districts elsewhere in the state. "This difference is a discrimination as between voters in the two classes," creating what the court called "a dilution of votes on the basis of homesite." This rather abstract—and non-racial—disparity in

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92 Pye, an ardent segregationist, undoubtedly understood the racial implications of single-member districts but he also believed in upholding the state constitutional requirements. The defendants appealed Pye's ruling to the Georgia Supreme Court but also sought and won a temporary stay of Pye's injunction from the three-judge federal court, which sought to preserve the electoral opportunity for both sides in the controversy pending a final resolution of the issue in the courts. The federal stay permitted Fulton County party officials to conduct the primary on a countywide basis, and also to tabulate them on a district basis. Pye subsequently extended his prohibition on at-large voting to cover the general election. McCrary & Lawson, supra note 7, at 305-06, 318-19 nn.88-95.

93 In an at-large system, Johnson would have been forced into a runoff against white candidate Ed Barfield, who came in second in the countywide tabulation and last in a field of four in the district tabulation. The Constitution editorial speculated that due to racial bloc voting, Johnson "will be hard pressed to defeat No. 2 man Ed Barfield in the runoff, according to the fat overall vote cast for Barfield and for the other candidates now eliminated." Editorial, It Was a Confusing Primary . . ., ATLANTA CONSTITUTION, Oct. 17, 1962, at 4.

94 McCrary & Lawson, supra note 7, at 306, 319 n.96.


treatment, the court ruled, violated the equal protection clause of the Fourteenth Amendment. 97

The state appealed the decision to the U.S. Supreme Court. The original white plaintiffs, now the appellees, argued in their brief that the 1962 legislature adopted at-large elections in metropolitan counties "to minimize the strength of certain urban groups . . . predominantly composed of racial and political minorities." 98 At oral argument, Justice Arthur M. Goldberg asked plaintiff's attorney, Edwin F. Hunt, whether the case involved a claim of invidious discrimination on the basis of race or party. According to the account of one observer, "the Bench leaned forward and awaited eagerly the response, as did the courtroom spectators." Hunt replied lamely that the plaintiffs did "not want the Court yet to say" that the right of minority voters to be protected from vote-dilution was "a constitutionally protected right." 99

The Supreme Court reversed the lower court, on the grounds that the harm claimed by the plaintiffs was "only a highly hypothetical assertion." 100 Writing for the majority, Justice William J. Brennan observed that in the last term, when deciding the landmark one-person, one-vote case Reynolds v. Sims, 101 "we rejected the notion that equal protection necessarily requires the formation of single-member districts." 102 Reading between the lines, Justice Brennan addressed the racial issue the white Republicans had ducked, borrowing the concept of vote dilution from the population context in Reynolds. The Court might have reached a different decision, he wrote, had the record demonstrated that the use of at-large elections, either "designedly or otherwise," would "operate to minimize or cancel out the voting strength of racial or political elements of the voting population." 103 Voting rights lawyers subsequently cited this as the

97 Id. at 264. The parties agreed as to the facts of the case, which the court decided on motions for summary judgment. The racial dimension of the controversy over at-large elections was not raised at this stage of the proceedings.


99 DIXON, supra note 3, at 477.


102 Fortson, 379 U.S. at 436.

103 Id. at 439. Justice Brennan continued, "[w]hen this is demonstrated it will be time enough to consider whether the system still passes constitutional muster." Id.; see also DIXON,
earliest recognition by the Supreme Court that the Equal Protection Clause might extend to the problem of racial vote dilution. Not until 1973, however, did the Court actually strike down the use of at-large elections on equal protection grounds in a Texas redistricting case, White v. Regester.

V. THE ADOPTION OF THE VOTING RIGHTS ACT

By the time the Supreme Court decided Fortson v. Dorsey, both President Lyndon Johnson and supporters of minority voting rights in Congress had decided that litigation by itself would never provide an effective franchise in the South. Even those judges who sought to eliminate discriminatory barriers found that every time the courts struck down one procedure, Southern local officials or state legislators devised newer, more subtle ways of minimizing black voter registration. Frustrated with the slow progress of the jurisdiction-by-jurisdiction campaign before often hostile Southern courts, the President asked the Civil Rights Division to draft a strong voting rights law substantially increasing the Department's enforcement powers.

The Voting Rights Act of 1965 departed from precedent by providing for direct federal action to enable African-Americans in the South to register and vote. Section 4 of the Act suspended, initially for only five years, the use of literacy tests in six states and 40 counties in a seventh, North Carolina. To counter the broad discretion previously exercised by local registrars and poll officials, other provisions of the Act authorized the use of federal examiners to register persons in designated counties and federal observers to monitor the conduct of elections. On the other hand, the Act also contemplated continued resort to the federal courts, instructing the Department of Justice to file lawsuits challenging poll tax requirements in states where they appeared to be used as a deterrent to minority voting.

supra note 3, at 477 (characterizing this statement as a "tantalizing invitation for further litigation").

104 See Laughlin McDonald, The Quiet Revolution in Minority Voting Rights, 42 VAND. L. REV. 1249, 1259 (1989) (detailing the relationship of Fortson to other civil rights cases).


106 See, e.g., GARROW, supra note 1, at 36-39, 41-42 (describing the political climate and the President's reaction to Southern states' obstructionist ways); Christopher, supra note 16, at 5-9 (providing summaries and examples of the battle between of the Department of Justice and the states over the voting rights enforcement); Derfner, supra note 19, at 546-50 (describing the federal government's increasing frustration with the states leading up to the Voting Rights Act of 1965).

The most novel feature of the Act—and, to those concerned with the operation of our federal system, the most intrusive—was the “preclearance” requirement set forth in Section 5. Here, too, the statute blended judicial enforcement with administrative implementation. Under its terms all changes in voting practices in states covered by the Act’s special provisions must be approved by one of two factfinders before they can be legally enforced; either a three-judge panel in the federal courts of the District of Columbia or the Attorney General of the United States must “preclear” voting changes before they can be legally enforced. Administrative preclearance by the Department of Justice has proved to be far speedier and less costly than judicial preclearance, and has almost always been preferred by covered jurisdictions.

In 1966 the Supreme Court ruled that the preclearance requirement, like other challenged provisions of the Act, was constitutional. In the past, whenever the Justice Department had obtained favorable decisions striking down particular tests, Southern states simply enacted new discriminatory devices, said the Court, and “Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself.”

In the first three years, implementation of the Act by the Department of Justice and by the federal courts, focused on removal of barriers to registration and voting. The Attorney General dispatched federal examiners to register blacks and federal observers to monitor elections in counties designated because of their record of obstruc-

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108 The work most critical of the intrusive nature of the preclearance provisions of the Act is THERNSTROM, supra note 11, at 26, 38, 157-58, 162, 170, 178.

109 See id. at 15-17 (observing correctly that Justice Department attorneys drafted the preclearance provisions as a way of institutionalizing the “freezing principle” recently adopted by the federal courts as a way of coping with the constantly changing discriminatory devices used by Southern registrars and election officials). See also STRONG, supra note 17, at 44, 48-52, 93 (explicating the use of the “freezing theory” by the courts); L. Thorne McCarty & Russell B. Stevenson, The Voting Rights Act of 1965: An Evaluation, 3 HARV. C.R.-C.L. L. REV. 357, 361 n.18 (1968) (providing the history of the “freezing” doctrine). Applications of the freezing principle began with United States v. Alabama, 192 F. Supp. 677 (M.D. Ala. 1961), aff’d, 304 F.2d 583 (5th Cir. 1961), aff’d, 371 U.S. 37 (1962); United States v. Penton, 212 F. Supp. 193 (M.D. Ala. 1962); and United States v. Duke, 332 F.2d 759 (5th Cir. 1964), and was adopted by the Supreme Court in Louisiana v. United States, 380 U.S. 145 (1965).


111 See Katzenbach, 383 U.S. at 309 (“Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures . . . .”).

112 Id. at 385.
tion and discrimination. As a result, most blacks were able to register and vote. Initially, however, the Department of Justice had to go to court to prevent state court judges from blocking the work of federal examiners and private voter registration activists. The federal courts also struck down the poll tax in four states that still used it as a prerequisite to voting in state elections. The Justice Department also objected to various changes in state law or local practices that had the potential for restricting access to the ballot. The combination of administrative and judicial implementation brought a dramatic increase in voter registration among both black and white Southerners.

VI. THE COURT CONFRONTS MINORITY VOTE DILUTION

Shortly after passage of the Act, the lower courts began to deal with the problem of minority vote dilution at the same time as they struggled to remedy violations of the one person, one vote standard. The first instance in which the use of multi-member districts was found to be unconstitutional, as it happens, was in *Reynolds v. Sims*, subsequently on remand as *Sims v. Baggett*. The court found the

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113 Although examiners were used in only sixty counties, the threat that they might be dispatched, coupled with the fact that other provisions of the Act provided criminal penalties for officials who interfered with voters' efforts to cast their ballots, brought substantial compliance throughout the region. See U.S. COMMISSION ON CIVIL RIGHTS, supra note 2, at 153-62 (providing a relatively contemporaneous description of the policy of enforcement and its results); Garrow, supra note 1, at 179-86, 190 (detailing the history of the use of examiners and the resulting effects); Lawson, Black Ballots, supra note 6, at 329-35 (analyzing the policy rationale for using examiners as a means of enforcement); Richard Scher & James Button, Voting Rights Act: Implementation and Impact, in Implementation of Civil Rights Policy 30-33 (Charles S. Bullock III & Charles M. Lamb eds., 1984) (describing the role of federal examiners in enforcement).


115 Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966) (holding use of a poll tax unconstitutional because it was not rationally related to voting); U.S. COMMISSION ON CIVIL RIGHTS, supra note 2, at 166-67 (describing lawsuits invalidating poll taxes in Alabama, Mississippi, Texas, and Virginia). Payment of the poll tax as a prerequisite for voting in federal elections had previously been struck down by the 24th Amendment.


state house redistricting plan unconstitutional on two grounds. First of all, the deviation from population equality was higher than the ten percent acceptable under the one person, one vote principle, and there was no rational basis for the deviation. The court also found that the legislature had combined counties in multi-member house districts so as to minimize the percentage of blacks in any one district "for the sole purpose of preventing the election of a Negro House member." Thus the plan was doubly unconstitutional.

One of the three judges who decided Sims was Frank M. Johnson, the Chief District Judge in the Middle District of Alabama, who played a role in most of the important civil rights decisions in the state for a quarter century. He also decided the first lawsuit filed to challenge local at-large elections as discriminatory vote dilution. In 1966, Fred Gray, the veteran black civil rights lawyer who six years earlier had successfully attacked the racial gerrymandering of municipal boundaries in Tuskegee, Alabama, filed Smith v. Paris. In this case Gray attacked the adoption of at-large elections for the Democratic executive committee of Barbour County, Alabama (George Wallace’s home county). The party committee’s defense was that they shifted to at-large elections because their old districts violated the one person, one vote principle. Dismissing this claim as “nothing more than a sham,” Judge Johnson pointed out that the committee could simply have reapportioned its districts.

The “clear effect” of the change, as demonstrated in the 1966 elections, was that, because black voters comprised a majority of those registered in some districts but not in the county as a whole, minority voting strength would be diluted by the bloc votes of the white majority in a county-wide election. The court also relied on the long history of racial discrimination in Barbour County and the fact that the change followed the rapid enfranchisement of the county’s African-American citizens by the Voting Rights Act. In light of this factual pattern, Judge Johnson ruled that the change was motivated by an unconstitutional racial purpose.
Not all federal judges were as sympathetic to the interests of minority voters as Alabama's Frank Johnson. For this reason African-American plaintiffs sought to persuade the courts that the pre-clearance requirements set forth in Section 5 of the Voting Rights Act, not just the Reconstruction amendments, covered changes with the potential of diluting minority voting strength. The focus of this effort was Mississippi legislation authorizing a shift from single-member districts to at-large elections for county boards of supervisors and boards of education because, as one state senator put it, "countywide balloting will safeguard 'a white board' [of supervisors] and preserve our way of doing business."127 The African-American plaintiffs contended that under the Voting Rights Act such voting changes were not legally enforceable without federal pre-clearance.128

In 1969 the Supreme Court agreed, ruling in *Allen v. State Board of Elections*129 that this Mississippi law, like all other voting changes adopted in covered jurisdictions, must be submitted either to the Attorney General or to a three-judge district court in the District of Columbia, for pre-clearance.130 A change from district to at-large voting for county supervisors could have a discriminatory impact, noted the Court: "[v]oters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole."131 Under those circumstances, at-large elections could—if voting patterns followed racial lines—"nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting."132 The decision in *Allen* fundamentally altered enforcement of the Voting Rights Act.

Even conservative commentator Abigail Thernstrom, who is sharply critical of the pre-clearance requirement on theoretical grounds, concedes that the state laws at issue in *Allen* were racially

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127 *Jackson Clarion-Ledger*, May 18, 1966, at 1, 16.
128 Plaintiffs' legal strategy is discussed in a letter from Denison Ray to Frank R. Parker, Oct. 22, 1967, cited in *U.S. Commission on Civil Rights*, supra note 2, at 23 n.18. Ray was, in 1967, Chief Counsel for the Lawyers' Committee for Civil Rights Under Law (representing some of the plaintiffs). Parker was the staff counsel for the U.S. Commission on Civil Rights who wrote much of *Political Participation*. For a full discussion of the efforts of the 1966 Mississippi legislature to minimize the effects of the Act, see *Frank R. Parker, Black Votes Count: Political Empowerment in Mississippi After 1965*, at 34-66, 214-17 (1990).
130 *Id.* at 544. Four cases were consolidated in *Allen*, three from Mississippi. The case involving at-large elections was styled *Fairley v. Patterson; Bunton v. Patterson* dealt with a change from elected to appointed county school superintendents in certain counties; *Whitley v. Williams* concerned new restrictions on independent candidates. *Allen* involved restrictions on providing assistance to illiterate voters. *Id.* at 550-53.
131 *Id.* at 569.
132 *Id.*
discriminatory in both intent and effect. Yet she argues that the Allen decision improperly extended the preclearance requirements of the Voting Rights Act beyond the intent of the framers in 1965, which was merely to protect the right of minority voters to enter a polling booth and pull the lever.

It is true that the primary concern of the framers of the Voting Rights Act in 1965 was, understandably, to protect the right of black voters to register and cast a ballot. During the hearings, however, both Attorney General Nicholas Katzenbach and House members explicitly referred to the racial gerrymander struck down by the Supreme Court a few years earlier in Gomillion as one sort of voting change the preclearance requirement was designed to foil. When Congress voted to extend the Voting Rights Act in 1970 and to expand its coverage to include language minorities in 1975, it confirmed its intent to cover efforts to dilute minority voting strength.

VII. DEVELOPMENT OF THE PRECLEARANCE PROCESS

The effects of Allen were profound. Mississippi, for example, had to submit the 1966 at-large election statute for preclearance and the Department of Justice refused to preclear the change. Fourteen

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133 "Clearly, the Court could not stand by while southern whites in covered states—states with dirty hands on questions of race—altered electoral rules to buttress white hegemony." THERNSTROM, supra note 11, at 4. Indeed, she characterizes the decision as "correct." Id. at 29-30. Yet she also charges that, once the Court "enlarged the definition of enfranchisement" to include protection against vote dilution, it was on a slippery slope leading to "entitlement" to proportional representation, "the power, that is, to elect blacks." Id. at 4. This view is reiterated in STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE 465-66 (1997).

134 THERNSTROM, supra note 11. In this view Thernstrom follows the reasoning in Justice John M. Harlan's dissent in Allen, which she believes "incontrovertible." Id. at 24.


136 The Nixon administration made a substantial effort to eliminate the preclearance provisions altogether, but was unsuccessful. See THOMAS BYRNE EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS 84 (1991); LAWSON, IN PURSUIT OF POWER, supra note 6, at 150-51, 154-57.


138 Mississippi chose to seek preclearance from the Attorney General, rather than from a three-judge panel in the District of Columbia. In addition to the fact that the administrative
Mississippi counties nevertheless tried to switch to at-large supervisor elections, and another 17 counties to at-large school board elections, but the Department and, in some cases the federal courts, blocked all of these efforts. The task of winning constitutional challenges on a case-by-case basis would have been formidable, and Mississippi was just one of the covered states.

Administrative reorganization in 1969 produced a separate section within the Civil Rights Division specializing in voting rights. Prodded by liberal critics in Congress, the new Voting Section developed detailed guidelines for enforcing Section 5 that were, in turn, endorsed by the Supreme Court. The Department’s procedures for enforcing Section 5 were also the subject of numerous unsuccessful court challenges during the 1970s.

In 1971 the Supreme Court ruled that municipal annexations were among the voting changes covered by the Act. The Court sub-

route was faster than litigating the issue, the state may have believed that President Nixon’s “Southern strategy” had spawned a climate more sympathetic to the state’s racial views than the more liberal D.C. Circuit. See LAWSON, IN PURSUIT OF POWER, supra note 6, at 162 (explaining that the District court “Could be expected to guard vigilantly against threats to disenfranchise-ment.”). Two years later the state attempted to re-enact the authorization for county-wide supervisor elections struck down in Allen, and the Attorney General again objected. See also Frank R. Parker, County Redistricting in Mississippi: Case Studies in Racial Gerrymandering, 44 MISS. L.J. 391, 396 n.32 (1973).


Perhaps v. Matthews, 400 U.S. 379 (1971). In a startling passage, Thernstrom and Thernstom claim that the High Court’s few Section 5 decisions are not easy to decipher, and the incoherence of its rulings released both the Department of Justice and the D.C. court from the confines of principled decision-making. The annexation cases, particularly, left the lower court and the DOJ free to pick and choose among its disparate elements in muddled majority opinions. THERNSTROM & THERNSTROM, supra note 133, at 468. The authority Thernstrom and Thernstom cite for this claim is THERNSTROM, supra note 11, at ch.7. Perhaps court decisions in general are “not easy to decipher,” but it is the job of lawyers, and those who write about the law, to decipher them anyway. Section 5 case law is no harder to decipher than any other body of court opinions. See Hiroshi Motomura, Preclearance Under Section Five of the Voting Rights Act, 61 N.C. L. REV. 189, 221-32 (1983) (reviewing the case law regarding preclearance review of annexations and consolidations, as well as the effort of the Department to act as a surrogate for the D.C. court).
sequently decided that municipalities facing Departmental objections to annexations which had the discriminatory effect of reducing the black or Hispanic percentage within the city could overcome that objection by adopting an election plan that fairly reflected minority voting strength for the enlarged city, normally a single member district system. Otherwise such cities would likely be condemned to declining tax revenues, as well-off whites moved to nearby suburbs to escape racial integration. As a result, departmental objections to annexations played a significant role in persuading Southern municipalities to give up at-large elections.

The Court's first major restriction on the scope of the Act was announced in its 1976 decision, *Beer v. United States*, in which the city of New Orleans sought a declaratory judgment preclearing its redistricting plan. The three-judge trial court refused, on the grounds that under current Supreme Court doctrine the plan diluted minority voting strength. The majority in *Beer* reversed the trial court, however, ruling that the term "effect" has a different meaning under Section 5 than under the Constitution. The Court determined that, in the context of a preclearance review, "effect" is to be defined as "retrogression," a newly minted term to describe changes that place minority voters in a worse position than under the status quo. Ameliorative changes that do not make matters worse for minority voters are, under *Beer*, not discriminatory in effect.

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[t]he record is replete with statements by Richmond officials which prove beyond question that the predominant (if not the sole) motive and desire of the negotiators of the 1969 settlement was to acquire 44,000 additional white citizens for Richmond, in order to avert a transfer of political control to what was fast becoming a black population majority.

422 U.S. at 382. For ample evidence of this racial purpose, see John V. Moeser & Rutledge M. Dennis, *The Politics of Annexation: Oligarchic Power in a Southern City* 88-93, 98-102, 107-09 (1982). Newly appointed Justice Lewis F. Powell, Jr. abstained from the *City of Richmond* decision because he had earlier sought to persuade the Attorney General to preclear the annexation. Letter from Justice Powell to John N. Mitchell (Aug. 9, 1971) (on file with U. S. Dep't of Justice).

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


149 *Beer*, 425 U.S. 130.

150 Id. at 141.

151 Id. at 141-42.
On the other hand, *Beer* did not affect the purpose prong of Section 5.150 “Even without retrogression, a covered jurisdiction will violate [Section] 5 if an impermissible racial purpose is behind an electoral change,” explains conservative legal scholar James F. Blumstein.151 As the *Beer* majority put it in a key passage: “We conclude, therefore, that such an ameliorative new legislative apportionment cannot violate [Section] 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution.”152 This wording appears understandable only as a reference to the purpose test in Fourteenth or Fifteenth Amendment cases.153 The reference to a constitutional violation could not refer to a dilutive effects test because, in endorsing the retrogression concept the *Beer* majority had rejected a dilutive effects test as inapplicable in the Section 5 context.154 As a result, federal courts interpreted this wording in *Beer* as referring to a constitutional “purpose” test for the next quarter-century.155

Both the complexity involved in measuring retrogression and, by contrast, the straightforwardness of applying the purpose standard are exemplified by the decision in a Section 5 declaratory judgment action filed by a Georgia county, *Wilkes County v. United States*.156 The case involved a change from single-member districts to an at-large plan in the early 1970s for both county commission and school...
board. The evidence showed that voting patterns were racially polarized and that, as a result, no black candidates had been elected to either governing body despite the fact that African-Americans made up 47 percent of the county's population. The county claimed that under the retrogression standard the at-large system had no discriminatory effect because blacks did not form a majority of the registered voters in any of the old districts, which, it admitted, were badly malapportioned.

The court, noting that the low level of black voter registration was itself a function of historical discrimination, found that even under the old districts minority voters had more influence on the outcome of the elections than under the at-large system. Moreover, in the court's view the correct benchmark was a properly apportioned— and "fairly drawn"—system of single member districts, and such a plan could have been drawn to include a 71 percent black district (which would have given black voters an equal opportunity to elect a candidate of their choice). In either event, the court decided, the change was retrogressive.

Applying the constitutional purpose standard, the court observed that the change to at-large elections followed a substantial increase in minority voter registration after the Voting Rights Act. No African-Americans had either served as Democratic party officials in this one-party county or been appointed to fill vacancies for elected offices. Nor had any black citizens been consulted about the decision to adopt an at-large plan. The county claimed that the purpose of the change was solely to satisfy the one person, one vote requirement, but the court found that argument a mere pretext; the districts could simply have been equalized in population after the 1970 census. In light of these circumstances, the county failed both purpose and retrogression tests and was not entitled to preclearance.

The Department's implementation of Section 5 evolved in direct response to federal court orders and statutory requirements. In deciding whether to preclear or object to voting changes, the Department acts as a surrogate for three-judge district courts in the District

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157 Id. at 1174-75.
158 See id. at 1176 (discussing claims made by Wilkes County).
159 Id. at 1177.
160 Id. at 1175.
161 See id. at 1175-76. The Supreme Court's affirmation indicates that this view was consistent with Beer's understanding of retrogression.
162 Id. at 1176.
163 Id. at 1174-75.
164 Id. at 1175.
165 See id. at 1174-76 (holding that the county's scheme could not be maintained). See also Hale County v. United States, 496 F. Supp. 1206 (D.D.C. 1980) (holding that at-large elections for county commissioners had purpose and effect of abridging right to vote on basis of race).
of Columbia, to which the Voting Rights Act also assigns preclearance responsibility. Contrary to the claim of earlier studies, the Department's attorneys do not "bargain" or "negotiate" with submitting jurisdictions when conducting preclearance reviews. Both public officials and minority citizens have an opportunity to present comments regarding voting changes, but the decision-making is designed to follow the dictates of current Section 5 case law. Thus the Department's administrative review under Section 5 can properly be characterized as a quasi-judicial process of implementation.

VIII. VOTING RIGHTS UNDER THE RECONSTRUCTION AMENDMENTS

In the 1970s vote-dilution lawsuits were decided under a constitutional standard set forth by a unanimous Supreme Court in a legislative redistricting case from Texas, White v. Regester. The decision struck down the use of multi-member districts to elect members of the state house of representatives in Dallas and Bexar counties. The Court's opinion relied on evidence of a history of official discrimination against blacks in Dallas and Hispanics in Bexar; cultural and language barriers in Bexar and a discriminatory slating group in Dallas; a lack of responsiveness by elected officials to the needs of the minority community; and the use of numbered place and runoff requirements which enhance the discriminatory potential of at-large

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166 See Supplementary Submissions Rule, 28 C.F.R. § 1.39 (2003) (stating that the responsibility to act as a surrogate for the D.C. court is set forth in the Department's Section 5 guidelines at 28 C.F.R. 51.39).

167 See BALL ET AL., supra note 11, at 25, 100, 111, 116, 130, 136-37, 140, 145-46, 199 (describing that negotiation and compromise with jurisdiction officials often served to weaken the Department's voting rights enforcement); Lorn S. Foster, Section 5 of the Voting Rights Act: Implementation of an Administrative Remedy, PUBLIUS, Fall 1986, at 17, 22, 26-27 (indicating that no one is advocating for interest of minorities and the process is not working in their best interest).

168 This view is contradicted by Graham who pictures enforcement of Section 5 as a form of what he calls "the new social regulation," in which Voting Section attorneys are "captured" by a civil rights clientele much as economic regulators are typically captured by business, farmer, or labor groups. See Graham, supra note 11, at 179-80, 185, 187, 192. Similarly, Thernstrom characterizes Justice Department attorneys as civil rights activists who "invent law as they enforce it." See THERNSTROM, supra note 11, at 236.


170 See id. at 755-70. The case involved both malapportionment and racial vote dilution. See id. at 756 (discussing the questions before the court). The trial court had ruled that the redistricting plan, with a total deviation of 9.9 percent, violated the one person, one vote standard. See Graves v. Barnes, 343 F. Supp. 704, 713, 717, 723-24 (W.D. Tex., 1972) (holding there was no justification for the deviation). The Supreme Court reversed in part, on the grounds that, except for congressional districts, where different constitutional provisions were at stake, deviations of less than 10 percent were acceptable—a ruling from which three liberal justices dissented. See White, 412 U.S. at 763-64, 772-82 (holding the district court's ruling of a prima facie violation was in error).
Based on what it called "the totality of the circumstances," the Court found that minority voters in these two counties had "less opportunity than did other residents . . . to participate in the [electoral] processes and to elect [candidates] of their choice."  

Although in later decisions the Supreme Court interpreted White as incorporating an intent requirement, the majority opinion in the case did not state explicitly that proof of discriminatory intent was required under the totality of circumstances test. The Fifth Circuit Court of Appeals, which handled by far the largest number of vote-dilution cases in the 1970s, initially treated the test as requiring proof of either purpose or effect, but not both, in deciding a Louisiana challenge to at-large elections in East Carroll Parish, Louisiana, Zimmer v. McKeithen.

Under this approach, plaintiffs in vote dilution cases were often able to win by documenting a history of racial segregation and discrimination in the jurisdiction and by showing that, due to racially polarized voting, the election system operated in such a way that minority voters did not have a reasonable opportunity to elect representatives of their choice. The lower courts understood how to apply the standard because it was, as one commentator describes it, "flexible, fact-specific, precise, and workable."  

Veteran Fifth Circuit

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171 Id. at 766-69.
172 Id. at 769.
173 Id. at 766. Previously, African-American plaintiffs had lost a challenge to the use of at-large elections for the Indiana legislature because that state lacked the history of racial discrimination or discriminatory slating present in Texas, leading the Court to conclude that, unlike in Texas, minority candidates lost because they ran as Democrats and not because they were black. See Whitcomb v. Chavis, 403 U.S. 124, 153-55 (1971). In addition, the plaintiffs conceded there was no evidence of racially discriminatory intent. See id. at 153-54.
174 In City of Mobile v. Bolden, 446 U.S. 55 (1980), and Rogers v. Lodge, 458 U.S. 613 (1982), the Supreme Court subsequently found that White required proof of discriminatory intent. Blumstein observes that the wording in White supports both the view that proof of discriminatory intent is necessary and that it is not. See Blumstein, supra note 8, at 669-70.
175 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd sub nom. E. Carroll Parish Sch. Bd. v. Marshall, 424 U.S. 636 (1976). As the majority opinion stated, plaintiffs must maintain the burden of showing that a plan was either "a racially motivated gerrymander" or that it "would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." Id. at 1304 (citing Howard v. Adams County Bd. of Supervisors, 453 F.2d 455, 457-58 (5th Cir. 1972)). Because plaintiffs here met the second standard, it was not necessary for the court to rule on the initial purpose prong of the test. See Zimmer, 485 F.2d at 1304.
176 See Zimmer, 485 F.2d at 1308-09. See also Blacksher & Menefee, supra note 8, at 18-26 (describing the development of a standard for plaintiffs in vote dilution cases); McCrary, supra note 20, at 510-14 (explaining the statistical procedures used in these cases to measure the degree of racial bloc voting); Timothy G. O'Rourke, Constitutional and Statutory Challenges to Local At-Large Elections, 17 U. RICH. L. REV. 99, 51-57, 78-81 (Fall 1982) (discussing the move from an intent standard to a "results" standard).
Judge Irving Goldberg later characterized the standard as “a jurisprudence produced by ten years of struggle and compromise between judges of varying political and jurisprudential backgrounds.”

These cases were brought by a new generation of voting rights lawyers, mostly white and many of them Southerners, who devoted a significant part of their careers to litigation on behalf of African-American voters. The Lawyers’ Committee for Civil Rights Under Law maintained an office in Jackson, Mississippi, and under the leadership of Frank R. Parker brought most of the cases in that state; in the 1980s Parker, then based in the national office, litigated a number of important Virginia cases. The American Civil Liberties Union maintained an office in Atlanta where Laughlin McDonald, Neil Bradley, and Christopher Coates focused on problems in Georgia and South Carolina. Armand Derfner, working with the Lawyers’ Constitutional Defense Committee and the national office of the Lawyers’ Committee, tried Mississippi and Virginia cases and, as a private attorney in Charleston, litigated a number of South Carolina lawsuits. James U. Blacksher, Larry Menefee, and Edward Still brought most of the Alabama cases, and a few Florida lawsuits, as cooperating attorneys of the NAACP Legal Defense and Educational Fund. Stanley Halpin, usually as a cooperating attorney of the Lawyers’ Committee, brought most of the Louisiana cases. A private law firm headed by Julius Chambers and Adam Stein, usually cooperating with the Legal Defense Fund, handled many of the North Carolina lawsuits. In the 1980s Lani Guinier from the Legal Defense Fund’s national office litigated vote dilution cases in Louisiana, Alabama, North Carolina, and Arkansas. Justice Department lawyers brought cases throughout the South; the Voting Section’s most productive litigator over the years was J. Gerald Hebert. This new voting rights bar developed expertise in voting rights case law that gave minority plaintiffs a valuable edge over defendants at trial.

In 1980, the Supreme Court ruled in City of Mobile v. Bolden, a challenge to that city’s use of at-large elections, that plaintiffs must prove not only that the at-large system has a discriminatory effect due to racially polarized voting but also that it was adopted or maintained for the purpose of diluting minority voting strength. The Court

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176 Jones v. City of Lubbock, 640 F.2d 777 (5th Cir. 1981).
177 See Gregory A. Caldeira, Litigation, Lobbying, and the Voting Rights Bar, in GROFMAN & DAVIDSON, CONTROVERSIES IN MINORITY VOTING, supra note 11, at 230-35. The names of all attorneys on a case are listed in each published court opinion; this is the principal basis for my knowledge of the careers of attorneys discussed in the text above.
178 See City of Mobile, 446 U.S. at 66 (requiring proof of intent as well as a more difficult standard for inferring racial purpose through circumstantial evidence). Although supported by only a plurality, Justice Potter Stewart’s opinion was the prevailing view on the Court. See also O’Rourke, supra note 176, at 56-57 (describing how the Fifth Circuit Court of Appeals had an-
remanded the case, and a companion suit challenging at-large school board elections in Mobile County, for a new trial on the intent question. The plaintiffs prevailed under the intent standard, after demonstrating that a racial purpose lay behind shifts to at-large elections in 1876 and 1911, but at great cost.\(^\text{181}\)

In the view of many observers, the Mobile decision was inconsistent with the intent of Congress when it adopted and expanded the Voting Rights Act in 1965, 1970, and 1975. A substantial majority in both houses revised Section 2 of the Voting Rights Act in 1982 to outlaw election methods that result in diluting minority voting strength, without requiring proof of discriminatory intent.\(^\text{182}\) In creating a new statutory means of attacking minority vote dilution, Congress cited the "totality of circumstances" test of White and Zimmer as the evidentiary standard to be used in applying the Section 2 results test. Vote-dilution cases previously decided under the Fourteenth Amendment would henceforth be tried under the new statutory standard.\(^\text{183}\)

Even so, in a few complex lawsuits in the 1980s evidence of discriminatory intent proved critical to the court's decision, most dramatically in one Alabama case, Dillard v. Crenshaw County, which led to the elimination of at-large elections in more than 180 counties, municipalities, and school boards.\(^\text{184}\) The plaintiffs presented historical evidence showing that whenever black voting strength was substantial state and local officials had a policy of using at-large rather than district elections, and that in the 1950s and 1960s the state, motivated explicitly by the goal of preventing the election of blacks to


\(^{182}\) See Thomas M. Boyd & Stephen J. Markman, The 1982 Amendments to the Voting Rights Act: A Legislative History, 40 WASH. & LEE L. REV. 1547 (1983) (describing how the 1982 amendments changed the Voting Rights Act); Armand Derfner, Vote Dilution and the Voting Rights Act Amendments of 1982, in DAVIDSON ED., MINORITY VOTE DILUTION, supra note 20, at 145-63 (reviewing the struggle to pass the new amendments to the Voting Rights Act); Parker, supra note 177, at 725. See also THERNSTROM, supra note 11, at 79-136 (arguing that Congress was misguided in adopting a results test because she favors an intent standard).

\(^{183}\) See Blacksher & Menefee, supra note 8, at 31-32; McDonald, supra note 104, at 1265.

\(^{184}\) See Dillard v. Crenshaw County, 640 F. Supp. 1347 (M.D. Ala. 1986). See also McCrary et al., supra note 114, at 54-64 (describing the effects of the court's decision in changing from at-large district elections to district elections in Alabama).
office, adopted laws requiring the use of anti-single shot devices in all jurisdictions to enhance the dilutive power of at-large elections.185

IX. THE IMPACT OF THE SECTION 2 RESULTS TEST

In the decade following the revision of Section 2, voting rights lawyers successfully brought numerous lawsuits under the new results standard. The Supreme Court made clear in *Thornburg v. Gingles*, that minority plaintiffs could win by showing that: 1) the minority group is sufficiently numerous and geographically concentrated so that a majority-minority district can be drawn; 2) minority citizens vote cohesively; and 3) that the racial majority votes as a bloc to the degree that minority candidates usually lose.186 Once this pattern was clear, many defendants settled before trial and went to single-member districts.187

Scholarly research on the impact of the Voting Rights Act in the South demonstrates that the substantial increases in minority representation since 1970 are due primarily to the elimination of at-large elections and other devices that can dilute minority voting strength.188

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185 See *McCrary & Hebert*, supra note 41, at 118-21 (summarizing the evidence). The most colorful evidence was a speech by a member of the State Democratic Executive Committee explaining that without an anti-single shot law or a numbered place requirement, "it would be easy under the single shot voting for all of them to come in, to put a scalawag or put a negro [sic] in there." He complained about "increasing Federal pressure to . . . register negroes [sic] en masse, regardless of . . . their criminal records." In one black belt county "where there were very few darkies [sic] registered, there has probably increased 4 or 5 hundred percent already," he claimed. In such a context "it has occurred to a great many people, including the legislature of Alabama, that there should be numbered places." See also Peyton McCrary, *Discriminatory Intent: The Continuing Relevance of "Purpose" Evidence in Vote-Dilution Lawsuits*, 28 How. L.J. 463 (1985) (discussing other cases where intent evidence was important during the 1980s).


187 See generally *Davidson & Grofman*, *Quiet Revolution in the South*, supra note 4, at 35-36, 84, 120-21, 143, 171-73, 210-12, 247, 256, 284-87 (documenting the numerous redistricting plans resulting from settlements of Section 2 claims).

188 See *Pildes*, supra note 13, at 1362-76 (summarizing the findings of *Davidson & Grofman*, *Quiet Revolution in the South*, supra note 4, and relating them to voting rights case law as of the mid-1990s). As Pildes observes, these findings provide more definitive proof of the conventional view among political scientists that at-large elections serve as a significant barrier to minority representation. See generally *Albert K. Karpic & Susan Welch*, *Black Representation and Urban Policy* (1980); *Chandler Davidson & George Korbel*, *At-Large Elections and Minority Group Representation: A Re-Examination of Historical and Contemporary Evidence*, 43 J. Pol. 982 (1981); *Richard L. Engstrom & Michael D. McDonald*, *The Election of Blacks to City Councils: Clarifying the Impact of Electoral Arrangements on the Seats/Population Relationship*, 75 Am. Pol. Sci. Rev. 344 (1981); *Clinton B. Jones*, *The Impact of Local Election Systems on Black Political Participation*, 11 Urb. Aff. Q. 345 (1976) (examining research on the impact of at-large systems
Fairly drawn single-member district plans have provided an opportunity for African-American or Hispanic voters to elect candidates of their choice in districts where they constitute a majority of the voting population. The trend was almost as dramatic in jurisdictions that switched from at-large elections to mixed plans including a few at-large seats. In many localities the level of black representation by 1990 approached the black percentage of the population in the jurisdiction. Very few African-Americans were elected to council seats from white-majority districts. On the other hand, virtually all black-majority districts elected black council members.

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

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

X. ASSESSING THE VIABILITY OF DISTRICTING PLANS

Before 1990, only a handful of vote dilution challenges were filed against single-member district plans. The use of racial gerrymandering in redistricting was most often found in the context of pre-clearance reviews under Section 5. In the first 30 years after adoption of the Voting Rights Act in 1965, the Department of Justice reviewed around 270,000 changes in voting and precleared all but about one percent. Among the most controversial types of change is redistricting. Over the years the Department has objected to less than seven percent of all the redistricting plans submitted for review. Quite naturally, the rate of objections was greater in the early years of enforcement. For the years 1971-1974, the Attorney General refused to preclear roughly 14 percent of the plans; from 1981-1984 the rate was approximately eight percent; for the most recent period, 1991-

indifference to the empirical evidence of racially polarized voting, judges and justices who rely on her for evidence on this subject are misguided. See Pildes, supra note 13, at 1365-67.

At first glance, Susan Welch appears to show that at-large elections no longer have a racially discriminatory effect. See Susan Welch, The Impact of At-Large Elections on the Representation of Blacks and Hispanics, 52 J. Pol. 1050 (1990). Welch's sample of cities seems, however, to reflect what is known in statistics as a "selection bias." Particularly in the South, many at-large systems that had diluted minority voting strength in the past have, in many cases as a result of litigation, now shifted to single-member districts or mixed plans, leaving only a few at-large systems in jurisdictions where racially polarized voting may have been less pronounced than usual. See Bernard Grofman & Chandler Davidson, The Effect of Municipal Election Structure on Black Representation in Eight Southern States, in DAVIDSON & GROFMAN, QUIET REVOLUTION IN THE SOUTH, supra note 4, at 320-21 (arguing for the continuing importance of the Voting Rights Act to protect minority rights of representation).

But see Ketchum v. Byrne, 740 F.2d 1398 (7th Cir. 1984); Major v. Treen, 574 F. Supp. 325 (E.D. La. 1983); Rybicki v. State Bd. of Elections, 574 F. Supp. 1082 (N.D. Ill. 1982); Kirlsey v. Bd. of Supervisors of Hinds County, 402 F. Supp. 658 (S.D. Miss. 1975), aff'd, 528 F.2d 536 (5th Cir. 1976), rev'd, 554 F.2d 139 (5th Cir. 1977) (en banc).

Mark A. Posner, Post-1990 Redistrictings and the Preclearance Requirement of Section 5 of the Voting Rights Act - A Perspective from the Justice Department, in WAYNE ARDEN ET AL., RACE AND REDISTRICTING IN THE 1990S 80, 88-89 (Mark A. Posner ed., 1998). These numbers were calculated as of July 1, 1995; Posner was then an attorney with the Voting Section.
1994, the Department objected to only around seven percent. In order to overcome these objections, states and localities necessarily adopted fair single-member district plans under which minority voters have gained a reasonable opportunity to elect candidates of their choice.

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

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

Recognizing those facts, the federal courts in the 1970s came up with a rule of thumb often dubbed "the 65 percent rule." As minority registration and turnout rates have increased, often to a point approaching parity with whites, experts often recommend districts with a smaller percentage of minority population. And where a substantial percentage of white voters have demonstrated a regular tendency to

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195 Id. Posner's numbers and percentages are approximate, but they are the best available data.
196 Motomura, supra note 142, at 233-36; Frank R. Parker, Racial Gerrymandering and Legislative Reapportionment in Minority Vote Dilution, supra note 20, at 85-117.
support minority candidates, the minority threshold can be lowered accordingly. For these reasons the Department of Justice and the courts assess district composition on a case-by-case basis.

Both before and after the Beer decision, discriminatory purpose as defined in constitutional cases played a significant role in the Department's review of redistricting plans. In assessing the issue of racially discriminatory purpose, a major issue is whether authorities have rejected alternative districting plans that would provide minority voters a better opportunity to elect candidates of their choice. The courts and the Justice Department also focus on whether minority citizens were excluded from the redistricting process, or if their requests for alternative plans are rejected without substantial justification, and whether there is a departure from usual redistricting practices or criteria.

The Assistant Attorney General whose Section 5 objections played a key role in advancing minority representation during the 1980s was, ironically, W. Bradford Reynolds, the conservative Republican whom Ronald Reagan had named to lead the Civil Rights Division away from the policies of the 1970s. Legal theorist Abigail Thernstrom has criticized Reynolds for objecting to changes that were not retrogressive merely because they failed to maximize minority voting strength, using proportional representation as his standard. "Indeed," she writes, "it is hard to imagine a Civil Rights Division more responsive to the demands of minority and civil rights spokesmen with respect to districting than that headed by William Bradford Reynolds."

Raymond Wolters, a conservative historian whose views on most civil rights issues are consistent with those of Thernstrom, has defended Reynolds emphatically against this charge. Reynolds, he points out correctly, was just "a lawyer who recognized that when it came to electoral districting, both Congress and the Supreme Court had rejected the argument that race-conscious districting was per se unconstitutional" in favor of the view that it was necessary to take race into account in districting in order "to facilitate the election of members of unrepresented racial groups." In short, in the numerous in-

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200 GROFMAN ET AL., supra note 197, at 120.
201 Days & Guinier, supra note 110, at 170-71; Grofman, supra note 5, at 78 n.5; Motomura, supra note 142, at 239-39, 241.
202 THERNSTROM, supra note 11, at 170.
203 RAYMOND WOLTERS, RIGHT TURN: WILLIAM BRADFORD REYNOLDS, THE REAGAN ADMINISTRATION, AND BLACK CIVIL RIGHTS 131-35 (1996). Reynolds' own views are reflected in his congressional testimony in 1982 against the creation of a Section 2 results test. See Voting
stances where Reynolds objected to voting changes, usually under the intent prong of Section 5, he was simply following the dictates of relevant case law as set forth by the federal courts.

In broad quantitative terms, the administration of Section 5 under Reynolds appears comparable to both predecessors and successors. The Department objected to approximately eight percent of all redistricting plans submitted from 1981 through 1984, a bit over half the percentage in the 1970s but slightly more than the seven percent of redistricting plans to which objections were interposed in the 1990s. Looked at in terms of absolute numbers, there were almost twice as many objections in the 1980s round of redistricting, because far more plans were submitted for preclearance review than in the 1970s (and the number of objections in the 1990s was correspondingly greater than in the 1980s).\footnote{204}

On the other hand, there were also instances in which Reynolds precleared voting changes to which staff attorneys had recommended objections.\footnote{205} The best known example is his decision to preclear a congressional redistricting plan in Louisiana later found by a federal court to violate the Section 2 results test, despite strong evidence in a staff memorandum that the plan was adopted with a racially discriminatory purpose as well.\footnote{206} The number of affirmative Section 2 lawsuits filed by the Voting Section was also unimpressive by comparison to the dockets of private voting rights organizations. And when \textit{Thornburg v. Gingles} went to the Supreme Court, the Department filed an \textit{amicus curiae} brief siding with the state of North Carolina against the African-American plaintiffs.\footnote{207} Yet on balance the protections afforded minority voters by federal voting rights law in the 1980s effectively constrained Reynolds' conservative instincts.

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\footnote{204} Fosner, supra note 194, at 88-89.


\footnote{206} See Major v. Treen, 574 F. Supp. 325 (E.D. La. 1983); Reynolds Nomination Hearings, supra note 205, at 410-39 (reporting the memorandum of Robert N. Kwan).

\footnote{207} Guinier, supra note 135, at 403, 405-06.}
XI. THE ROLE OF THE COURTS IN POLICY IMPLEMENTATION

We have examined the role of the federal courts in the implementation of two extraordinarily successful public policies, the one person, one vote principle and the prevention of minority vote dilution. The impact of these two policies on electoral politics in the South has been profound. How can we account for this success?

Political scientist Richard Cortner attributes the successful implementation of the one person, one vote policy to six factors. First, the Court was clear about what its orders require: compliance entails only the use of simple arithmetic to design districts of equal population. Second, the lower courts readily implemented the standard, in contrast to their reluctance in the area of school desegregation. A third factor was the availability of litigants willing and able to serve as plaintiffs, since courts themselves cannot file lawsuits. Fourth, the courts had the means to implement their orders: legislatures and local governing bodies routinely complied with the equal population requirement. Fifth, implementation of the policy did not, again in contrast to school desegregation, require supporting action by the President or Congress. Finally, those adversely affected by the reapportionment decisions, primarily legislators from rural areas, had little power to block enforcement of the policy. By the 1980s, the one person, one vote requirement had become sacrosanct.

The reasons for the success of the Voting Rights Act are similar. First, the statute explicitly gave great authority to the federal courts—and to the Department of Justice acting as a surrogate for the courts—to enforce its provisions. Second, these provisions, especially Sections 2 and 5, were straightforward and rather easily implemented; they required only changes in voter registration procedures, the conduct of balloting, or the method of election in the affected jurisdictions (all already precisely regulated by state law or local ordinance). Third, for the most part the courts enforced the Act vigorously along the lines defined by a supportive Supreme Court, even

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209 CORTNER, supra note 3, at 257-61.
though these complex, fact-intensive lawsuits came to require great quantities of time and effort. Fourth, the Congress proved consistently supportive of expanding minority voting rights, endorsing the prohibition on minority vote dilution in 1970, expanding coverage to language minorities in 1975, and establishing a clear statutory results test in 1982. Congressional support reflected the general public acceptance of minority voting rights, where remedies did not require whites (except perhaps incumbent officeholders) to give up individual benefits. Fifth, the development of an effective voting rights bar and continued availability of willing minority plaintiffs kept the issue of vote dilution before the federal courts. Finally, once remedies were in place—typically single-member district plans that gave minority voters a reasonably good chance of electing candidates of their choice (usually at less than their proportion of the voting-age population)—no further monitoring by the court was required.

The impact of judicial implementation depends, of course, on the efficacy of the remedies typically ordered by the courts. In the case of voting rights, the success of the Act in the South is usually measured in increased black voter participation and representation. Because racially polarized voting has consistently been the norm in the South, black voters were rarely elected at large or in white-majority districts, but they were typically able to win in black-majority districts drawn to satisfy the Voting Rights Act.

There is remarkable similarity between the factors leading to successful implementation of these two court-directed policies. It seems plausible that these factors would be applicable to policy implementation in other areas. If so, then the effectiveness of judicial implementation might be expected to vary with the degree to which the following factors are present:

1) general public acceptance of the goals of the policy, and the absence of potential litigants who can demonstrate that they have suffered harm from the policy;

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211 Once serving on the governing body or in the legislature, however, minority officeholders were successful only to the degree that they were able to participate in winning coalitions and reshape the agenda to better meet the needs of their constituents. In my view, these goals are beyond the scope of the remedies possible under the Act. But see Lani Guinier, No Two Seats: The Elusive Quest for Political Equality, 77 Va. L. Rev. 1413 (1991); Lani Guinier, The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success, 89 Mich. L. Rev. 1077 (1991). Revised and abridged versions of these two articles are found in GuINIER, supra note 205, at 41-70, 71-118.
2) relative consensus within the court system concerning the interpretation of the statute, and related case law;

3) the ability of the courts to put easily enforced remedies into effect; and

4) the durability of court-ordered remedies without routine monitoring by the courts.

Ultimately the continued effectiveness of any court-driven policy depends upon the degree to which the case law supports vigorous enforcement. The one person, one vote standard is considered sacrosanct; every redistricting plan displays unquestioning obedience to the principle of population equality. Where there is no consensus in the courts about the legal standard to be enforced, on the other hand, the courts will necessarily be less effective as an instrument of policy implementation. That is what happened in the 1990s, when a 5-4 conservative majority on the Supreme Court reinterpreted the guarantees of the Fourteenth Amendment in a way that made it a barrier to full equality for minority voters.\textsuperscript{212}

The enormous increase in minority electoral participation and representation in the South between 1965 and 1990 is directly attributable to the effective implementation of the Voting Rights Act and, between 1965 and 1982, to the Fourteenth Amendment. Its success stems from the power given to the courts and to the Department of Justice to conduct searching inquiries into the relationship between race and voter choice at the local and state level, and to assure through legally enforceable decisions that minority voters compete with the majority on a level playing field. Those critics who lament the Act as an unwarrantable intrusion into the political process are now beginning to be quoted approvingly in court decisions hostile to minority voting rights.\textsuperscript{213} They are right in saying that the Act is intrusive. Alas, in light of the continued level of racially polarized voting

\textsuperscript{212} See Karlan, supra note 14, at 288; McDonald, supra note 14, at 273-74.

in most areas of the South, the historical record fails to indicate that fair elections could have been achieved in the South without it.