

**THE COMPLEX HISTORY OF VOTING RIGHTS:
THE ORIGINAL HISTORY OF STATE ATTEMPTS TO
SUPPRESS VOTING BY BLACK CITIZENS
&
THE LEGAL HISTORY AND LEGACY OF THE
RELATIONSHIP BETWEEN THE FIRST AMENDMENT AND
THE RIGHT TO VOTE**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The First Amendment
[Ratified, December 15, 1791]

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

The Congress shall have power to enforce this article by appropriate legislation.

The Fifteenth Amendment,
[Passed by Congress on February 26, 1869,
And ratified on February 3, 1870]

No period in the legal history of the Civil Rights Movement, as the period from 1954 – 1968 has come to be known, was a more important threat to the integrity of democracy than the relentless cultural and political efforts by a white supremacist South to disenfranchise black citizens. Although this aspect of the legal history of the Civil Rights Movement begins no later than 1870, the 1960's Civil Rights Movement would become known as a capstone period in the coming together of the First Amendment freedoms, and the federal jurisprudence that both influenced the passage of the

Voting Rights Act and sustained the enforcement of its immediate mandate.

A decade before the Montgomery Bus Boycott, in 1944, the attempt by states to formally disenfranchise black citizens through the structure of the State Primary process was brought into question in Smith v. Allwright, 131 F.2d 593 (5th Cir.1942), a decision that was reversed by the Supreme Court and reported at 321 U.S. 649 (1944). The case originally came before a three-judge federal court. Smith sued because election and associate election judges of a Texas voting precinct refused to give him a ballot or allow him to vote in the Democratic Party Primary elections of July 27, 1940 and August 24, 1940, for the nomination of Democratic candidates for the United States Senate and House of Representatives, the office of Governor, and other state offices.

The 1932 State Democratic Party convention had resolved that only white citizens of the State, qualified to vote, would be eligible for membership or to participate in the party's deliberations. The question in the lower court was whether the primary was an election in which a black voter had a right to vote by virtue of the provisions relating to voters of the Federal and State Constitutions, or whether the primary was merely a party procedure, which could be controlled by the resolution of white citizens who were Party members. The three-judge court observed that its prior decision in Grove v. Townsend established that the Primary was not an election in the constitutional sense. On appeal, the United States Supreme Court overturned the decision of the three-judge court.

The Supreme Court had held, in its 1941 decision in United States v. Classic, that Sec. 4 of Article I of the United States Constitution authorized Congress to regulate primary as well as general elections, where the primary is by law made an integral part of the election machinery. Consequently, in the Classic case, corrupt acts of election officers were subjected to Congressional sanctions, because Congress had

the power to protect rights of federal suffrage secured by the federal Constitution in Primary as well as General elections. The Smith case was important because it explicitly overturned Grovey v. Townsend and prevented the State of Texas from asserting that a state political party's racially motivated restriction of its "membership" was mere "voluntary" party action and that those in control of the party's convention and Primary election were not State actors.

Resolving any Constitutional questions obscured or left open by the prior cases, the Court made it clear that a state's delegation to a political party of the power to fix the qualifications of Primary elections is delegation of a State function that may make the party's action the action of the State. Thus Smith held that the right to vote in such a Primary for the nomination of candidates is a right secured by the Fifteenth Amendment that may not be denied by any State on the basis of the race of a citizen otherwise entitled to a ballot. Primary elections in Texas were controlled by a legislative scheme conducted by the party under State statutory authority, making the party, which was required to follow the legislative scheme, an agency of the State for purposes of the Fifteenth Amendment, insofar as the party determined the participants in the Primary election.

The southern states responded to Smith v. Allwright by perpetuating alternative barriers that had been created to enforce the legacy of Plessy v. Ferguson regarding both social segregation and the denial of participation by black citizens in the democratic political process. These alternative schemes were finally confronted at their core in 1963 in the *post-Brown v. Board* landmark decision of a federal three-judge court in United States v. Louisiana (reported at 225 F. Supp. 353). Judge John Minor Wisdom, noted as the Fifth Circuit's true scholar, began his historic opinion with the acclaimed statement: "A wall stands in Louisiana between registered [white] voters and unregistered, eligible Negro voters. The wall is the State constitutional requirement that an applicant for registration 'understand and give a reasonable interpretation

of any section' of the Constitutions of Louisiana or of the United States. It is not the only wall of its kind, but since the Supreme Court's demolition of the white primary [in 1944 in Smith v. Allwright], the interpretation test has been the highest, best-guarded, most effective barrier to Negro voting in Louisiana. When a Louisiana citizen seeks to register, the Parish Registrar of Voters may ask the applicant to interpret a state or federal constitutional provision, or the voting registrar may ask the applicant to interpret a less technical but more difficult provision * * * In giving this test, the Registrar selects the constitutional section, and he must be satisfied with the explanation. In many parishes the Registrar is not easily satisfied with constitutional interpretations from Negro applicants."

Judge Wisdom wrote for the court that this requirement was unconstitutional as written and as administered. He explained that the "understanding clause or interpretation test" had no rational relation to measuring the ability of an elector to read and write. It was instead obvious that the test was a sophisticated scheme to disfranchise black citizens. It is noteworthy that the United States itself was bringing the lawsuit in federal court for the purpose of determining the constitutionality of the laws of Louisiana, and thus Louisiana could not assert sovereign immunity under the Eleventh Amendment. Since the suit challenged the validity of provisions of the State Constitution and certain statutes, and presented substantial federal constitutional questions, it was a proper case for a three-judge federal court.

Judge Wisdom's constitutional analysis is characterized by its scholarly examination of both Louisiana history and Constitutional Law. He traced the federal authority for the government's inquiry into the motive for the so-called "understanding and interpretation" strategy, and compared it with Louisiana's revealing constitutional history. It is difficult to abstract the full scope of his brilliant analysis; but it is appropriate to do so in order to emphasize his general affirmation that the Supreme Court's prior decisions

supported the rejection of racial discrimination, and that Article I, the Due Process and Liberty Clauses of the Fourteenth Amendment, and the Fifteenth Amendment, empower Congress to pass appropriate legislation to prevent the denial of equal protection of the laws, including in the context of holding elections.

Judge Wisdom presented a critical legal history of the “interpretation” requirements as “the latest in a long, logically connected series of socio-political events, rooted in Louisiana’s historic policy and the dominant white citizens’ determination to maintain white supremacy in state and local government by denying Negroes the right to vote.” He meticulously traced this political and constitutional history from the 1724 Code to Act 33 of the Territorial Legislature of 1806, disfranchising Negroes, and thereafter from 1812 (when Louisiana became a state) to its constitutions of 1845 and 1864 (Abolishing slavery, and at least considering Negro suffrage).

His historical discussion then described the socio-political events that led to the quick return of opposition to Negro suffrage, the riots of 1866, and the formal rejection of the Fourteenth Amendment (in 1868, the year of its adoption) by the Louisiana legislature, noting however that the Constitutional Convention of that year desegregated public schools, adopted the Bill of Rights, rejected a literacy test, and prohibited discrimination in public conveyances and places of public accommodation.

It was this Constitution, he writes, that provoked Southern white supremacists. During most of the years between 1866 and 1877, there were two governors and two legislatures. White citizens considered it a civic duty to belong first to The Knights of the White Camelia, a secret organization equivalent to the Ku Klux Klan and later the White League, a statewide organization, which openly advocated white supremacy. In the election of 1876 (policed by the White League), white Democrats under Francis T. Nicholls, defeated the Negro Republican candidate, S. B. Packard, and Nicholls

and Packard were each inaugurated. For four months thereafter, armed members of the White League patrolled the streets of New Orleans. In April 1877, President Hayes, as part of the Hayes-Tilden compromise, removed federal troops from Louisiana and recognized the Nicholls administration as the legal government of the state. These events were of special significance and thus an explicit part of Judge Wisdom's history, because they foreshadowed the "white Primary" and the so-called "grandfather" clause, the "understanding or interpretation test" and the registration application form as techniques to disenfranchise black voters. Ultimately, in 1898, a State Constitutional Convention was held explicitly "to establish the supremacy of the white race" and disenfranchise black voters.

The "grandfather" provision was the principal creation of the 1898 Constitution, requiring a black applicant for registration to be able to read and write and demonstrate the ability to do so by filling out the application form without assistance. The tethered property test required the applicant to own property assessed at \$300 and to have paid the taxes due on the property. The "grandfather clause" exempted persons entitled to vote on or before January 1, 1867, or the son or grandson of such person. At the time, forty per cent of the registered voters in Louisiana were illiterate and most black citizens could not meet the property requirement. Judge Wisdom noted that the chair of the new convention, a New Orleans lawyer and veteran of the White League, stated that the Convention had been called "[for the purpose of eliminating] from the electorate the mass of corrupt and illiterate voters who have during the last quarter century degraded our politics [and to exclude] from the suffrage [every] man with a trace of African blood in his veins."

In 1921, the Committee on Suffrage and Elections met in secrecy and agreed to establish what would be called the "Mississippi interpretation test." The "interpretation test" was rarely applied however, until the early 1950's, because it was not needed. During the period from 1921 to 1946 black

registration was never in excess of 1% of the total registered voters, although black citizens comprised about one-third of the population of Louisiana. But following the Supreme Court's decision in Smith v. Allright, black registration grew to 15% of all voters by 1956, when the return of black soldiers from WWII and the Court's decision in Brown v. Board had also increased the awareness of black citizens about the issue of civil rights generally.

Judge Wisdom recognized these developments as influencing the use of the "understanding test" by Parish registrars to impede voting registration of black citizens. Louisiana argued that the "interpretation test" was basically a test of a person's "native intelligence" and, it was argued, "white people have this native intelligence while most Negroes do not." Judge Wisdom rejected this argument, writing that, where State officers unfairly administer a state law, the federal court may enjoin the unfair acts without passing on the validity of the statute. He found "massive evidence" that voting registrars discriminated against black voting registration applicants as a matter of State policy in a pattern based on the consistent, predictable unequal application of the test. The evidence showed that the test was seldom, if ever, applied anywhere in Louisiana before 1954 (When Brown was decided). This meant that the majority of Louisiana's registered voters (mostly white) had never taken the test. The decision to enforce the interpretation test more than thirty years after its adoption was accompanied by a purge of black voters so that they would be required to re-register after the test came into use. And to do so they had to pass the interpretation test. The white voters, not having been challenged were, in effect, exempted from the test.

The test itself: Judge Wisdom explained that the Louisiana Constitution contained 443 sections, compared to the 56 sections of the United States Constitution, and was the longest and the most detailed of all state constitutions. He noted that there was great abuse in the selection of sections of the constitution to be interpreted, with white applicants more

often being given easy sections, many of which could be answered by short phrases such as “freedom of speech” and registrars frequently helped white citizens with answers. In contrast, Judge Wisdom noted, black citizens who were highly qualified by literacy standards, and of high intelligence, were rejected, although they had given a reasonable interpretation of applicable clauses of the constitution.

In the end, Judge Wisdom noted, most interpretation tests were administered orally, thus precluding the use of written records as a check on what the registrar accepted as reasonable interpretations. Reviewing the record, Judge Wisdom found that the great number of examples of these abuses demonstrated that these discriminatory acts were not isolated or peculiar to an individual registrar, but were part of a pervasive pattern and practice of disfranchisement through discriminatory use of the interpretation test. Judge Wisdom recognized proper definitions of a so-called “literacy test” but concluded that all of the time Louisiana had an interpretation test it allowed illiterate white citizens to vote. Under these circumstances, he held, the interpretation test, as applied, had no rational relation with the proper governmental objective of giving the vote only to qualified persons.

The “citizenship” test: In 1962, the State Board of Registration adopted an alternative “citizenship” test to protect against the possibility that the “understanding” or “interpretation” test would be held unconstitutional. Under the latter test, an applicant for registration would be required to answer multiple choice questions about the duties of citizenship. On its face, the test required a comprehension of the theory of the American system of government and knowledge of specific constitutional provisions. The sort of answers accepted in the past from white applicants under the “understanding” test would have been unacceptable under a fair administration of the “new” test, and Judge Wisdom held that this scheme violated the fundamental principles announced by the Supreme Court in 1886 in its decision in

Yick Wo v. Hopkins, because once again, previously registered white voters were not subjected to this test.

The remedy: Judge Wisdom explained: (1) That it would be impracticable, and generate endless litigation if a wholesale attempt were made to purge the rolls of white persons improperly registered; (2) That it would be extremely difficult to establish who was unconstitutionally purged for failing to take or pass the interpretation test; (3) That it would be virtually impossible to establish which qualified black citizens were rejected because in many parishes inadequate records were maintained by the registrars; and (4) That it would be impossible to ascertain how many and which qualified black applicants were deterred from seeking registration, knowing that they had no chance of succeeding. Thus, Judge Wisdom held, a time-defined nondiscriminatory re-registration of all voters in the State would be the only completely fair and effective means of eliminating the effect of the “interpretation” test or applying the “citizenship” test.

Selma and a watershed in First Amendment history:

While United States v. Louisiana would signal the Fifth Circuit’s interpretation of federal constitutional rights for black citizens seeking the right to vote, the Supreme Court was yet to consider the appeal of the case, as black citizens attempted to register to vote in Selma, Alabama in January of 1965. As these black citizens, including public school teachers, attempted to register at the Dallas County courthouse, they were repeatedly turned away by Sheriff James G. “Jim” Clark and his deputies. Abusing the power of his office as Sheriff, Clark specifically confronted the county’s teachers, physically confronting the highly respected Ms. Amelia Boynton, and also assaulting Dr. Martin Luther King’s colleague Reverend C.T. Vivian, a prominent figure in both the Illinois sit-ins that preceded the southern civil rights campaign, and the 1961 Freedom Rides. During a subsequent protest in February, in Marion, Alabama (near Selma) 26 year-old Jimmie Lee Jackson was shot by an Alabama State Trooper as he tried to protect his mother from being beaten by other troopers. He

died later as the result of either his gunshot wounds, or a second surgery, or both. In 2005, forty years after the death of Jimmie Lee Jackson, the distinguished journalist and investigative reporter John Fleming of the Anniston Star would write that: “It proved to be a moment when the moral authority of Martin Luther King and the essential rightness of the Civil Rights Movement were solidified in the nation’s psyche.”

The 1965 Voting Rights March: In Chapter 17 of his biography of Judge Frank Johnson, Jr. [*Taming the Storm*], Professor Jack Bass (an acclaimed scholar who knew and wrote at length about the Fifth Circuit judges who implemented Brown v. Board’s mandate), recalls the story of the mass march from Selma to Montgomery to protest the death of Jimmie Lee Jackson and Alabama’s violent suppression of the efforts of black citizens to vote.

The Voting Rights March is a complex First Amendment story with a jubilant ending. The planned march began on Sunday, March 7, 1965. At the outset the gathering of more than 500 peaceful protesters, led by John Lewis and Hosea Williams was met by a large contingent of Clark’s deputies and Alabama Troopers. Many of these state law enforcement officers were already wearing gas masks and carrying “billy clubs” – and many were on horseback. At Clark’s instruction, his officers and state troopers rushed toward hundreds of unarmed black marchers, including women and children, who had peacefully walked, two by two on a pedestrian sidewalk, across the Edmund Pettus Bridge that spans the Alabama River on Highway 80 toward Montgomery. Unprovoked by any action of the protesters (who remained still), the deputies and troopers charged, and then trampled and clubbed many in the line of the march, which included men, women and children. The deputies and troopers fired canisters of tear gas and nausea gas, as protesters fled to escape the unprovoked assault.

In response to these attacks, Hosea Williams, John Lewis and Amelia Boynton, represented by Fred Gray, Solomon Seay,

Jr., and other legal counsel, became the nominal petitioners in a federal lawsuit filed against Governor George Wallace of Alabama. The case, like so many others, came before federal District Court Judge Frank Johnson, Jr., perhaps by then the most famous federal trial judge in Civil Rights Movement history. Judge Johnson initially issued an order prohibiting any further march until hearings could be heard. While Martin Luther King viewed Judge Johnson's order as somewhat "unjust" from the perspective of the marchers' First Amendment rights, he met with Leroy Collins – the former Governor of Florida who had been sent to Selma by President Lyndon Johnson as head of a federal Community Relations Service. The two men agreed on the parameters for a second "symbolic" march, now joined by clergy, public figures, and others who had come from around the country to Selma, because they were moved by the events of March 7.

Dr. King also agreed, over dissent from a significant minority of his supporters, to support further hearings before Judge Johnson, and to allow Judge Johnson the opportunity to rule on the merits of the case, specifically in the context of First Amendment jurisprudence. Sheriff Clark, at Collins' request, agreed to allow marchers to approach the Pettus Bridge a second time, and Dr. King agreed "on the basis of the nonviolent spirit," to cross the Bridge and then turn around prior to reaching the wall of police stationed on the other side.

Williams v. Wallace thus became the most important First Amendment case in the Movement's now ten-year history – arguably a case of first impression because of its magnitude. Following the "symbolic" First Amendment event facilitated by Governor Collins, the hearings in Judge Johnson's court resumed, and Judge Johnson took 1100 pages of testimony over four days. This testimony revealed a detailed account of "the full background of voting discrimination and police brutality – including the arrests of more than 150 black citizens who had attempted to register to vote at the Dallas County Courthouse." Judge Johnson then viewed the filmed details of the bloody beating of marchers by local and state

police on Sunday, March 7, and he then took the case under advisement.

As Professor Bass recalls, the principal legal issue for Judge Johnson was whether The First Amendment should be interpreted to support a peaceful mass march of (by then) thousands of people, along Highway 80, a public highway from Selma to Montgomery. Such an unprecedented march would limit the use of a public highway and would likely, because of a history of southern violence, require the protection of marchers by state or federal law enforcement officers.

Judge Johnson’s justification of a First Amendment event of this magnitude would come from his innovative use of the “theory of proportionality” – a theory used traditionally in civil injury cases and criminal cases to justify higher damage awards or criminal penalties. The theory was, to Judge Johnson, appropriately applicable to Constitutional injury. Quoting from Chief Justice Marshall in McCulloch v. State of Maryland, Judge Johnson wrote: “It must never be forgotten that our Constitution is intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs.”

In his historic opinion (reported at 240 F. Supp. 100), lifting the injunction and permitting the mass march, Judge Johnson captured the essence of The First Amendment’s distinct and connected guarantees as the touchstone of democracy – the means by which citizens assert their most basic rights through association and expression, especially when they no other alternative but to petition their government when fundamental substantive constitutional rights are denied. This is the essence of what the five freedoms are all about and why they are stated distinctly. The issue is not simply “freedom of speech” *per se*– it is how and why. On this point, Judge Johnson’s interpretation of the First Amendment’s relationship to the rights guaranteed by the Fifteenth Amendment is essentially timeless, looking both back to our history and ahead to our future as a democracy.

Judge Johnson recalled and reported in a detailed Appendix to his opinion the peaceful and orderly attempts by black citizens to register to vote at their courthouse, and their peaceful demonstrations for the purpose of encouraging such attempts by other black citizens. He then presents the image of local and state law enforcement's "harassment, intimidation, coercion, threatening conduct, and, sometimes, brutal mistreatment toward these plaintiffs and other members of their class – including mass arrests without just cause [and] forced marches for several miles into the countryside, with the sheriff's deputies and members of his posse herding the Negro demonstrators at a rapid pace through the use of electrical shocking devices and night sticks to prod them along." His attention then turned to Sunday, March 7, and the attempted two-by-two march across the Edmund Pettus Bridge toward the state capital in Montgomery, noting that the purpose of this mass march was "to present to the defendant Governor Wallace their grievances concerning the voter registration processes in these central Alabama counties, and concerning the restrictions and the manner in which these restrictions had been imposed upon their public demonstrations."

It must be emphasized, in light of the relationship between our past and our future as a democracy, that, although some current writers on the subject of constitutional law suggest that the "petition clause" is not the focus of First Amendment jurisprudence, Judge Johnson's words invoke this defining quality of democracy in a way that seemed special in 1965 and perhaps is much more significant to our future than we might appreciate. Its importance seems to call for its revival as the capstone of the five freedoms when the subject is democracy itself.

And Judge Johnson said this explicitly! Again capturing the essence of The First Amendment, he characterized the attempted march along U. S. Highway 80 as "nothing more than a peaceful effort on the part of Negro citizens to exercise a classic constitutional right; that is, the right to assemble

peaceably and to petition one's government for the redress of grievances,” citing the Supreme Court’s decision only two months earlier in Cox v. State of Louisiana, and other cases overturning breach-of-peace convictions of civil rights advocates. Applying the idea of the balance of rights and remedies, he reasoned that: “it seems basic to our constitutional principles that the extent of the right to assemble, demonstrate and march peaceably along the highways and streets in an orderly manner should be commensurate with the enormity of the wrongs that are being protested and petitioned against. In this case, the wrongs are enormous. The extent of the right to demonstrate against these wrongs should be determined accordingly.” With these justifications, he rejected Governor Wallace’s ban on the march, lifted the injunction, and the historic Selma to Montgomery march proceeded pursuant to a carefully drafted protocol included in the Court’s opinion, ending with a formal gathering and speech by Dr. King at the steps of the Capital in Montgomery.

It also remains significant and relevant to First Amendment jurisprudence that Judge Johnson revealed the pre-conceived motive of the public law enforcement authorities by noting that “within one minute” of demanding that John Lewis, Hosea Williams and the peacefully standing line of marchers behind them disperse the State troopers and the members of the Dallas County sheriff’s office and “possemen” violently turned on the protesters using tactics “similar to those recommended for use by the United States Army to quell armed rioters in occupied countries” – including prodding, striking and beating them, followed by the use of approximately 20 canisters of tear gas, nausea gas, and canisters of smoke. On the dispositive issue of motive, Judge Johnson wrote that these actions were not directed toward enforcing any valid law of the State of Alabama, but rather were “for the purpose and [had] the effect of preventing and discouraging Negro citizens from exercising their rights of citizenship, particularly their peaceful protest for the right to register to vote.

The United States Supreme Court affirmed Judge Wisdom's decision in Louisiana v. United States, 380 U.S. 145, on March 8, 1965, the day following the deliberate and brutal attack by Alabama State Troopers on Voting Rights marchers at the Pettus Bridge. One week later, on March 15, President Lyndon Baines Johnson asked the Congress, pursuant to its power under the Civil War Amendments, to enact federal legislation specifically addressing federal enforcement of the right of black citizens to vote, free from discrimination because of race, calling the right to vote the promise of democracy.

The 1965 Voting Rights Act

AN ACT To enforce the Fifteenth Amendment to the Constitution of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that this Act shall be known as the "Voting Rights Act of 1965."

SEC. 2. No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

SEC. 4(a) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under subsection (b) or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the five years preceding the filing of the action for the purpose or with the

effect of denying or abridging the right to vote on account of race or color * * * The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color. If the Attorney General determines that he has no reason to believe that any such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment. [Additional specific jurisdictional and procedural language omitted].

SEC. 5. Whenever a State or political subdivision with respect to which the prohibitions set forth in Section 4(a) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification,

prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of Section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.

Our discussion of the legal history of the Voting Rights Act itself begins with Allen v. State Board of Elections, brought before the United States District Court for the Eastern District of Virginia, and ultimately decided by the United States Supreme Court in 1969 (reported at 393 U.S. 544), following the Supreme Court's holding in 1966 in South Carolina v. Katzenbach (reported at 383 U.S. 301). The fundamental holding in these seminal cases was that the Voting Rights Act was constitutional, and that the Act "implemented Congress' intention" to prohibit racial discrimination in voting by suspending the pretextual requirements described by Judge Wisdom in his opinion in U.S. v. Louisiana and providing remedies when state or local voting practices denied the right to vote on the basis of race. Allen was an original decision on the requirements of Section 5 of the Voting Rights Act, involving four consolidated cases (from Mississippi and Virginia).

The Court first considered significant jurisdictional questions, and held that the plaintiffs, as private citizens, could institute these lawsuits in a United States District Court. The majority reaffirmed that provisions of the United States Code on the subject of Civil Rights generally recognize the original jurisdiction of federal District Courts over civil actions "commenced by any person" for the deprivation of "any right or privilege" of citizenship, including "[to] recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

Thus, while the Voting Rights Act did not explicitly allow or deny a private right of action alleging a state's failure to comply with the Act, the language and legislative history of the Act supported the intent of Congress to allow a private civil

action seeking a declaratory judgment whether a state law is governed by Section 5, and seeking an injunction against a state's attempted enforcement of such a law. Any contrary interpretation, the Court reasoned, would diminish the guarantees of the Fifteenth Amendment, and the Court's observation in South Carolina v. Katzenbach that existing remedies were inadequate to accomplish the enforcement of the Voting Rights Amendment, by leaving any citizen totally dependent upon the discretion of the Attorney General whether to seek the intervention of a federal court. The Court distinguished a suit brought by a state to secure a declaratory judgment that a state law did not have the purpose or effect of racial discrimination, from a private action seeking a declaratory judgment that the state law is subject to the Voting Rights Act. Finally, the Court concluded that Congress intended that disputes involving the coverage of Section 5 should be determined by a three-judge District Court.

Approaching the merits of the cases, the Court held, at the outset, that the requirements of the Voting Rights Act applied to "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting [and] that the term 'voting' [included] all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing . . . or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election."

In the Mississippi cases, the State Board of Elections claimed that Section 5 governed only cases challenging state laws that specifically prescribe "who may register to vote," and not laws that establish the qualifications of candidates, laws that define state elected offices, or laws that provided for "at-large" rather than district voting – and they argued that the Department of Justice concurred in this interpretation during subcommittee hearings while the Act was under consideration

in the House of Representatives Judiciary Committee. The Court rejected this narrow interpretation of Section 5, emphasizing that Congress' intent was to prohibit "the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race" – pointing to the Congressional discussions that led to the intentionally broad language subsuming "voting qualifications or prerequisite to voting, or standard, practice, or procedure" that attempted to evade the mandates of the Fifteenth Amendment and to deprive citizens of the right to vote on the basis of race.

Applying this interpretation of the Act to the facts of the cases, the Court observed that the Mississippi laws involved a change from district to at-large voting for county supervisors, a proposed change that could dilute voting power comparable to the denial of the right to cast a ballot, because "voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole." The Court also decided that a state or county's determination whether an office would be appointed or elective directly affects a citizen's vote and could be made for the purposes of disenfranchising black voters, as could a companion law providing that no person who has voted in a primary election may thereafter be placed on the ballot as an independent candidate in the general election. This last provision was "a procedure with respect to voting" that is especially noteworthy in its potential effect, because a proposed party candidate must forgo his right to vote in his party primary if he thinks he might later wish to become an independent candidate. Finally, the Court held that the Virginia procedure governing write-in votes was a procedure subject to the approval requirements of Section 5.

However, as to all aspects of the merits, the Court ruled only prospectively, holding that it would restrain the further application of the laws until the states involved obtained a declaratory judgment from the District Court for the District of Columbia that for at least five years they have not used the

"tests or devices" for discriminatory purposes based on race. [Justice Harlan's separate opinion, disagreeing with the majority's liberal construction of Section 5 of the Voting Rights Act, and the separate opinion of Justices Marshall and Douglas, agreeing with the majority's construction of Section 5, but disagreeing with the Court's decision to apply its ruling only to future attempts to apply the challenged laws, and not to the relief requested as to the Mississippi cases that were before the Court, are omitted].

In 1969, the Court also considered a civil action in which voters and candidates for city offices sought to enjoin an election in Canton, Mississippi. Perkins v. Mathews, 400 U.S. 379, was another early attempt, using different methods, to prevent state and local officials from changing voting requirements without following the procedures stated in Section 5 of the Voting Rights Act. Specifically the voters and candidates who filed the case in the federal District Court alleged that the City of Canton had altered the election procedures for Mayor and Alderman offices in 1969 by changing the location of polling places, changing municipal boundaries to enlarge the number of eligible voters, and changing from ward to at-large election of Aldermen.

The District Court judge temporarily enjoined the elections, but a three-judge court was convened and dismissed the complaint. On appeal to the United States Supreme Court, Armand Derfner sought reversal in light of the Court's decision two months earlier in Allen v. State Board of Elections. At the outset, the majority reaffirmed that Allen distinguished between suits seeking a determination that state enactments are subject to Section 5 from suits seeking an ultimate determination that such enactments discriminate on the basis of race. Thus, Perkins, like Allen, raised only the issue whether Canton's changes were subject to prior submission before enforcement, and the Supreme Court thus agreed with the District judge that: "The only questions to be decided [by the three judge court to be designated are] whether or not the State of Mississippi or any of its political

subdivisions have acted in such a way as to cause or constitute a voting qualification or prerequisite to voting or standard, practice or procedure with respect to voting within the meaning of Section 5 of the Voting Rights Act of 1965, which changed the situation that existed as of November 1, 1964, and whether or not prior to doing so the City had filed a request for declaratory judgment with the United States District Court for the District of Columbia or asked for approval of the Attorney General [of the United States.]”

The Supreme Court noted that the District judge was also correct in explaining that the absence of proof at this stage of judicial inquiry that annexations that changed a city’s boundaries were motivated by race discrimination was unnecessary because that question was premature when “coverage” was the threshold issue. Of course, the Supreme Court observed, a federal trial court is properly aware that Congress’ purpose in enacting Section 5, *i.e.*, included preventing post-Voting Rights Act changes in local or state laws that have the obvious or subtle purpose or effect of disenfranchising black voters, or diluting their vote.

In sum, the Supreme Court held that remand was unnecessary on the issue of the scope of Section 5, citing Allen [that changes, no matter how small, *e.g.*, changes from paper ballots to voting machines (and thus as here, changes in the location of polling places, changes in boundary lines that determine who may vote in a city election and who may not), were within the scope of Section 5’s demand for pre-submission]. Such an interpretation of the scope of Section 5, the Court held, was consistent with the Court’s concern, in its prior decisions in Reynolds v. Sims, 377 U.S. 533 (1964) and Gomillion v. Lightfoot, 364 U.S. 339 (1960), as well as Fairley v. Patterson, 393 U.S. 544 (1969) that boundary or district line changes that affect which citizens may vote in certain elections, or that otherwise strike at the right of black citizens to vote by diluting the voting power of black citizens, raise questions of the potential for continued race discrimination in violation of the Fifteenth Amendment’s fundamental purpose.

Finally, the Court recognized the legitimacy of judicial deference to the Office of the Attorney General by citing Udall v. Tallman, 380 U.S. 1 (1965), recognizing the Attorney General's position that both the relocation of polling places and annexation fall within the purview of Section 5.

In Perkins, the Court reconsidered its decision to apply Allen (a case of first impression) only prospectively, and noted that Canton's actions were taken after Allen was decided. However, the Supreme Court observed that the circumstances of the case justified remand to the District Court to determine if local officials should be given the opportunity to seek federal approval, and whether the District Court should order a new election only if Canton refused to seek that approval. [The separate opinion of Justice Harlan concurring in the result, but arguing that Canton's changes pre-dated the Voting Rights Act, and agreeing with Justice Black that Canton's actions appeared to lack discriminatory purpose or effect, as well as Justice Black's opinion on that point, and his overriding belief that Section 5 was unconstitutional *per se*, under original notions of state sovereignty, are omitted].

An example of the cases following Perkins is the decision of a three-judge panel of the United States District Court for the District of Columbia in The City of Petersburg, Virginia v. United States, reported at 354 F. Supp. 1021 (1972). Following the mandate of Section 5, the City sought preclearance from the Attorney General for an annexation "which added a net of approximately 7,000 white persons to the City, increasing the white population by nearly half and eliminating a black population majority." On behalf of the Department of Justice, the Assistant Attorney General for the Civil Rights Division objected to the annexation, in the context of the use of at-large elections for City Councilmen. The Attorney General concluded that these combined measures would dilute the proportional voting strength of black citizens, and thus constitute a discriminatory effect on voting under the Voting Rights Act. The City argued that the change "[did] not have the purpose [or] the effect of denying or abridging the

right to vote on account of race or color" and the court bifurcated these inquiries in the context of the historical politics of the City.

The court's discussion of the annexation began with the description of the City, as it existed in 1970: An eight square mile independent city in Virginia with a population of 36,103. The annexation in question had been contemplated at the time of the passage of the Voting Rights Act, and included 14 square miles from portions of two counties bounding the Petersburg side of the Appomattox River, and comprising 7,323 persons. This annexation would not merely have increased the gross population of the City, but would also change the population from 55% black and 45% white to 46% black and 54% white (because nearly all of the annexed population was white), at a time when approximately 51% of registered voters were black. On the question of motive or purpose, the three-judge federal court noted that the City Council, including its two black members, supported the annexation for reasons related to the economic development of the City, and held that the annexation did not have a racial purpose.

That however, did not end the inquiry. Because all Council members were chosen in nonpartisan at-large elections that changed the composition of the Council every two years, and because the City's history was clearly marked by deliberate racial segregation that was directly reflected in its laws and customs, black citizens had disproportionately limited political power despite their actual numbers. The court observed that a *de facto* white political elite survived the days of legally enforced "Jim Crow" segregation, retaining influence in City politics by putting forth only white candidates and excluding black citizens from composing "slates" of candidates. In contrast, in recent years, a black political structure had emerged to put forth its own slate of black candidates. This *de facto* political structure had in fact promoted and resulted in a pattern of almost total bloc voting along racial lines in the City's wards. While two black

Councilmen had been elected in 1964 and 1966, the court observed that: “race has been a dominant factor in Petersburg elections where black candidates opposed white candidates.”

Also noteworthy is the court’s observation that the predominantly white Council had, over the years, been generally unresponsive to needs and requests put forth by its black community, including the rejection of certain programs, employment policies and staff appointments recommended by black residents. In this context, the black member of the Council, supported by the black community generally, sought a change from at-large voting to single member districts, for the express purpose of remedying the dilution of black political influence brought about by the at-large voting process.

Speaking to the issue of representation in a pure context, the court recognized that at-large and single member systems might approach community as compared to district issues differently, and indeed the City argued that an at-large system with a City Manager form of government outweighed any discriminatory disadvantage affecting the voting strength of black citizens. The court noted however that this is not an either-or proposition, and that single member systems may produce a closer relationship of an elected public official with his or her constituents. Perhaps more important, the adoption of the City’s argument would put any at-large system beyond the reach of The Voting Rights Act, contrary to Congressional intent. In any event, the court held, the City has the burden of proving by a preponderance of the evidence that any proposed change in the election process (even if not motivated by racial animus) “does not have the effect of denying or abridging the right to vote on account of race or color” – especially when the City and State in question have a long history of intentional discrimination based on race. Thus, the proposed election procedures should be frozen unless the changes can be shown to be nondiscriminatory.

Citing Perkins, Allen and Reynolds v. Sims, the court held that the proposed annexation, in the context of at-large

election, “dilutes the weight, strength and power of the votes of the black voters in the City, with a concomitant effect upon their political influence which is a part of the bundle of individual rights embodied in the franchise as recognized and guaranteed by the Constitution.” The court made it clear however that post-Act annexation decisions were not *per se* invalid, but could be shown to be legitimately essential to a community’s economic stability and/or favored by both white and black citizens. In such cases, the fact that annexation would result in a shift of majority strength would not in and of itself require disapproval by a federal court. Noting the Supreme Court’s decision in Gomillion v. Lightfoot that federal inquiry into the motive for redrawing district lines was constitutionally proper and not precluded by notions of sovereignty, the court distinguished the purposeful racial gerrymandering in Gomillion from the case before it.

The court held that if the annexation brought before it in this case, were “a mere boundary change and not an expansion of an at-large system [then it] is not the kind of discriminatory change which Congress sought to prevent.” However, the City’s petition for approval extended the at-large voting system, and on the findings made by the court, any such annexation would be approved “only on the condition that modifications calculated to neutralize to the extent possible any adverse *effect* upon the political participation of black voters are adopted, *i.e.*, that the plaintiff shift from an at-large to a ward system of electing its city councilmen.” On this issue, the court observed that the Attorney General objected to the City’s changes only in the context of an at-large system for the election of Councilmen, and a significant portion of the City’s black community supported approval of the annexation assuming a change to the ward system of elections.

The court concluded that it was not limited to approving or disapproving the annexation *per se*, as recommended by the City (*i.e.*, retaining an at-large system) but that it could deny the City’s request for approval of its proposal and approve the

annexation, in accord with the Attorney General's concerns, on the condition that the annexation would be accompanied by a change away from the at-large election of City council members, and that a ward system would be established. The United States Supreme Court summarily affirmed (without opinion) the decision of the three-judge court.

Apart from the issue of annexation, Equal Protection issues were also the subjects of the legal history of the Voting Rights Act in its first decade. An example is Ferguson v. Williams, a case decided in 1972 by a federal three-judge court in Mississippi (on remand in light of the Court's decision in Dunn v. Blumstein), and reported at 343 F.Supp. 654. Unlike the blatant understanding and interpretation tests employed in Mississippi and Louisiana to disenfranchise black citizens prior to U.S. v. Louisiana, Ferguson raised Mississippi's requirement that, allegedly to prevent fraud, voters were required (by state constitutional provision and statute) to register four months before any state or local elections. The Court had already rejected a "reasonable relationship test" in a case involving Tennessee's one-year residency requirement, and thus reaffirmed in Ferguson that a state could justify such requirements only under a "compelling state interest" standard. This stricter standard demanded, of course, that the state's residency requirement affecting the fundamental right to vote must raise a legitimate state interest that cannot be protected by other, more reasonable measures.

Assuming that Mississippi's state interest was the prevention of voter fraud (a legitimate interest), the Court held that under a strict scrutiny standard applied to the Equal Protection Clause a state could justify residency requirements that were essential to the holding of orderly elections. However, the state may not meet such a threshold by asserting that longer residency requirements were required because of its use of part-time, or under-paid election officials supported by limited staff, or the use of "slow-moving" election equipment that might be adequate in some elections but not in other elections. In a statement that could be contemplated as

relevant to elections held decades later, the Court observed that it is the duty of the state to provide “efficient and expeditious registration procedures that impose only imperatively needed restrictions” on registration requirements.

Considering this duty in the factual circumstances of the case, it was obvious that Mississippi’s justifications were all related to the continued employment of outmoded procedures, *e.g.*, the use of registration books, and that in that context the state had failed to justify the durational residency requirement as serving the state’s compelling interest in holding orderly elections. In fact, the Court explained, given adequate staff and resources, election officials could provide a valid election process within 30 days after its registration books were closed, and that Mississippi had in fact provided by statute for a 30-day requirement in its primary elections.

In this context, the Court rejected any claim of “administrative convenience” as justifying a longer durational requirement for general elections. This observation is axiomatic when the state’s asserted “compelling interest” is in holding “orderly and honest” elections. The Court remanded the case for the purpose of allowing the State to determine at its next regular legislative session (in 1973) a residency cut-off date that would satisfy a compelling state interest standard, suggesting that it would approve a 30-day requirement. At the same time, the Court rejected and overturned the requirement that, to be an eligible voter, a person must have been a resident of Mississippi, and his county, for at least one year, holding that this requirement must be promptly eliminated, so that qualified voters could vote in any upcoming election prior to 1973.

Armand Derfner would again appear in the Supreme Court in an annexation case in which the Court would issue, in a 5-3 decision, its own interpretation of Section 5 of the Voting Rights Act. In City of Richmond, Virginia v. United States, docketed in 1974 and reported in 1975 at 422 U.S. 358, Mr. Derfner, representing Crusade for Voters of

Richmond, brought the case to the Supreme Court on appeal from the decision of the United States District Court for the District of Columbia. In the Richmond case, as in the Petersburg case, the question was whether the proposed annexation had either the purpose or effect of denying black citizens of the City the right to vote, or effectuated a dilution of their voting power on the basis of race.

The Court began its opinion by reaffirming its divided decision in Perkins v. Matthews that Section 5 of the Voting Rights Act subsumes the planned extension of a city's boundaries through the process of annexation. In the Richmond case, pursuant to Section 5, the City sought a declaratory judgment from the United States District Court for the District of Columbia approving two annexation ordinances, which it argued did not, in purpose or effect, deny or abridge the right to vote of Richmond's black community, on the basis of race or color.

The original ordinances provided for the annexation of 150 square miles of land in Henrico County and 51 square miles of Chesterfield County, but economic issues resulted in the City's dismissal of the Henrico plan, and the City moved forward on a modified annexation of 23 square miles of land adjacent to Richmond in Chesterfield County. Prior to the annexation, 52% of the City's 202,359 residents were black. The annexation added 47,262 persons, only 1,557 of whom were black. The result of the annexation, which was consummated in 1970, was therefore to reduce the percentage of black citizens in the "new" City to 42% of the 249,621 gross population of the City.

As in the Petersburg case, the focus would be on the effect of the annexation, in light of the manner of choosing the members of the City Council through an at large election. Both before and after the annexation, the Council was comprised of nine persons including three members that were endorsed by the Crusade for Voters of Richmond. However, the Attorney General found that the annexation, by substantially

altering the racial balance in favor of whites, would dilute the voting strength of black voters, and proposed consideration of single-member non-racially drawn districts rather than an at-large system, to minimize the discriminatory effects of the annexation, a position the Supreme Court had summarily approved in Petersburg.

A note on the legal context of the case: At the same time as the instant suit was pending, the United States District Court for the Eastern District of Virginia ruled in favor of other petitioners on a Fifteenth Amendment claim of intentional discrimination based on the same annexation plan. The Fourth Circuit Court of Appeals had reversed that decision, holding that the City had valid reasons for the annexation and that the annexation was not racially motivated [Thus reaffirming the distinction between “Gomillion” claims of purposeful discrimination *via* redistricting, and proposed annexations that are challenged as having a discriminatory effect], and the Supreme Court denied *certiorari*. Thereafter, but before the three-judge decision in the Petersburg case was announced, the City again sought the approval of the Attorney General, and the Crusade for Voters had intervened.

Following discussions between the City and the Attorney General, the City agreed to a nine-ward proposal, “under which four of the wards would have substantial black majorities, four wards substantial white majorities, and the ninth a racial division of approximately 59% white and 41% black.” All parties sought a consent decree from the District Court for the District of Columbia. Crusade for Voters opposed the plan, and a Special Master decided that annulling the annexation was justified, because of both discriminatory racial purpose accompanying the annexation, and an inadequate response to the diluting effect of the annexation. Following the Special Master’s findings and conclusions, the District Court did not annul the annexation, but concluded that there was no verifiable legitimate purpose for the annexation, noting the Crusade’s proposal of a ward plan that would create 5 wards comprised of predominantly black citizens.

The Supreme Court considered first whether the annexation as proposed by the City and the Attorney General had the effect of denying or abridging the right to vote under Section 5 of the Voting Rights Act. Noting that any annexation is likely to change a City's racial composition, and that Perkins did not require a *per se* rejection of any annexation that reduces the percentage of black voters, the Court quoted extensively from the Petersburg case, approving the decision that Petersburg's annexation could be subject to approval under Section 5, on the condition that the election of Councilmen be by wards [Noting that it had approved the Petersburg decision without opinion].

Re-affirming Petersburg, the Richmond Court concluded that even if an annexation created or enhanced a white majority of potential voters, such an annexation might be approved under Section 5 if potential racial consequences could be avoided by replacing at-large elections with a fairly designed ward system of choosing Council members that would give black citizens "representation reasonably equivalent to their political strength in the enlarged community" – even if after the annexation black citizens are the majority in fewer wards, such that "bloc" voting would result in a decline in relative influence of the black community as to seats on the Council. On this rationale, the Court held that the specifically agreed-upon annexation and ward system proposed by the City and the Attorney General avoided the effect on voting rights prohibited by Section 5. Under this plan, although the proportional black population of the City would fall by 10%, four of the nine wards created by the revised annexation plan would have a 64% or greater black majority and one would have a 41% black constituency.

With these findings and conclusions having resolved one major aspect of the case, the Court turned to the allegation that the City adopted the annexation plan with the purpose of denying or diminishing the franchise of its black citizens. Once again, this allegation presented a different inquiry. It required that the City prove some "objectively verifiable, legitimate

purpose for the annexation at the time of adopting the ward system of electing councilmen in 1973 [and that] the ward plan not only reduced, but effectively eliminated, the dilution of black voting power caused by the annexation. The Special Master had found that the City had no such reasons in support of the annexation, and that the ward plan put forth did not sustain the political influence enjoyed by black citizens prior to the annexation under an at-large system.

The majority of the Court rejected the argument that the City was constrained, under any new plan, to allocate seats on the Council or voting power to the black community “in excess of its proportion in the new community.” Perhaps more significant is the majority’s statement that, even if the purpose of the plan as originally conceived was to perpetuate white power through annexation and at-large elections, nevertheless if verifiable reasons supported the ultimate annexation as agreed upon, and if the ward plan was fairly designed, the City would be entitled to a finding of compliance with Section 5. Conversely, if such legitimate, nondiscriminatory grounds did not exist, the annexation should not be approved, in the absence of extreme circumstances, even if the black community were to be overrepresented on the Council. In the latter instance, the Court noted, the County of Chesterfield remained able and willing to compensate the City for any capital improvements and resume its governance of the annexed area – and thus annulling the annexation would not cause the City economic or administrative harm. The Court found, and the United States agreed, that it was necessary to remand the case for reconsideration of the conflicting findings of the Special Master, the District Court and the special three-judge court.

[The dissenting opinion of Justice Brennan, joined by Justices Douglas and Marshall deserves brief mention. The dissenting argument first suggested that the District Court relied on proper legal standards and correctly found that the City had presented insufficient evidence that its annexation did not purposefully or in its effect, deny or dilute the voting

rights of the black community. Justice Brennan recalled the history that compelled the adoption of the Fifteenth Amendment, and the continued disenfranchisement of black citizens that made Section 5 of the Voting Rights Act necessary in the first place. He then emphasized that the substantial record in the case contained statements by Richmond officials “which [proved] beyond question that the predominant (if not the sole) motive and desire of the negotiators of the original 1969 [annexation] 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.”

Justice Brennan found that the record of the annexation plan revealed no expression of the City’s interest in economic or geographic considerations, and revealed in fact, that “the mayor required assurances from Chesterfield County officials that at least 44,000 additional white citizens would be obtained by the City before he would agree to settlement of the annexation suit.” To allow such purposes to be overcome by economic justifications many years later, Justice Brennan argued, would be contrary to the intent of Section 5].

As would be expected, the line of cases arising from the mandates of Sections 2 and 5 of the Voting Rights Act would continue, and the United States Supreme Court would further expand the legal history of Section 5. In 1982, the Court considered and decided Blanding v. Du Bose, reported at 454 U.S. 393. The case arose from a preclearance submission under Section 5 by Sumter County, South Carolina, informing the United States Attorney General that a referendum had approved at-large County Council elections. The Attorney General objected, and the County requested reconsideration. When the Attorney General declined to withdraw the federal government’s objection to the proposal, the County proceeded with a referendum to hold at-large elections, and informed the Attorney General of the results of the referendum. Overturning a District Court order allowing the County to proceed with at-large elections, a three-judge District Court concluded that the

County's reconsideration request was not a preclearance submission to which the government had failed to respond.

The three-judge court re-affirmed the benchmark established by Section 5 and the process it created: That, under Section 5, “when a covered political subdivision enacts a voting procedure different from that in effect on November 1, 1964, the political subdivision must either seek a declaratory judgment in the United States District Court for the District of Columbia approving the procedure or submit it to the United States Attorney General for preclearance.” The court observed that the procedure could proceed if the Attorney General failed to object within 60 days of submission, and noted that the Attorney General had objected to the referendum in question.

The three-judge court’s rationale included a more specific legal history of the case. In 1967, the State’s General Assembly enacted local legislation establishing a new seven-member County Commission for Sumter County, to be elected at-large. Such a change, in 1967, required a preclearance submission, but the County proceeded with at-large elections without making the submission required by Section 5. Then, in 1975, the legislature passed a “Home Rule Act” allowing any South Carolina county to choose between at-large and single member district elections. The Act explicitly provided that if Sumter County did not hold a referendum, it would be assigned a “council-administrator” form of government, with council members being elected at-large. This Act was submitted to the United States Attorney General under Section 5. The Attorney General did not object, but did indicate that: “the outcomes of Home Rule Act referenda or assignments of forms of government under the Act would be subject to preclearance.”

At that time, Sumter County decided not to hold a referendum and it was assigned the at-large council-administrator form of government. Subsequently the County Council passed a resolution and ordinance accepting this form of government. In 1976, the County Administrator submitted

the “Home Rule Ordinance” to the Attorney General under Section 5, and the Attorney General made a timely objection specifically to the “at-large election” aspect of the council-administrator form of government. Contrary to the County’s interpretation of the further exchange of correspondence, the Attorney General declined to withdraw the objection to the at-large aspect of the referendum proposal and advised that: “a favorable outcome of such a referendum, by itself, would not [be persuasive].” It was at this point that both private parties and the United States filed lawsuits in federal court, leading to the order of the three-judge court enjoining the elections until the Section 5 issues could be determined.

Despite this order, the County proceeded with its referendum, asking voters whether they preferred at-large or single member district elections. The majority of voters preferred at-large elections and the County so notified the Attorney General in June of 1979. It was in this context that the County moved for Summary Judgment in the lawsuit, contending that the referendum outcome letter was a [separate] preclearance submission, to which the Attorney General had not timely responded. The three-judge court suggested that it was the District Court that confused the issue by holding that the post-referendum letter was a “new preclearance submission” – and the three-judge court held that it was not a “new” submission but instead simple notice that voters had endorsed an at-large method of elections, a process to which the Attorney General *had already objected*. Upholding the position of the United States and the private parties, the three-judge court held that such a notice, which was in fact an untimely request for reconsideration, “[did] not convert [the letter] into a preclearance submission.”

Blanding, and McCain v. Lybrand, decided by the Court two years later, would reveal that the attempt to enforce the transformation of Southern states’ history of disenfranchising black voters, or diluting the voting power of black citizens in the election process, was a difficult ongoing effort for two decades following the passage of the Voting Rights Act.

McCain v. Lybrand, reported at 465 U.S. 236, came to the Supreme Court from a decision of a three-judge court for the District of South Carolina. *McCain is especially important for its emphasis, almost twenty years after the passage of the Voting Rights Act, of (1) the purpose of the Act; (2) the Court's summary of the ongoing decisions necessary to sustain the enforcement process necessary to insure the voting rights of black citizens in the South; (3) the tactics of Southern states to thwart the Act's remedial purpose; and (4) the dynamic enforcement scheme developed by the Office of the U.S. Attorney General in response to its experiences with the southern states and their political subdivisions.*

In 1966, South Carolina enacted a statute that altered Edgefield County's election practices, but the statute was not submitted to federal officials for their approval as required by the Voting Rights Act of 1965. In 1971, the statute was amended, modifying the 1966 election practices, and state officials submitted the amendment to the Attorney General for approval. In response to a request from the Attorney General, state officials provided additional documentation in support of their submission, including the 1966 statute. The Attorney General did not object to the 1971 change. The question in the case was therefore whether the Attorney General's approval of the 1971 submission could be interpreted as ratifying, *ex post*, the changes embodied in the earlier 1966 enactment.

As of November 1, 1964, local political authority in Edgefield County, South Carolina, was vested in a County Supervisor who was elected at large for a four-year term, and served as chair of a three-member Board of County Commissioners. The two other commissioners were appointed to four-year terms by the Governor, on the recommendation of a majority of the County's delegation in the State legislature. The County Supervisor had disproportionate power as Chair. In 1966, the state General Assembly passed a special Act creating a new form of County government for Edgefield County, abolishing the former Supervisor/Commissioner structure in favor of a three-member County Council with

broad legislative and administrative powers. A candidate for a seat on the Council under the Act was required to be a qualified voter in one of three new “districts” defined by the General Assembly and was required to register as a candidate from that district. However, pursuant to an “at-large” election process, residents from throughout the county voted for a candidate from each district, and the candidate in each district with the largest number of votes prevailed for that district’s seat on the Council for a two-year term.

It was this Act that was then amended in 1971, to increase the number of residency districts to five, with new district boundaries. In 1971, state officials sent the letter to the Attorney General that they described as being in accord with Section 5 of the Voting Rights Act. The letter included 18 state enactments, including the 1971 Act regarding Edgefield County. The Justice Department responded to the letter by stating, *inter alia*, that it did not have any objection to the 1971 changes to the 1966 Act, but neither did it have sufficient information to evaluate the 1971 submissions as a request for clearance. The Department requested maps showing boundaries of current districts, population and registration statistics, recent election returns, “a copy of the election statute now in force” and explicitly indicated that the time limitation on consideration of the request for clearance would begin to run when the necessary information was provided. The State forwarded the requested information to the Justice Department, including a copy of the 1966 Act.

Black voters filed a class action lawsuit in 1974, alleging that the County’s at-large method of electing the County Council diluted the voting strength of black voters and that the County’s residency districts were “malapportioned.” The case had a long legal history in the District and appellate courts, leading to the emerging question whether the Justice Department had ever been provided with sufficient information concerning the voting practices of the County prior to 1966, or notified of the fact that the 1966 Act changed election practices in place before 1966 – this being the critical Section 5 issue.

On appeal, the United States Supreme Court first reiterated its observations in South Carolina v. Katzenbach (in 1966) that the Voting Rights Act was enacted as a response to the “unremitting and ingenious defiance” of the command of the Fifteenth Amendment for nearly a century by Southern State officials – and that case-by-case litigation was an unsatisfactory method by which to remedy systematic discriminatory election practices. In all too many instances, Southern States simply altered discriminatory practices following adverse holdings in individual cases.

The Court reaffirmed that the Section 5 preclearance requirement was an extraordinary response to these *ad hoc* attempts to thwart the mandate for the elimination of racial disenfranchisement in the Southern States, by prohibiting these jurisdictions from implementing election practices different than those employed before 1964, unless they were precleared. A systematic process was needed to generally subject changes that influenced elections to prior federal review, by a three-judge court or the Attorney General, to determine whether they had the purpose or effect of continuing to discriminate in the voting process on the basis of race. The issue in McCain became whether this more expeditious preclearance process diminished the standard of review, especially when states often submitted ambiguous or incomplete requests to the Department of Justice.

Noting that the Office of the Attorney General had attempted to use several methods to identify un-submitted changes, or efforts to circumvent the administrative preclearance process, the Court held that: “In light of the structure, purpose, history, and operation of §5, we have rejected the suggestion that the Act contemplates that a ‘submission’ occurs when the Attorney General merely becomes aware of legislation, no matter in what manner,” and instead have held that “[a] fair interpretation of the Act requires that the State in some unambiguous and recordable manner submit any legislation or regulation in question directly to the Attorney General with a request for his

consideration pursuant to the Act” [Citing Allen and other cases]. Speaking to the rights at stake, the Court stated that: “[The] purposes of the [Voting Rights Act] would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him.”

Having admitted that it was subject to the Voting Rights Act’s preclearance process, Edgefield County never submitted the provisions of the 1966 State Act to the Attorney General or the United States District Court for the District of Columbia for a Section 5 review. More specifically, the process of submission in McCain revealed the strategies that Section 5 was meant to overcome, *i.e.*, when the State submitted its letter, only the change proposed by the 1971 amendment was being considered for preclearance, and there was no clear implication or inference that the Department of Justice was being asked to review whether the 1966 Act changed the pre-1964 process in a way that discriminated (or continued to discriminate) in purpose or effect against minority voters in Edgefield County. To answer that question, the Justice Department would have needed information of pre-1964 election practices that were neither submitted nor subjected to review – and such a review would have revealed that the provisions of the 1971 submission re-codified practices in the 1966 Act that in themselves may have been discriminatory in purpose or effect. [The most important aspect of the case, in both principle and fact, is that *the preclearance process was intended to be stringent because of the legal history of the deliberate southern politics of disenfranchisement of black citizens, i.e., Southern State schemes to avoid the guarantees of the Fifteenth Amendment*].

The seminal issues arising from the requirements of Section 5 of the Voting Rights Act would continue to require Supreme Court review, including the review of filing requirements for candidates in southern states in the mid-1980s. In 1985, in NAACP v. Hampton County Election Commission, (reported at 470 U.S. 166), the Court considered

a challenge to the holding of a federal three-judge District Court in South Carolina that Section 5 of the Voting Rights Act did not require changes in candidate filing requirements to be subject to the preclearance process, because such changes were “ministerial” in nature. The circumstances of the case included not only Hampton County’s opening the filing period for candidates for school district trustees before securing Section 5 preclearance, but the fact that it scheduled the election to be held at a date four months later than the date approved by the U.S. Attorney General. Armand Derfner argued the case for the appellants who challenged the District Court’s ruling. A unanimous United States Supreme Court reversed the District Court’s determination that preclearance was not required.

Prior to November 1, 1964, the Hampton County, South Carolina, public schools were divided into two school districts, one predominantly black and the other predominantly white. The Districts were singularly governed by an appointed, six-member Board of Education (appointed by the County’s legislative delegation), with an elected Superintendent of Education. Each District however had its own separate six-member Board Of Trustees, appointed by the County Board Of Education. In 1982, the State General Assembly enacted a special law, apparently for the purpose of facilitating a consolidation of the two districts, and transitioning to a single Board of Education, elected at-large beginning in the 1982 general election. The special Act was submitted to the Office of the U.S. Attorney General, which responded that it had no objection to the change.

Although this aspect of the preclearance process was followed, the Governor of the State signed into law an Act abolishing the prior Act, which had been submitted for approval, and abolishing the Board of Education/County Superintendent model in favor of a governance model that consisted of District Boards of Trustees, elected by each School District, if approved by referendum. This change was not submitted to the U.S. Attorney General until three weeks

following the referendum and more than two months after its enactment. Despite the lack of approval by the Department of Justice, the County opened the filing period, and accepted candidate filings. The United States subsequently objected in writing that the State had not met the burden of showing the absence of discriminatory purpose or effect (and noting that the prior plan had been particularly responsive to the interests and needs of the black community, including appointed bi-racial representation on the local boards for each of the two School Districts). The U.S. Attorney General thereafter withdrew the objection, concluding that the County School Board lacked authority to approve a consolidation of the two Districts in question.

The State Attorney General however proceeded to order elections for School District trustees, without reopening the filing deadline for candidates. The NAACP and several individual residents of Hampton County filed suit against the Elections Commission and County officials, in the United States District Court for the District of South Carolina seeking to enjoin the election as illegal under Section 5 of the Voting Rights Act. The election took place, and following the election a three-judge District Court held that preclearance was not required because the changes that enabled the election were merely “ministerial acts necessary to accomplish the statute’s purpose.” Alternatively, the District Court stated that: “after-the-fact federal approval under § 5 might retroactively validate a change in voting procedures.”

The U. S. Supreme Court held unanimously that the question whether a jurisdiction covered by Section 5 may open a candidate filing period prior to federal preclearance was not the issue, because the County altered the filing deadline from a date approximately two months before the election to a date that was almost six months before the election – a change that was clearly more than ministerial [Again citing its seminal decision in Allen v. State Board of Elections that Section 5 was to be liberally construed, and that the rescheduling of candidate filing periods is a “change” subject to Section 5

preclearance]. The Court observed that the filing period must be viewed in the context of the election of which it is a part.

The Court explained that, under Hampton County’s argument, a filing deadline that was a year in advance of an election would be considered equal in effect to a deadline established one week before an election, despite the obvious fact that issues that provoke voter interest and participation are in many instances issues arising shortly before an election. Perhaps more significant, because the filing period was determined when the Attorney General had an outstanding objection, candidates might have chosen to await filing, and in any event, a statutory change in the date of an election unquestionably required preclearance. Avoiding the latter requirement by cloaking the change in an election in “administrative” language is contrary to both the fundamental holding in Allen [that a change that affects even a single election is subject to Section 5], and to Section 5 Regulations that interpret Section 5 to subsume changes affecting “the eligibility of persons to become or remain candidates.” Finally, the Court observed that the State could easily have complied with Section 5, if it had simply selected an election date sufficiently far in the future to allow preclearance.

The Hampton County case is important, not only because it reveals an ongoing two decade legal history that required constant United States Supreme Court intervention to support Justice Department enforcement of the Voting Rights Act, but because it revealed the ongoing Supreme Court rulings necessary to reassert the basic reasons for the Act in the first place – the need for federal examination of Southern State election procedures that had the continuing purpose or effect of disenfranchising black voters.

The Legal History of Section 2 of the Voting Rights Act:

In 1980, in the case of Mobile v. Bolden (reported at 446 U.S. 55), the Supreme Court held that: “[In] order to establish a violation either of [Section 2 of the Voting Rights Act] or of

the Fourteenth or Fifteenth Amendments, minority voters must prove that a contested electoral mechanism was intentionally adopted or maintained by state officials for a discriminatory purpose.” In 1982, Congress amended Section 2 (a process in which Mr. Derfner was involved) to explicitly reject the intent requirement of Mobile v. Bolden and to provide that the “results test” established in 1973 in White v. Register 412 U.S. 755, was an appropriate standard to apply in Section 2 cases (*i.e.*, to return to the *pre-Bolden* standard).

As amended, Section 2 provided that:

“(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).

“(b) A violation of subsection (a) is established if, *based on the totality of circumstances*, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.” [Codified at 42 U. S. C. §1973]. (Emphasis added).

The Senate Judiciary Committee created (or re-created) a totality of the circumstances approach to Section 2, explaining the relevant factors that should be considered in determining a violation:

- “1. [The] extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. [The] extent to which voting in the elections of the state or political subdivision is racially polarized;
3. [The] extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. [If] there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. [The] extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. [Whether] political campaigns have been characterized by overt or subtle racial appeals;
7. [The] extent to which members of the minority group have been elected to public office in the jurisdiction.”

[Other factors recognized in the Senate Report that could reflect a violation could include “whether there [was] a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group, and whether the policy underlying the state or political subdivision’s use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous”].

The United States Supreme Court was first required to construe Section 2 of the Act, as amended, in 1986, in Thornburg v. Gingles (reported at 478 U.S. 30). In April 1982, the North Carolina General Assembly enacted a legislative redistricting plan for the State’s Senate and House of

Representatives. Black citizens who were registered to vote filed a three-judge federal District Court petition alleging that the redistricting scheme, which created seven districts, six of which were multi-member districts, impaired black citizens' ability to elect representatives of their choice in violation of the Fourteenth and Fifteenth Amendments to the United States Constitution, and Section 2 of the Voting Rights Act.

Although the Thornburg case had been filed prior to the effective date of the amendment to Section 2, the District Court applied the "totality of the circumstances" test, set forth in Section 2(b), to the statutory claim. Applying the factors explicitly defined in the Senate Report, the District Court held that the North Carolina redistricting scheme violated Section 2 because "it resulted in the dilution of black citizens' votes in all seven disputed districts." The court's fact findings emphasized that there were concentrations of black citizens within the boundaries of each challenged district that were sufficiently large and contiguous to constitute effective voting majorities in single-member districts lying wholly within the boundaries of the newly created multimember districts.

The court also considered the historical context of the case, and found an established record that, between 1900 and 1970, the State had deliberately employed a poll tax, a literacy test, a prohibition against "single-shot" voting; that it had designated seat plans for its multi-member districts; and that examples persisted of candidates for office continuing to appeal to race in their political campaigns. More to the point of the purpose of Section 2, as amended to reflect both purpose and effect, the District Court found that as of 1982, only 52.7% of eligible black voters were registered, as compared with 66.7% of eligible white voters, and that black citizens comprised only 2% - 4% of the State House and Senate. This disparity, the court found, was at least partly a present effect of pre-Act official discrimination. The District Court then recognized a circumstance of Section 2 analysis that remains relevant today: That the disproportionate socio-economic dislocation of black citizens affects their ability to effectively

participate in the political process. This finding is confirmed by the intersection of race, poverty and inequality in public education during the entire era of racial segregation, and the legal history of these dislocations reveals an undeniable federal mandate to remedy the present effects of these dislocations until equal opportunity can characterize the spectrum of civil rights, including the right to fully participate in the political process of a democratic form of government.

The State challenged the District Court's findings, alleging error in both the application of the amended Section 2 standard of proof to determine whether the contested districts exhibited racial bloc voting sufficient to raise Section 2 judicial scrutiny, and error in the conclusions drawn from the statistical evidence related to the challenged districts. The State argued that the newly created multi-member districts did not result in a dilution of black opportunity to participate effectively in the political process.

Most important to the ongoing legal history of voting rights are the Supreme Court's initial observations in the case about the legislative history, purpose and specific provisions of Section 2 of the Voting Rights Act: First, the Court observed, Subsection 2(a) "prohibits all States and political subdivisions from imposing *any* voting qualifications or prerequisites to voting, or any standards, practices, or procedures which result in the denial or abridgment of the right to vote of any citizen who is a member of a protected class of racial and language minorities." (Italics used by the Court). Second, the Court affirmed the "totality of the circumstances test" that was the essence of the amendment to Section 2, *i.e.*, explicitly rejecting the position of the plurality of the Court in Mobile v. Bolden that Section 2 cases required proof of intentional or purposeful discrimination based on race.

Reinstating the *pre-Bolden* standard of review, the Court held that the reported Senate history was clear that voting practices could be challenged where circumstances revealed that a state's political process was not equally open to

members of the protected class. The Court was clear that this does not mean that members of the protected class are guaranteed elected positions, or that at-large elections are *per se* invalid, but rather that the Section 2 standard imposes a mandate of equal participation in the process. Finally, the Court emphasized that the burden of proof remains on the parties challenging an election scheme.

Turning to the specific issues of multi-member districts and at-large voting, the Court cited its prior decisions, including White v. Register, and framed the question as whether plaintiffs in Section 2 cases can show that such schemes “operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.” Factually this translates to situations in which “minority voters and majority voters consistently prefer different candidates,” and where white majority voters, because of their numbers, regularly defeat the candidate preferred by minority voters, *i.e.*, *because of vote dilution*. (Emphasis added). The context of challenges to multi-member districts will, for example, reveal a potential violation of Section 2 when the minority group is sufficiently large and geographically confined that it would constitute a majority in a single-member district. In such a circumstance, submerging the minority group voters in a multi-member district “structurally” dilutes the influence of minority voting on the outcome of the election and may insure the success of candidates preferred by the white majority of voters.

Although lay witnesses may provide evidence in Section 2 cases, those persons who have direct roles in the election process must appreciate the importance of statistical evidence and analysis under a Thornburg analytical approach, on the specific issue of racially polarized voting. In Thornburg, the Court thoroughly examined such expert statistical analysis [both extreme case analysis and bivariate regression analysis], to determine whether black voters and white voters in the districts in question differed in their voting behavior, including estimates of the percentage of both races that voted for black candidates.

The District Court reported the results of this analysis in both tabulated numerical form and in written form, finding “that in all but 2 of the 53 elections [the] results of the individual election would have been different depending upon whether it had been held among only the white voters or only the black voters,” and that the examination of several election years revealed that white voters were extremely reluctant to vote for black candidates. [It should be noted that, as to this aspect of the analysis, the majority rejected the suggestion that the discriminatory intent of *individual* white voters must be proved in order to make out a Section 2 claim; such an interpretation of the evidentiary burden would be counter-intuitive to Congress’ rejection of the Bolden intent test with respect to governmental bodies. What plaintiffs must prove is that the statistical significance of racially polarized voting is sufficient to support a vote dilution claim. This is a *pattern* claim, and the focus is on the subordination of minority voting, not whether a particular candidate was or was not successful in an individual election.

The details of the Court’s internal debate about alternative statistical analysis is noteworthy, but what is of overriding importance is that the Supreme Court’s holding rejected the argument of both the State and President Ronald Reagan’s Justice Department that only a multiple regression analysis, which would consider not only race, but also age, income, religion, education and other variables, could be considered a proper statistical analysis. The Court noted that, for purposes of Section 2, “the legal concept of racially polarized voting incorporates neither causation nor intent. It means simply that the race of voters correlates with the selection of a certain candidate or candidates; that is, it refers to the situation where different races (or minority language groups) vote in blocs for different candidates.” Not ignoring the contrary assumption however, the majority observed that the legislative history of Section 2 recognizes that: “Race or ethnic group not only denotes color or place of origin [but] also functions as a shorthand notation for common social and economic characteristics. Appellants’ definition of racially

polarized voting is even more pernicious where shared characteristics [such as lower income and educational barriers] are causally related to race or ethnicity.”

[In rejecting the Bolden intent requirement, and announcing the analytical approach to Section 2 cases, the Court upheld the District Court’s decision, despite finding factual error in the District Court’s application of its analysis to one voting district included in the challenge. This alleged error generated much discussion and was the partial reason for the separate opinions of several justices, who would have bifurcated the Court’s ruling. This lengthy and complex debate, raising mixed issues of law and fact, is omitted here in favor of emphasizing the purpose and standard of Section 2, and the Court’s affirmance of the District Court’s general conclusion that “the multi-member districting scheme at issue in this case deprived black voters of an equal opportunity to participate in the political process and to elect representatives of their choice”].

EPILOGUE

President Lyndon Baines Johnson introduced his March 7, 1965 message to the House and Senate on the subject of his submission of the Voting Rights Act in words that seem timeless:

“I speak tonight for the dignity of man and the destiny of democracy.”

In a speech that sought not who to blame, but to emphasize the fundamental promise of democracy that Alexis deTocqueville had deemed in 1835 to be America’s defining uniqueness, the President reaffirmed the essence of the issue facing the country following the awful events of “Bloody Sunday” in Selma, Alabama:

“This dignity cannot be found in a man’s possessions; it cannot be found in his power, or in his position. It really rests on

his right to be treated as a man equal in opportunity to all others. It says that he shall share in freedom, he shall choose his leaders, educate his children, and provide for his family according to his ability and his merits as a human being.

Many of the issues of civil rights are very complex and most difficult. But about this there can and should be no argument. Every American citizen must have an equal right to vote. There is no reason which can excuse the denial of that right. There is no duty which weighs more heavily on us than the duty we have to ensure that right.”

The legal history of the efforts to make this promise real continued into the 21st Century, including the reauthorization of the Voting Rights Act in 2006. However, political and Supreme Court views of voting rights were reshaped, and the Justice Department’s authority to enforce voting rights was dramatically altered by the United States Supreme Court’s divided opinion, in 2013, in Shelby County, Alabama v. Eric Holder, Jr., Attorney General, et al., reported at 133 S.Ct. 2612.

Shelby County, Alabama sued the U.S. Attorney General in the Federal District Court for the District of Columbia, seeking a declaratory judgment that Section 4(b) and Section 5 of the Act were facially unconstitutional. The District Court upheld the Act, finding that the evidence before Congress in 2006 (in support of its reauthorization for an additional 25 years) was sufficient to justify reauthorizing §5 and continuing §4(b)’s coverage formula, and the Circuit Court affirmed the decision, finding that Section 5 was still necessary to protect the rights of minority voters. However, the United States Supreme Court reversed, by an indecisive bare majority vote of 5-4 (when consensus was needed). Appearing to cabin history, the bare majority held Section 4 of the Voting Rights Act was unconstitutional, and observed that there was no longer a need for subjecting the previously covered southern jurisdictions to preclearance. More boldly, the majority held that the Voting Rights Act, as currently enforced through

Section 5, contravenes basic principles of “equal state sovereignty” insofar as the Tenth Amendment reserves to the states broad autonomy in the structuring of their governments, emphasizing the very premise that made the Voting Rights Act necessary, *i.e.*, that it would apply to nine specific states.

The central reasoning of the majority’s holding in the Shelby County case was simply that, while the long history of deliberate and continued attempts of certain Southern States to disenfranchise black voters, or dilute their influence in elections (which structure all levels of state governance) was beyond doubt – that nonetheless “nearly 50 years” after the Act’s passage (and in less than 10 of the 25 years of its reauthorization), “things have changed dramatically.” Using 2009 as an apparent benchmark, despite Congressional 25-year reauthorization of the Act in 2006, the Court’s reasoning emphasized that minority candidates now hold political office at “unprecedented levels.”

But the majority also relied on older history quite literally as a principal justification for its holding, observing that the specific “tests and devices” that were most popularly used to disenfranchise black voters (*i.e.*, the “extreme” devices such as “understanding” and “interpretation” tests, created for the purpose of rejecting efforts of black citizens to register to vote) have been forbidden for more than 40 years, and that the violent white resistance to black voter registration, *e.g.*, in 1964 in Mississippi and in 1965 in Selma, Alabama are a “decades old and *eradicated past history* (emphasis supplied). This central rationale of the majority in Shelby County explicitly marginalizes the rationale of the Supreme Court cases that sustained and upheld the reasons for the enforcement of voting rights, through the necessary process created by Sections 4 and 5, throughout four decades.

Also noteworthy is the Court’s assumption that the continuation of Section 5 preclearance rests on a punitive interpretation of the Fifteenth Amendment itself, rather than a

remedial premise, again singling out the Act's impact on a discrete minority of Southern States. Indicating that the Act's remedial period was originally intended to expire in 5 years the majority clearly questioned the Court's decisions throughout the 4 decades after its passage as construing the Act too stringently for too long, again despite repeated *Congressional* re-authorization of Sections 4 and 5 as late as 2006.

The majority qualified its holding by noting that Section 2 of the Voting Rights Act, as amended, continues to forbid (nationally) any "standard, practice, or procedure [that] results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color," and the majority emphasized that Section 2 of the Act was not at issue in the Shelby County Case, without emphasizing how Sections 4 and 5 make Section 2 effective in fact.

[The concurring opinion of Justice Thomas and the dissenting opinion of Justice Ginsburg, joined by Justices Breyer, Sotomayor and Kagan are omitted. It is noteworthy however, to emphasize that the dissenting Justices viewed the effect of the Court's opinion as not only striking down Section 4(b) of the Voting Rights Act, but as rendering Section 5 ineffective. Justice Ginsburg's detailed discussion of "second-generation" barriers to racial equality in voting rights reviews the very subject of the cases discussed in this text, as well as recent examples of cases which the dissenting Justices assert reveal that "political exclusion through racism "remains a real and enduring problem" in the states covered by Section 5 of the Voting Rights Act].

AFTERWORD: THE LEGACY OF THE VOTING RIGHTS ACT

The right to vote is facing parlous times today. The "crown jewel of American liberties," as President Ronald Reagan called it, is increasingly becoming a token to be toyed with for partisan, financial or other advantage. The vote has always been vulnerable, but the threat seems to be especially great now.

I.

There are many reasons why this may be so. Increasing partisanship, and greater ideological division between the major political parties – the same trend that causes increasing gridlock; increased influence of truly vast amounts of money; and even the advanced technology that permits computers to tailor political strategies to a microscopic level – all these and others may play a part.

Our democracy has always had growing pains but much of the past has seemed to trend toward progress. The 20th century was a good example: Women’s suffrage (the 19th Amendment, in 1920); the end of shameful racial disenfranchisement (the Voting Rights Act itself, in 1965); the 18-year-old vote (the 26th Amendment, in 1971); lessening of miscellaneous barriers (the end of long residence requirements, early registration deadlines, *etc.*, in the 1960s & 70s); the end of malapportionment (The Supreme Court’s decisions in the 1960s); and even extending the franchise to Washington, D.C., (the 23d Amendment in 1961).

Three events around the turn of this century illustrate the positive trend. In 1993, the National Right to Vote Act (“Motor Voter law”) took us a big step forward in making voter registration available at motor vehicle bureaus and other government services offices. In 2002, the Bipartisan Campaign Reform Act (the “McCain-Feingold law”) curbed campaign abuse by so-called “independent” committees. And in 2006, Congress overwhelmingly continued the Voting Rights Act to block any attempts to discriminate against minority voters. The U.S. Supreme Court has washed away all three achievements in the past decade.

II.

Many of the techniques for abusing voters are familiar, such as manipulating election rules, discriminating against minority voters, and gerrymandering. Current techniques

rarely do not seek to disenfranchise all potentially contrary voters, but only to eliminate or neutralize as many as it takes to determine the outcome. As we know from many recent high-profile close elections, the number of voters it takes to succeed is often small; this allows for even subtle techniques to be successful. In the past few years, many states have enacted new obstacles to registering to vote or voting, reversing our Nation's long struggle to expand voter eligibility and participation. In the past decade, half the states have passed new voting restrictions, erecting barriers for voters in general, but particularly affecting – and often deliberately targeting – minority and poor voters.

Some of the implications of this trend have been spelled out in A. Derfner and J. Hebert, *Voting is Speech*, 34 YALE LAW & POLICY REV. 471 (2016). This type of restriction has acquired the name “voter suppression,” since these procedures do not explicitly deny anyone the right to qualify but instead set up barriers that discourage potential registrants or voters. The most prominent tool is the Photo ID law, which requires a registered voter to present a designated form of photo ID at the poll in order to vote. State laws always include driver's licenses and some other specified IDs that vary by state. There is almost universal agreement that these laws respond to no need whatever. Supporters argue that the photo IDs are necessary, but that claim has been massively refuted. The photo ID protects against a particular evil, in-person impersonation, that is essentially non-existent. No state has ever reported as many as ten instances, out of tens of millions of votes cast, and most states report zero instances of such fraud.

Other approaches to voter suppression include ending or reducing programs that have been successful in boosting voter participation, especially among minority voters. Some of these methods include reducing the number of “early voting” days; eliminating Election Day registration; restricting registration opportunities by reducing satellite offices and restricting deputy registrars who receive and transmit out-of-office

registration applications; and/or reducing the number of voting precinct locations.

III.

For much of the 20th century, the U.S. Supreme Court was a bulwark protecting the right to vote, and is a major reason this Part of the course text has extended beyond the 1960s. The roots of the Court's turn away from its protective role go back to the 1970s but only recently have borne bitter fruit. In 1972, in *Dunn v. Blumstein*, 405 U.S. 330 (a landmark case striking down long residence requirements), the Supreme Court reaffirmed that the right to vote is "fundamental." Yet the next year, in *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, after a change in membership, a narrow majority of the Court said voting is not a fundamental right. The small wording issue makes all the difference. If a right is fundamental, a court reviews any restrictions on the right with skepticism, but if the right is not fundamental, the court's review is relaxed, and most restrictions are allowed.

In 1974, in *Storer v. Brown*, 415 U.S. 724, the Court said that, as a practical matter, elections have to be regulated to insure fairness and order; the opinion said that under this approach, most election procedures would be allowed unless they were proved to be discriminatory or "excessively burdensome." Since that time, several cases modified the rules slightly (*e.g.*, *Anderson v. Celebrezze*, 460 U.S. 780. This case said the State would have to make a specific showing of its interest underlying the regulation, but that does not seem to have made much difference in the Court's easy acceptance of state regulation). The current standard is as stated in 1992, in *Burdick v. Takushi*, 504 U.S. 428. There is one significant exception in the early era: In 1976, money began to be equated with speech, so campaign spending would be entitled to First Amendment protection. Since then, regulation of campaign spending, whether by federal or state government, has faced increasingly tough sledding in the Supreme Court – a

necessary point made at the end of our interview on this aspect of the Movement, because the future of voting rights is at the foundation of the Movement's substantive legacy.

IV.

The ultimate question for today, and for the future promise of democracy – that President Lyndon Johnson made the central theme of his message to Congress in March of 1965 – is: how a deeply divided Supreme Court has treated the constitutional and statutory right to vote in our democracy in the years following the 40th anniversary of the Voting Rights Act. Most of the cases have been decided by a 5 Justice majority with four Justices dissenting, but the decision to restrict the vote has consistently prevailed.

2008: Voter suppression.

In Crawford v. Marion County Bd. of Elections, 553 U.S. 81, the Supreme Court upheld Indiana's photo ID law and effectively cleared the way for other photo ID laws. Indiana had never reported a case of in-person impersonation, but the Supreme Court said voter fraud can still be a problem. True, there is often a problem of vote fraud, but not the type of fraud that Indiana claimed to be protecting against. The Supreme Court cited a number of instances of voter fraud around the country, but every one of its examples was of other types of fraud, while in-person impersonation was involved in exactly one case involving one voter nearly a century ago. This is not to say that in-person impersonation never happens, but it is in the category of hens' teeth. More to the point, when it does happen, it is invariably a single misguided person, never an organized group effort. The fact that the Supreme Court has said a state may discourage hundreds of thousands of voters to root out these hens' teeth simply shows the low esteem in which the Supreme court holds the vote and voter.

2010: Campaign spending.

As we emphasize in our interview with Mr. Derfner, the Court's 2010 decision in the *Citizens United* case (538 U.S. 310), reshapes campaign finance law by holding that corporations have as much First Amendment right to pour money into campaigns as real people do. That one case also struck down federal laws from as long ago as 1907 and as recent as 2002. In several other 21st century cases, the Supreme Court has struck down more and more campaign finance regulation laws passed by the states and the federal government.

2013: Gutting Enforcement of the Voting Rights Act.

After deciding Citizen's United, the Court, in a bare 5-4 majority decision, the Court struck down a major provision of the Voting Rights Act itself, the law that enforces the Fifteenth Amendment by enforcing the fundamental civil right that defines democracy. The Court struck at the very heart of the Voting Rights Act by holding unconstitutional the preclearance procedure that had blocked more than a thousand discriminatory voting changes, after Congress had overwhelmingly reenacted the law in 2006. The state and local laws blocked by the Act are listed on the website of the U.S. Department of Justice.

2018: Barriers to Registration.

In Husted v. A. Philip Randolph Inst., 138 S.Ct. 1833, the Court upheld Ohio's procedure for removing voters from the rolls, again 5-4, against a claim that this violated the Motor Voter law's strict regulation of such removal.

2018: Racial gerrymandering revisited: While the Supreme Court has consistently held that racial gerrymandering is unconstitutional, several cases in recent years have had mixed outcomes. A 2018 case from Texas, *Abbott v. Perez*, 138 S.Ct. 2305, indicates that the Court is becoming cool or hostile to such cases. The Supreme Court has decided several other claims of racial gerrymandering in the past several years, with mixed outcomes. After a lower court found as a fact that the

Texas redistricting of congressional seats was a racial gerrymander, a finding which is entitled to deference, the Supreme Court nevertheless stepped in, rejected the lower court's careful findings, and substituted its own finding that the Texas legislature was innocent of racial gerrymandering. Once again, four Justices dissented from the bare majority.

2019: Political gerrymandering.

This noxious form of gerrymandering can undermine democracy as easily as the now-outlawed system of “rotten boroughs” (mathematical malapportionment). After years of uncertainty, the Supreme Court decided in 2019, in Rucho v. Common Cause, another 5-4 bare majority opinion, that federal courts cannot strike down a gerrymander drawn – even confessedly – for the purpose of favoring one political party over another. Two main avenues are still open for judicial challenges: (1) state courts still can, and many do, consider political gerrymandering claims; (2) political gerrymanders often also amount to racial gerrymanders, which federal courts (as well as state courts) can still hear and hold unconstitutional. And, as the Court pointed out, in Harris v. Arizona Ind. Redistricting Comm., 136 S.Ct. 1301 (2016), in some fortunate states, the districting process has been removed from the legislature and put in the hands of a non-partisan commission.

V.

If the Supreme Court has been tolerant of most restrictions on voters, it has been vigilant, even aggressive in rejecting curbs on money in politics, whether those curbs are imposed by Congress or the states. Money often plays an essential role in democracy, yet increasingly seems to be a significant threat to democracy. Congress and the states have tried to regulate the role of money by laws that limit contributions and expenditures and by providing for timely financial disclosure. Over the years, the Supreme Court has upheld laws regulating candidates and political parties, and

has also upheld most disclosure requirements. However, the Court has struck down most restrictions on so-called independent committees, leaving a gaping hole for the influence of “political” money.

Supreme Court doctrine thus far has allowed only a single justification for any regulation of campaign finance – corruption or the appearance of corruption. Based on this doctrine, the Court has upheld limits on contributions directly to candidates and political parties, but has rejected limits on so-called independent committees like PACs, on the theory that, since they are “independent,” there can be no corruption or appearance of corruption. Is this rational? Are PACs and other committees really “independent” and do they not raise the same specter of the appearance of corruption as direct contributions to candidates?

The 2016 election also shows the danger to American voters and American Democracy from foreign contributions or foreign interference (whether or not anyone in this country is involved or cooperating). This presents a whole new range of risks.

And so, what lies ahead? Will the Court strike down limits on contributions directly to candidates and political parties? Will the Court allow enhanced disclosure requirements or will it give more protection to secrecy? What about foreign money and foreign activity in our elections? These cases also raise the question – if money spent on voting has such First Amendment protection, why doesn’t voting itself have the same protection? Why isn’t voting a fundamental right entitled to the most robust First Amendment protection? Mr. Derfner’s article with J. Gerald Herbert, *Voting is Speech*, 34 YALE LAW & POLICY REV. 471 (2016) makes that argument, and it may well be the foundation of a new discussion of the right to vote.

