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THE VOTING RIGHTS ACT IN PERSPECTIVE

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The Voting Rights Act: A Brief History

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AT HIS FAREWELL presidential press conference, a weary and beleaguered Lyndon B. Johnson was asked by a reporter what he regarded as his greatest accomplishment and his happiest moment during his tenure. Johnson responded with a single answer: signing the Voting Rights Act of 1965.[1] Undeniably, passage of the act was of great historical significance. The climax of the so-called second Reconstruction, it secured for black Americans what the Fourteenth and Fifteenth Amendments, passed during the first Reconstruction, had not—the right to vote, the very bedrock of democracy.

Taking the act's full measure requires a broad historical compass. The story of black disfranchisement in America began in 1619 when the first Africans debarked from a ship in Jamestown, Virginia. For the next two and one-half centuries most blacks in this country were enslaved, and so they were unable to vote. Neither, of course, could women of any color. But freedmen, too, were not usually given the opportunity. At the time the Constitution was framed, to be sure, free black men could vote in some of the original states, including the southern one of North Carolina.[2] Moreover, some thousands of free southern blacks had the franchise early in the nineteenth century.[3] But the situation deteriorated as the century progressed. On the eve of the Civil War, free blacks were denied suffrage everywhere but in New York and the New England states—except for Connecticut, where they were also disfranchised. In New York, only blacks possessing $250 worth of property could vote; no such barrier applied to whites.[4]

I wish to thank Edward Cox, Bernard Grofman, Lani Guinier, Thomas Haskell, Gerald Hebert, David Hunter, Samuel Issacharoff, Gerald Jones, Pamela Karlan, and Laughlin McDonald for their help.

1. Lawson 1985, 4.

2. Dinkin 1982, 41–42. Stephenson 1969, 284, states that until the Revolution free blacks could vote in all the original states except South Carolina and Georgia. Dinkin does not go so far.

3. Franklin 1961, 80.

4. McPherson 1964, 223.

Between 1865 and 1869, blacks in the North remained largely disfranchised, as whites in the region voted against equal suffrage in eight out of eleven referendums on the issue.[5] Disfranchisement in the North as well as the South was the target of those abolitionists, still active after the war, who supported the Fifteenth Amendment.[6]

Reconstruction and the Black Franchise

Given what is known about his views on reconstructing the South, Abraham Lincoln probably did not favor general enfranchisement of the largely illiterate black population, although he suggested at one point that "very intelligent" blacks and those who were Union veterans might be given the vote.[7] Lincoln's successor, Andrew Johnson, was opposed to giving blacks suffrage immediately and, in any case, believed that individual states should decide the question.[8] It was only as a result of the Republican-dominated Congress that southern blacks were finally enfranchised. In its Reconstruction Act of 1867, passed over Johnson's veto, Congress required as a condition for readmission to the Union that the rebel states call conventions, to which blacks could be elected as delegates, in order to devise new constitutions guaranteeing voting rights to black men. By the time registration was completed that year, more than 700,000 southern blacks were on the rolls, comprising a majority of registered voters in several former Confederate states.[9]

Additionally, three Civil War amendments gradually extended constitutional protection to the black franchise. The Thirteenth, ratified in 1865, forbade slavery and thus secured for all blacks a minimal degree of citizenship. The Fourteenth, ratified in 1868, carried the process a step further, granting citizenship to all persons "born or naturalized in the United States." The Constitutional Convention of 1789 had decided that in determining a state's number of representatives in Congress, each slave would be counted as three-fifths of a free person. The Fourteenth Amendment, by implication, required that all blacks be counted equally with whites. Further, if a state denied or abridged the voting rights of male citizens who were at least twenty-one years of age, its representa-

5. See the chapter by Kousser in this volume.

6. McPherson 1964, 424.

7. Stampp 1965, 47. Had Lincoln lived, his views on black enfranchisement might have become more expansive. See McCrary 1978, 3–18.

8. Stampp 1965, 77.

9. Franklin 1961, 80; McPherson 1990, 19.

tional base in Congress was to be diminished in proportion to the number of those whose rights were curtailed. (This part of the amendment, however, was not applied when blacks were disfranchised some years later.)[10] Finally, by guaranteeing the "privileges and immunities" of citizens, as well as due process and equal protection of the laws, the amendment provided blacks with a weapon against political discrimination—one, however, whose potential would only begin to be fully realized in the twentieth century.

What the Fourteenth Amendment failed to do was explicitly prohibit vote discrimination on racial grounds. This prohibition was accomplished by the Fifteenth, ratified in 1870, which stated simply, "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 voting rights of blacks in the North as well as in the South were thereby given explicit constitutional protection, although much stronger versions of the amendment favored by Radical Republicans and blacks—one that would have prohibited states from imposing nativity, property, or literacy tests; another that would have given the federal government complete control over voting rights—were rejected on the grounds that they could not be ratified.[11] The amendment also was silent about the right to hold office, which many Radical Republicans wanted guaranteed.[12] Even so, the Fifteenth Amendment was a major advance in providing constitutional protection for black voting rights.

10. Myrdal 1944, 515.

11. McPherson 1964, 424–25; Foner 1988, 447. It is ironic that Wendell Phillips, one of the most radical of the abolitionists, was largely responsible for passage of the version of the Fifteenth Amendment that many abolitionists at the time correctly perceived to contain gaping loopholes that could be used to disfranchise blacks. The problem was that this version, passed by the House of Representatives, was in competition with a much more thorough Senate version that seemed incapable of ratification. No compromise between proponents of the two versions seemed possible. Congress would soon adjourn, and there was fear that a delay would preclude any amendment in the foreseeable future. Phillips endorsed the weaker version in his abolitionist newspaper, which was credited with passage of the amendment. Another abolitionist, Lydia Maria Child, saw clearly that this version might yet "be so evaded, by some contrivance, that the colored population will in reality have no civil rights allowed them" (McPherson 1964, 428). Indeed, numerous contrivances were soon adopted in the southern states, in spite of a series of congressional statutes passed soon after the Fifteenth Amendment was ratified. For a concise description of these "enforcement acts," see Hyman 1973, 526–31, who describes them as "virtually dead letters" (534) after 1874.

12. Foner 1988, 446.

But intense and often violent white southern resistance to black voting—concurrent with the rise of the Ku Klux Klan—made it clear to congressional Republicans that enforcement legislation authorized by the amendment would be necessary. Between May 1870 and April 1871 three Enforcement Acts were passed to put teeth in the new constitutional guarantee of black voting rights. Yet they were no match for white southern intransigence and "proved wholly inadequate, especially when enforcement was left to the meager forces that remained in the South at the time of their enactment."[13] Two Supreme Court decisions in 1876 virtually gutted the Fourteenth and Fifteenth Amendments as protectors of the black franchise.[14] In the Compromise of 1877, northern Republicans, by withdrawing all federal troops from the three southern states in which they remained, tacitly gave southern white Democrats the message that the federal government was willing to let the white South deal with blacks as best it saw fit. The first Reconstruction was over.

Disfranchisement

Among the measures employed by southern white conservatives to undermine the Civil War amendments were violence, voting fraud, white officials' discriminatory use of election structures (such as gerrymandering and the use of at-large elections to prevent black officeholding), statutory suffrage restrictions, and, in the waning years of the century, revision of the "reconstructed" state constitutions to effect disfranchisement. As J. Morgan Kousser argues in this book, none of the approaches—even violence—was sufficient in itself; all worked together as interlocking barriers gradually and surely to stifle political participation.

The results were precisely what the white conservatives had intended. At the high point of southern black voting during Reconstruction, about two-thirds of eligible black males cast ballots in presidential and gubernatorial contests. In the early years of Reconstruction, moreover, these voters elected large numbers of black officials to legislatures and to Congress—324 in 1872 alone, and many more to lower offices (see Kousser, table 1). At this time "about 15 percent of the officeholders in the South were black," James McPherson has commented, "a larger proportion than in 1990."[15] But measures to prevent blacks from voting

13. Franklin 1961, 172.

14. See Derfner 1973, 523, 528. The cases were *United States* v. *Cruikshank,* 92 U.S. 542 (1876) and *United States* v. *Reese,* 92 U.S. 214 (1876).

15. McPherson 1990, 19. Of course, a larger percentage of the South was black in the nineteenth century.

were employed with increasing effect following Reconstruction. Beginning in 1890 the first of several southern disfranchising conventions was held. Ten years later, only five blacks were southern legislators or congressmen (Kousser, table 1). After Mississippi revised its constitution in 1890, black registrants dropped to 6 percent of the eligible black population; in 1906, Alabama's black registrants stood at 2 percent. By contrast, two-thirds of eligible Mississippi whites were registered, as were 83 percent of white Alabamians.[16] Throughout the South, the doors to black political participation were forcefully slammed shut.

Disfranchisement at the hands of Democrats, which was hastened in the 1890s by the alliance of many southern blacks with the Populists in a violent struggle against the white propertied classes, coincided with the rise of state-enforced Jim Crow institutions that prevented interaction between blacks and whites as equals in every aspect of southern society, perpetuating a harsh racial caste system. These disheartening events, coming after the brief springtime of freedom that followed 250 years of slavery, fully justify the characterization of the 1890s as "the nadir."[17]

The Struggle to Regain the Franchise

The twentieth century had hardly begun, however, before blacks and their white allies were at work to regain their voting rights. "Let not the spirit of Garrison, Phillips and Douglass wholly die out in America," wrote the young W. E. B. Du Bois in 1900, his ringing call to action invoking the famous abolitionists. "May the conscience of a great nation rise and rebuke all dishonesty and unrighteous oppression toward the American Negro, and grant him the right of franchise [and] security of person and property."[18]

In 1910 Du Bois was one of the founders of the National Association for the Advancement of Colored People (NAACP), the civil rights organization that would take the lead in challenging not only southern blacks' political exclusion but the entire legal underpinnings of the racial caste system. One of the organization's first legal victories came in challenging the Oklahoma grandfather clause, a subterfuge to excuse whites from taking the state's literacy test. The Supreme Court declared it unconsti-

16. Lawson 1976, 15.
17. Logan 1954.
18. Quoted in Aptheker 1976, 6.

tutional in 1915, although Oklahoma soon adopted a new version.[19] The NAACP took aim at the white primary in 1924 in the first major test of that institution's legality when it represented a black plaintiff in his challenge of Texas's party primary law, a law that an NAACP lawyer described as flying "right in the teeth of the Fifteenth Amendment."[20] The Supreme Court soon held that the statute violated the Fourteenth Amendment and later struck down as well a law Texas had subsequently passed giving state party executive committees the right to bar blacks from membership. But the court unanimously held in 1935 that the Texas Democratic party, when acting through its state convention as distinct from its executive committee, had the right as a "private" organization to exclude blacks. Only in 1944 did the high court, in *Smith* v. *Allwright,* finally declare the white primary an integral part of the state's election process and hence impermissible under the Fifteenth Amendment.[21] A key attorney in the case was Thurgood Marshall, the first director-counsel of the NAACP Legal Defense and Education Fund, which had been established in 1939. Marshall would also play a commanding role as strategist and trial lawyer in the school desegregation cases leading up to and including *Brown* v. *Board of Education of Topeka* in 1954.[22]

Although southern officials tried through various stratagems to overcome the prohibition of white primaries in *Smith* v. *Allwright,* they ultimately failed. Black registration increased significantly. In 1940 black voters in the South were estimated at a maximum of 151,000, about 3 percent of voting-age blacks in the region. This was a level not much higher than that at the time of disfranchisement. By 1947, three years after *Smith,* it had increased to 595,000 and in 1956 to 1,238,038—still a mere 25 percent of voting-age blacks compared with 60 percent of whites who were registered.[23]

19. *Guinn and Beal* v. *United States,* 238 U.S. 347 (1915). Oklahoma promptly devised another disfranchising mechanism following *Guinn* that still enabled whites to preclude blacks from voting, and this was not held unconstitutional until 1939 (Lawson 1976, 18–19).

20. Lawson 1976, 26.

21. See Hine 1979 for an account of the Texas white primary cases, which included *Nixon* v. *Herndon,* 273 U.S. 536 (1927); *Nixon* v. *Condon,* 286 U.S. 73 (1932); *Grovey* v. *Townsend,* 295 U.S. 45 (1935); and *Smith* v. *Allwright,* 321 U.S. 649 (1944). As late as 1953 the Court, in *Terry* v. *Adams,* 345 U.S. 461, struck down a white "pre-primary" held by a local party in Fort Bend County, Texas, to select the white community's contestants in the Democratic primary in order to prevent a split in the white vote in the primary.

22. *Brown* v. *Board of Education of Topeka,* 347 U.S. 483 (1954). See Lawson 1976, 52; Kluger 1976.

23. Garrow 1978, 6–7; Price 1959, 10.

The battle for black voting rights had far to go. The poll tax was a barrier in a number of southern states and a particularly formidable one in Alabama, Mississippi, and Virginia, where the tax was cumulative.[24] But the most effective barrier, aside from the ever-present threat of violence and economic reprisal in the Deep South, was the literacy test, which in 1944 was still operative in all states of the former Confederacy except Arkansas and Texas. Even its fair administration would have excluded many blacks because of their unequal education under the Jim Crow regime. But white registrars, a law unto themselves, were often arbitrary in giving the test; they could exclude literate blacks while allowing illiterate whites to vote.[25]

The struggle for the ballot waged by blacks and their allies over the two decades from *Smith* v. *Allwright* to the passage of the Voting Rights Act was difficult.[26] It took many forms, including voter canvassing in kudzu-bordered country lanes, violent confrontations between blacks and white registrars, legal actions in musty courtrooms, and impassioned floor debates in the national capitol. In the process, three civil rights acts, passed in 1957, 1960, and 1964, addressed the exclusion of blacks from the voting booth. With respect to their voting provisions, all three were tentative, piecemeal efforts that failed to breach the barriers maintained by southern white supremacists. The burden remained on black voters to seek relief in the courts case by case, a time-consuming and extremely inefficient process, especially inasmuch as the southern district courts were mostly presided over by conservative local judges.[27]

Even so, black voting in the eleven former Confederate states as a whole continued to increase. By November 1964 the number of blacks registered had doubled since 1952, constituting 43.3 percent of their voting-age population. In the Deep South, however, white resistance was fierce in many areas, particularly the rural ones: average black registration in Alabama, Georgia, Louisiana, Mississippi, and South Carolina was only 22.5 percent of those eligible. In Mississippi, a mere 6.7 percent were registered.[28]

24. Garrow 1978, 243, note 13. Georgia, which had also had a cumulative tax, abolished it in 1945.

25. Lawson 1976, 86–115; Commission on Civil Rights 1968, 13–19.

26. Lawson 1976.

27. Strong 1968. There were exceptions, such as J. Skelly Wright and Alabama's legendary Frank M. Johnson, Jr. For an account of progressive judges during this period, see Bass 1981.

28. Congressional Quarterly Service 1968, 115.

Selma

To overcome hard-core resistance in these states, civil rights organizations in the early 1960s began to mount intensive grass-roots campaigns. The Voter Education Project of the Southern Regional Council was formed in 1962 and played a major organizing role over the next year and a half. The Congress of Racial Equality was heavily involved in Louisiana. Then in 1964, largely through the efforts of the Student Nonviolent Coordinating Committee (SNCC), the "Mississippi Freedom Summer" was organized, in which black and white college students from across the country converged on the state, joining with local black workers primarily to conduct door-to-door voter canvassing.[29] Early in the project three civil rights workers—two white and one black—were murdered in Neshoba County, riveting the nation's attention on the area.[30] The Freedom Summer produced few black votes but a great deal of white violence: "35 shooting incidents with 3 persons injured; 30 homes and other buildings bombed; 35 churches burned; 80 persons beaten," and 6 murders.[31]

That November, one week after Lyndon Johnson's landslide victory over Barry Goldwater, leaders of the Southern Christian Leadership Conference (SCLC), including its president, the Reverend Martin Luther King, Jr., met in Birmingham to discuss strategy. When the question of voting rights came up, C. T. Vivian, one of the organization's leaders, told the group that the SCLC should have "a rallying point around which we can stir the whole nation." Amelia Boynton, a longtime Selma, Alabama, activist, suggested that her town, where the SNCC civil rights efforts were faltering under hard-line political oppression, would be an excellent place to begin a voting drive. Plans were made to look closely at this possibility.[32] President Johnson, for his part, decided in December to press forward with an administration bill providing for federal voter registration officials in the South.[33]

29. The volunteers were also joined by numerous lawyers from two national civil rights legal groups, the Lawyers' Constitutional Defense Committee and the Lawyers' Committee for Civil Rights Under Law. See Parker 1990, 79.

30. Belfrage 1965.

31. Watters and Cleghorn 1967, 139; Garrow 1978, 20–21.

32. Garrow 1988, 358–59.

33. Garrow 1978, 38. Johnson's motives were probably a mixture of genuine concern for voting rights and a fear that the Civil Rights Act of 1964 had so alienated white southerners from the Democratic party that only a vastly increased black vote could offset the party's losses. See Stern 1992, chap. 8.

The SCLC, satisfied before the year was out that Selma was the field on which a decisive battle for the vote should be fought, began its campaign on January 2, 1965, in a city whose resistance to black registration and voting was extraordinary, even by southern standards. In surrounding Dallas County, where slightly more than half the 30,000 persons of voting age were black, only 335 were registered in the fall of 1964, in spite of intense efforts over the previous three years by SNCC, SCLC, and the Justice Department. By comparison, 9,542 whites were registered by the all-white board of registrars. Although "the litigation method of correction has been tried harder here than anywhere else in the South," Justice Department attorney John Doar wrote at the time, Dallas County blacks still lacked "the most fundamental of their constitutional rights—the right to vote."[34]

The SCLC's choice of Selma to dramatize the plight of disfranchised blacks was a good one. Registration in Dallas County was possible only two days each month. An applicant was required to fill in more than fifty blanks on a form, write a part of the Constitution from dictation, read four parts of the Constitution and answer four questions on it, answer four questions on the workings of government, and swear loyalty to Alabama and the United States.[35] The choice of Selma was strategically sound for another reason as well. Its sheriff, James G. Clark, Jr., much like Police Commissioner Eugene "Bull" Connor in Birmingham two years earlier, could be counted on to overreact to peaceful civil rights demonstrations.

As blacks' efforts to register continued day by day, the resistance of Selma officials grew stiffer—and uglier. Demonstrations began. Right wing troublemakers drifted into town, including a leader of the American Nazi party and some of his hangers-on. Black and white supporters of the demonstrators, from Alabama and elsewhere, also came. Law enforcement officers roughed up civil rights workers. Sheriff Clark seemed spoiling for a chance to take out his racist feelings on the blacks rallying to the cause. In various confrontations he beat and jabbed black protesters and leaders. State troopers also used unjustified violence against demonstrators. Mass arrests occurred, including 500 demonstrating black schoolchildren. Martin Luther King and a companion were jailed.

The national press was now giving Selma detailed coverage. In January the White House had announced its intent to sponsor voting rights legisla-

34. Garrow 1978, 34; Congressional Quarterly Service 1967, 67.
35. Congressional Quarterly Service 1967, 67.

tion. In early March, with the Selma drama unfolding, Dr. King met with President Johnson to discuss both the crisis and a voting rights bill. The climax of the Selma campaign occurred on Sunday, March 7, the day on which civil rights forces had earlier announced their intention to complete a peaceful fifty-four-mile trek, led by King, along U.S. 80 to Montgomery, the state capital. Governor George Wallace had forbidden the march and declared that state troopers would "use whatever measures are necessary to prevent a march."[36]

King, who had left town earlier and was scheduled to speak in Atlanta that day, decided after conferring with colleagues in Selma not to return for the march because it was not likely to take place and his time could be better spent in Atlanta mobilizing support for a "larger thrust forward." About 600 marchers set out on Sunday afternoon, led now by SCLC's Hosea Williams and SNCC's John Lewis. On the Edmund Pettus Bridge leading out of Selma, they were met by state troopers and sheriff's possemen. When the marchers refused orders to turn back and instead knelt in prayer, they were set upon by club-wielding troopers, teargassed, and finally driven back into the black neighborhood. Ninety to 100 demonstrators were injured, some severely, with wounds including broken bones, deep head cuts, and smashed teeth. Lewis sustained a serious head trauma and was flown to a hospital in Boston. Amelia Boynton, who had suggested the Selma campaign to the SCLC leadership, was beaten and teargassed into unconsciousness.[37]

Bloody Sunday, as it was later called, and a subsequent march successfully led by King to Montgomery—once Federal District Judge Frank M. Johnson, Jr., had overruled Alabama officials' prohibition of the demonstration—stirred the national conscience, as did the murders of three civil rights volunteers connected with the Selma campaign. Sheriff Clark unwittingly played the role earlier assigned him in the SCLC script, and George Wallace unintentionally did his part for the protestors' cause as well. On March 15 President Johnson presented his voting rights bill in an electrifying address to Congress, watched by a nationwide television audience of 70 million people. "It was an emotional peak unmatched by anything that had come before [in the civil rights movement], nor by anything that would come after," wrote David Garrow. Watching Johnson on a television set in Selma, King cried, something his colleagues and friends had never seen him do before.[38]

36. Garrow 1988, 396.
37. Garrow 1978, 31–77; Garrow 1988, 396–97, 399.
38. Garrow 1988, 408–09.

Riding a crest of national outrage at the events in Selma, Congress began action on Johnson's program. On August 3 the House approved the new Voting Rights Act by a vote of 328 to 74. The next day the Senate followed suit 79 to 18. Passage of the bill was a bipartisan effort that split along regional lines: northerners of both parties overwhelmingly supported it, southerners of both parties opposed it.[39] On August 6 the president signed the bill, calling it "one of the most monumental laws in the entire history of American freedom." In a ceremony that self-consciously harked back to the Civil War, the signing took place in a room off the Senate chamber in which Abraham Lincoln, 104 years earlier to the day, had signed into law a bill freeing slaves whom the Confederacy had coerced into service.[40] Five days later, the Senate confirmed Johnson's nominee for solicitor general, Thurgood Marshall, an act not only of symbolic but also of substantive importance: in 1967, after ably performing in that role, Marshall was confirmed as the first black to serve on the Supreme Court, where he became one of the Voting Rights Act's most reliable supporters.

The Voting Rights Act of 1965

Lyndon Johnson had told his attorney general, Nicholas deB. Katzenbach, to compose the "goddamnedest toughest" voting bill he could write, and the product lived up to that command.[41] The act was a fundamental departure from the tepid voting measures of the civil rights acts of 1957, 1960, and 1964. Providing for direct federal action to enable blacks to register and vote, it placed the initiative for enforcement firmly in the executive branch and made unnecessary the case-by-case litigation that had been required. The act's purpose was to enforce the Fifteenth Amendment. Section 2, a permanent feature that forbade states or political subdivisions to apply a voting prerequisite "to deny or abridge the right of any citizen of the United States to vote on account of race or color," echoed the amendment's language.

Congress was well aware of the Fifteenth Amendment's failure to do its job after Reconstruction. The act's supporters were determined that such a fate should not befall the new measure, despite determined resistance in the South. New York Representative Emanuel Celler, chair of the House Judiciary Committee and floor manager of the bill, asserted in his speech opening

39. See Kousser's chapter in this volume, table 6.
40. Congressional Quarterly Service 1968, 70.
41. Raines 1977, 337.

House debate that the act would eliminate the "legal dodges and subterfuges" still in operation. He claimed that it would be "impervious to all legal trickery and evasion" of the sort that had enabled white racists from the 1870s forward to twist the intent of the Civil War amendments to their own purposes. The southern white politicians of the 1960s understood this purpose clearly. Echoing the Democrats' opposition to congressional enfranchising measures during the first Reconstruction, they argued vehemently against the bill. Howard W. Smith of Virginia, the House Rules Committee chair and a leading opponent of the bill, called it an "unconstitutional" vendetta against the former Confederate states. Senator Herman E. Talmadge, Democrat of Georgia, called the bill "grossly unjust and vindictive in nature." Senator Strom Thurmond, Republican of South Carolina, averred that if it passed, "we have a totalitarian state in which there will be despotism and tyranny."[42] Many southern congressmen of both parties, strident in their opposition, agreed.

At the heart of the original act were sections 4 through 9—the "special provisions," most of which were temporary and would be periodically renewed by Congress. In the spring of 1965 seven southern states still had literacy tests. By means of a triggering formula in section 4, the act abolished for five years literacy tests in all states of the Union or their subdivisions that had had a test or similar device as a voting prerequisite on November 1, 1964, and a voter registration rate on that date—or voter turnout in the 1964 presidential elections—of less than 50 percent of the voting-age residents.[43] On August 7, 1965, the day after the act was signed, Attorney General Katzenbach suspended tests in seven states entirely (including Alaska) as well as in twenty-six North Carolina counties and one Arizona county. Later in 1965 and 1966, other North Carolina and Arizona counties were added, as well as one each in Hawaii and Idaho. Some of these counties and one state, Alaska, were able during the 1960s to exempt themselves, or "bail out," from coverage by persuading the District Court for the District of Columbia that, as specified in

42. Congressional Quarterly Service 1968, 69; *Congressional Quarterly Almanac* 1966, 548. Senator James Eastland, Democrat of Mississippi, alleged that the administration's bill was written to exclude President Johnson's home state of Texas from the triggering mechanism of section 4, a claim denied by Attorney General Nicholas Katzenbach (*Congressional Quarterly Almanac* 1966, 556).

43. A "test or device," as defined by the act, was any voting or registration prerequisite requiring a person to "(1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class."

the section 4 bailout requirements, they had not used a test or a device in a discriminatory way for five years.[44]

Thus while coverage in the beginning was not, strictly speaking, limited to the South, for practical purposes it was. Between 1965 and 1970 six southern states and much of a seventh were the primary areas of coverage: Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and forty of the one hundred counties in North Carolina.[45] It is these states that are often referred to, with only slight inaccuracy, as the seven states originally covered by the act's special provisions.

Section 5, in which the triggering formula in section 4 again came into play, was another key part of the act—one that would grow in importance after a Supreme Court decision in 1969 provided an expansive interpretation of its scope. Those states and counties covered by the formula had their voting laws frozen pending federal approval of proposed changes. They were required to submit to the attorney general (who normally would have sixty days to object) or the District Court for the District of Columbia all planned changes in any "voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting" that had not been in force on November 1, 1964. The proposed changes would be precleared, jurisdiction by jurisdiction, after federal scrutiny of the particular facts only if the changes did "not have the purpose and . . . [would] not have the effect of denying or abridging the right to vote on account of race or color." This controversial preclearance requirement in the covered jurisdictions gave the Justice Department unprecedented authority to monitor the region's election machinery and to object to discriminatory changes. However, the initiative to submit changes for preclearance remained with the covered jurisdictions, and the Justice Department has never tried to determine in a systematic fashion whether all changes have been submitted—a policy for which it has sometimes been criticized.[46]

Sections 6 and 7 gave the attorney general discretionary power to appoint federal officials as voting "examiners" who could be sent into covered jurisdictions to ensure, in effect, that legally qualified persons could register in federal, state, and local elections. Section 8 provided for federal observers, or poll watchers, to oversee the actual voting process; they were to be assigned by the attorney general if needed. In the first

44. The original bailout provisions, as well as the changes in these provisions in 1970, 1975, and 1982, are described and analyzed by Hancock and Tredway 1985.

45. Commission on Civil Rights 1975, 13–14.

46. Commission on Civil Rights 1975, 28.

ten years of the act, examiners were used sparingly, being sent into only sixty southern counties, most of which were in Mississippi and Alabama. About 15 percent of the 1 million new minority registrants during this period were attributed to the examiner program. More than 6,500 federal poll watchers were assigned to the covered states during the period.[47]

If the attorney general or private parties brought voting suits outside covered jurisdictions, section 3 gave courts authority to send federal registrars and poll watchers to the locales as needed. If the suits demonstrated that tests or devices violated Fourteenth or Fifteenth Amendment rights, section 3 allowed courts to abolish the tests. And the same section empowered courts, in imposing a remedy in a voting case outside covered areas, to retain jurisdiction for a period of time during which any voting change in the locale had to be precleared by the court or the Justice Department.

The act did not prohibit the poll tax, which four states still used as a voting requirement. The Twenty-fourth Amendment, ratified in 1964, had already outlawed it in federal elections and primaries. But some in Congress worried that the courts might find such a prohibition unconstitutional, endangering the constitutionality of the act as a whole. Thus section 10, while declaring that Congress believed the tax violated the Constitution "in some areas," merely instructed the attorney general "forthwith" to challenge the constitutionality of poll taxes as voting prerequisites in state and local elections. Katzenbach did so quickly, and in 1966 federal courts struck them down in Texas, Alabama, Mississippi, and Virginia.[48]

Section 11 prohibited anyone "acting under color of law" from preventing qualified voters from voting or having their votes fairly counted; and it prohibited anyone "acting under color of law or otherwise" from intimidating, threatening, or coercing those attempting to vote or helping others to vote. It also prohibited voting fraud in federal elections, and provided jail terms and fines for it. Section 12 provided punishment, as well, for violations of others' voting rights.

Section 14, in a passage the courts would later fasten on, spelled out in comprehensive detail the meaning of "vote" or "voting" to "include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing [of

47. Commission on Civil Rights 1975, 33–35.

48. Commission on Civil Rights 1968, 166–67. In *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663 (1966), the Supreme Court overruled its 1937 decision in *Breedlove* v. *Suttles,* 302 U.S. 277, that the payment of a poll tax did not violate the Constitution.

eligible voters] pursuant to this act, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election."

These were, in short, the most important features of the law of which Lyndon Johnson was so proud and in the passage of which he, as well as Martin Luther King and the civil rights movement and its martyrs, played a major role. In 1966 the Supreme Court in *South Carolina* v. *Katzenbach* declared constitutional those sections of the act, including most of section 4 and all of section 5, challenged by the state of South Carolina.[49]

The South's Response to the Act

Attorney General Katzenbach designated the first group of counties and parishes for federal action three days after the president signed the act, and examiners immediately began to register black voters. Before the month was out, the president announced that 27,385 blacks in Alabama, Louisiana, and Mississippi had been registered by the federal examiners in the first nineteen days. He also alluded to signs of voluntary compliance with the act in some other locales.[50]

Faced with a federal enforcement effort that included the possibility of jail terms for miscreants, the most obvious response of white southern officialdom, even in the strongholds of resistance, was grudging acceptance of the new black enfranchisement. In Mississippi, that stronghold within a stronghold, black voter registration increased from 6.7 percent before the act to 59.8 in 1967.[51] The act simply overwhelmed the major bulwarks of the disfranchising system. In the seven states originally covered, black registration increased from 29.3 percent in March 1965 to 56.6 percent in 1971–72; the gap between black and white registration rates narrowed from 44.1 percentage points to 11.2. The Justice Department estimated that in the five years after passage, almost as many blacks registered in Alabama, Mississippi, Georgia, Louisiana, North Carolina, and South Carolina as in the entire century before 1965.[52]

49. *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966).

50. Congressional Quarterly Service 1968, 70.

51. Commission on Civil Rights 1968, 246–47.

52. Commission on Civil Rights 1975, 43; *Congressional Quarterly Almanac* 1971, 198. Here and elsewhere, comparisons between black and white registration and turnout rates must be treated with great caution, given the difficulty in obtaining accurate estimates

Optimists at the time believed the act would soon accomplish its purpose; the political incorporation of blacks seemed to be at hand. Steven Lawson, the leading student of twentieth century black enfranchisement, admits to having held such a view, with qualifications. In the 1980s, however, he concluded that "suffrage problems have not been self-correcting, and the second phase of enfranchisement—the search for a greater share of political representation—has engendered a new round of racial conflict."[53] Other observers were less sanguine from the beginning.

With some oversimplification, voting rights controversies during the past quarter century have focused more on what Lawson calls minority "representation" than mere access to the ballot box. The oversimplification lies in the fact that almost immediately after passage, white officials in numerous southern venues continued to restrict access to the ballot locally—that is, to disfranchise blacks—not in a frontal and obviously impermissible manner but with some of those "legal dodges and subterfuges" that Congressman Celler had anticipated during the hearings on the act. Thus in 1973, eight years after passage, Armand Derfner catalogued the following still-existing practices:

> Withholding information about registration, voting procedures or party activities from black voters; giving inadequate or erroneous information to black voters, or failing to provide assistance to illiterate voters; omitting the names of registered voters from the lists; maintaining racially segregated voting lists or facilities; conducting reregistration or purging the rolls; allowing improper challenges of black voters; disqualifying black voters on technical grounds; requiring separate registration for different types of elections; failing to provide the same opportunities for absentee ballots to blacks as to whites; moving polling places or establishing them in inconvenient or intimidating locations; setting elections at inconvenient times; failing to provide adequate voting facilities in areas of greatly increased black registration; and causing or taking advantage of election day irregularities.[54]

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of participation by race, no matter what the method of estimation used. Lichtman and Issacharoff 1991, using a method different from that employed by the Census Bureau, argue that the 1984 Current Population Survey showing that black voter registration in Mississippi actually exceeded white registration by a margin of 85.6 percent to 81.4 percent, was quite inaccurate. A more reasonable estimate, they believe, is 54 percent black and 79 percent white.

53. Lawson 1985, xiii.

54. Derfner 1973, 557–58. For further evidence of disfranchising attempts in the decade following passage of the act, see Washington Research Project 1972, chaps. 2, 4; Commission on Civil Rights 1975, chaps. 4, 5.

Derfner listed yet another set of practices, widespread in the South, that restricted the efforts of black candidates to win office—what have sometimes been called methods of minority "candidate diminution" as distinct from disfranchisement. He listed eight practices, including the abolition of offices, extending the terms of white incumbents, and "imposing stiff formal requirements for qualifying to run in primary or general elections," such as high filing fees or numerous nominating petitions.[55]

Finally, Derfner listed a third set of practices or laws under the heading of "vote dilution." Included were racial gerrymandering; decreasing the black proportion in a town or county by annexation, deannexation, or consolidation; imposing a majority runoff requirement, which can enable white voters to mobilize behind a single white candidate in the runoff after having split their votes among several whites in the first election; holding at-large rather than district elections, which allows white voters to overwhelm black ones when the latter are in the minority; enacting such devices as full-slate laws, numbered-place laws, and staggered terms, all of which can, under some circumstances, preclude the use of "single-shot" voting by blacks, a strategy that can help them in at-large systems to elect black candidates; and "splitting the vote for a strong black candidate by nominating additional blacks as 'straw' candidates for the same office." These devices, Derfner noted, operated in a dilutionary manner where, as in most of the South, racial bloc voting among whites as well as among blacks is a factor.[56]

Disfranchisement was largely curtailed during the first ten years of the act, although several remnants remained. For example, Mississippi's

55. Derfner 1973, 555–56.

56. Derfner 1973, 553–55. These operate in different ways to diminish minority officeholding. All depend for their effectiveness on racially polarized voting in the jurisdiction where they are used: the nonminority vote typically goes for one candidate or set of candidates and the minority vote for another. The racial gerrymander carves districts so as to diminish the minority percentage in districts or, alternatively, it packs almost all minority voters into one or a few districts to prevent their having influence outside that area. Annexation, deannexation, and consolidation rearrange a jurisdiction's boundaries to decrease the total minority percentage. The majority requirement forces the two top vote getters into a runoff election if neither has won a majority of votes in the first race. In instances in which a black is the front-runner, having won a plurality but not a majority in a contest against two or more white candidates, the runoff can force the black candidate to run against a single white, giving white voters an opportunity to coalesce behind the latter. Full-slate laws, numbered-place laws, and staggered terms all have the effect of preventing or minimizing the effects of single-shot voting, a practice minority voters have often resorted to in an at-large election to overcome the handicap of white bloc voting. For further evidence of widespread dilution in the late 1960s and early 1970s, see Washington Research Project 1972, chap. 5; Commission on Civil Rights 1975, chaps. 8–9.

notorious dual registration system, a relic of the disfranchising constitution of 1890, by which urban voters had to register twice—once for federal, state, and county elections, and again for municipal elections—was not abolished in its entirety until 1987, as a result of a lawsuit brought under the Voting Rights Act.[57] But vote dilution continued to be widely practiced.

The Problem of Vote Dilution

Ethnic or racial minority vote dilution may be defined as a process whereby election laws or practices, either singly or in concert, combine with systematic bloc voting among an identifiable majority group to diminish or cancel the voting strength of at least one minority group.[58] Thus conceived, it is a form of discrimination distinct from disfranchisement and candidate diminution. In its most easily recognizable forms—gerrymandering and multimember election systems—it was an important tool used by whites in the South both during and after Reconstruction to diminish the political strength of newly enfranchised blacks.[59] A Texas newspaper put the matter forthrightly in 1876 when it described districts in heavily black areas as "elongated most absurdly." In a redistricting process dominated by whites, the "districts were 'Gerrymandered,' the purpose being, in these elections, and properly enough, to disfranchise the blacks by indirection" so that black voters would not make up more than "a third of the voters in each district."[60] In addition to racial gerrymandering, white officials from Reconstruction through the Progressive Era abolished districts entirely in many cities and counties and substituted at-large election schemes that placed black voters in majority-white multimember districts, with the same effect: so-called disfranchisement by indirection.[61]

Precisely the same methods were employed by southern white officials during the second Reconstruction, and for the same purpose, although

57. Parker 1990, 205. There is some evidence, according to Ellis Turnage 1991, a Greenville, Mississippi, attorney, that even today various Mississippi jurisdictions, such as the town of Sunflower, refuse to abide by the court decision outlawing dual registration. For examples of both disfranchising and candidate-diminishing devices existing into the 1980s or later, see Cox and Turner 1981; Parker and Phillips 1981; Department of Justice 1990.

58. For a similar definition, see Engstrom and McDonald 1987, 245.

59. Foner 1988, 422, 590; Kousser 1984, 30–33.

60. Quoted in Rice 1971, 26. It was in the heavily black areas before they were gerrymandered that blacks in Texas were able to win office. Barr 1982, 48.

61. Kousser 1984, 32–33; Rice 1977.

their motives were not so plainly advertised. Actually, as lawsuits and voting drives became more frequent in the 1950s and early 1960s, various states had already begun to change their election statutes. In Alabama, where numerous counties had switched from at-large to district elections following turn-of-the-century disfranchisement, the change back to at-large elections began not long after *Smith* v. *Allwright* outlawed the white primary. Between 1947 and 1971, twenty-five of the state's sixty-seven counties switched from single-member districts to at-large elections.[62] Further, in 1951 Alabama adopted a full-slate law, preventing single-shot or bullet voting, a strategy that sometimes enables blacks to elect representatives from multimember districts by withholding votes for all candidates on the slate but their preferred ones.[63] The 1951 law, which applied to every public election in Alabama, statewide or local, was sponsored by a legislator who had entered politics in 1949 out of concern about increased black registration. Another legislator said the law was necessary because "there are some who fear that the colored voters might be able to elect one of their own race to the [Tuskegee] city council by 'single shot' voting."[64]

Whites' fear of black enfranchisement had also been building in Georgia for some time before the Voting Rights Act was passed. In 1957, the same year Congress enacted its first civil rights bill since Reconstruction, the general assembly officially resolved that the Fourteenth and Fifteenth Amendments be repealed because they "were malignant acts of arbitrary power" and "are null and void and of no effect." When the county-unit system, a scheme that guaranteed malapportionment and worked to the

62. McCrary and others 1990, 21.

63. A minority group, in using the single-shot strategy, decides in advance on a single candidate whom it will support among the field of candidates running for office. The structural preconditions for this strategy to work are that all the candidates are in competition with each other, the top vote getters fill the available positions, and each voter has as many votes to cast as there are positions to be filled. If the group's voters cast only one of their votes for a predetermined candidate, its other votes are withheld from their candidate's competitors, and this can sometimes lead to the election of their candidate, although the price paid for this strategy is having a say in the election of one candidate only. A full-slate law invalidates all ballots on which the voter has withheld any available votes, thus making single-shotting impossible. The numbered-place law requires candidates to run for designated places (A, B, C, and so forth) on the ballot, thus breaking what would otherwise be a single contest into several minicontests. The voter can cast only one vote per contest; thus by withholding votes, he or she is not taking votes away from a candidate's competitors. This law, too, frustrates efforts to single-shot. Staggered terms can also sometimes frustrate a single-shot strategy.

64. Norrell 1985, 79; McCrary and others 1990, 20.

disadvantage of blacks, was struck down by the Supreme Court in 1963, the state legislature quickly responded with a new bill establishing a majority-vote requirement for election to all county, state, and federal offices. The bill contained an anti-single-shot provision as well. Its sponsor was reported in several newspapers as saying its purpose was "to thwart election control by Negroes and other minorities." He warned that the federal government had been trying to "increase the registration of Negro voters."[65]

In Texas the numbered-place system was increasingly adopted by cities and school districts following *Brown* v. *Board of Education*, a trend that continued into the 1960s. The place system is the equivalent of an anti-single-shot or full-slate law when whites vote as a bloc against minority candidates. Used increasingly in both school board and municipal elections during those years, it was a potential weapon against minority voters, a fact that caused several Texas communities to adopt the system.[66] When Texas was forced to redistrict its badly malapportioned legislative and congressional districts in 1966 following the Supreme Court's one-person, one-vote decisions, the legislature gerrymandered multimember districts to dilute black votes in the state's most populous county. Not long thereafter, the legislature adopted a majority runoff requirement in the Houston school district, the state's largest, after two blacks and a white liberal had won election to the seven-person board under a plurality rule. When the state's poll tax was declared unconstitutional by a federal court in 1966, conservative Democrats in the legislature, led by Governor John Connally, adopted highly restrictive registration laws to supplant the tax requirement, laws a scholar at the time described as "very similar to the poll tax system, minus the poll tax." (The new laws included a four-month registration period that ended nine months before the elections.) The Connally faction also worked to limit the holding of state elections to off years, a measure that, when finally adopted in the early 1970s, slashed voter turnout in gubernatorial elections, which had been gradually rising over the past twenty years, by a third.[67]

In North Carolina the election of a black to the Winston-Salem board of aldermen in 1947 provoked a racial gerrymander of the city's wards; then, as blacks continued to win election in 1953 and 1955, the legislature imposed an at-large system on the city, after which all aldermen were white once more. Also in the 1950s the legislature passed a full-slate law

65. McDonald, Binford, and Johnson 1990, 9, 13–14.
66. Young 1965, 21–22.
67. May 1970; Davidson 1972, 55–67; Davidson 1990, 54–55.

applying to fourteen counties located primarily in the state's black belt. In 1966, soon after the Voting Rights Act was passed, the general assembly in special session "authorized 49 boards of county commissioners, which had had some form of election or residency by districts, to adopt an at-large election system." Departing from past practice, the legislature also required the at-large election of all school boards.[68]

Various kinds of dilutionary responses to increased black voting developed in every southern state in the 1960s; but the boldest response, linked directly to passage of the Voting Rights Act, occurred in Mississippi. Convening in January 1966, the all-white legislature passed thirteen bills concerning the election process, with little floor debate and without public hearings. None of the bills directly denied blacks the vote; yet all seemed intended to diminish their voting strength, either through creating racial gerrymanders, switching from district to multimember election systems, changing public offices from elective to appointive, or increasing the qualifications for candidacy.[69] The changes wrought by these bills were massive, affecting numerous state and local governments. For example, all county boards of supervisors and all county boards of education in the state—bodies having considerable public power—would now be elected at large in each county rather than from districts, as they had been since the nineteenth century. While the legislature was unusually reticent in explaining the motives behind this spate of laws, a few members were as forthright as their nineteenth century counterparts had been. One state senator, for example, opined that the switch to countywide elections would safeguard "a white board [of education] and preserve our way of doing business."[70]

The Growing Importance of Section 5

Faced with the possibility that the effectiveness of the newly acquired black franchise would be blunted in southern states by systematic vote dilution, as had happened during Reconstruction, black Mississippi plaintiffs and their attorneys attacked the legislature's 1966 laws in six separate actions.[71] Three were consolidated on appeal and together with a Virginia

68. Keech and Sistrom, forthcoming.

69. Parker 1990, 37–41.

70. Parker 1990, 51–55.

71. Two lawyers' groups were deeply involved in Mississippi voting rights litigation at the time: the Lawyers' Constitutional Defense Committee and the Lawyers' Committee for Civil Rights Under Law. A third group—the NAACP Legal Defense Fund, separate

case were decided in 1969 by the Supreme Court in *Allen* v. *State Board of Elections.* Among the questions before the Court was whether the changes, including those that did not disfranchise blacks but diluted their votes, had to be precleared under section 5. The original plaintiffs believed they did; the state of Mississippi disagreed and had not submitted them to the Justice Department. The Court accepted the black plaintiffs' argument. In one of the last decisions written by Chief Justice Earl Warren, it held that the act "gives a broad interpretation to the right to vote, recognizing that voting includes 'all action necessary to make a vote effective.'" Addressing specifically Mississippi's change from district to at-large elections of county supervisors, the Court invoked *Reynolds* v. *Sims,* the one-person, one-vote decision it had rendered five years earlier, to conclude that "the right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot. . . . Voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole. This type of change could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting."[72]

The decision affected the evolution of the Voting Rights Act as a weapon to prevent minority vote dilution. Until *Allen,* section 5 had been little used. The Justice Department, in the three and one-half years between passage of the act and the *Allen* decision, had objected to only six proposed changes in election procedure in covered jurisdictions, and none of these concerned vote dilution. In the three and one-half years following *Allen,* there were 118 objections, of which 88 involved dilution schemes. These

since 1939 from the NAACP—also had offices in the state but was primarily concerned with school desegregation cases. See Parker 1990, 79–81.

72. *Allen* v. *State Board of Elections,* 393 U.S. 544 at 565–66, 569 (1969). The Court's broad interpretation of the act as prohibiting dilution was strongly criticized by Justice John Harlan on the grounds that a close reading of the act's legislative history did not bear out this interpretation. It seems clear in retrospect that Warren feared white resistance to voting rights legislation in the South could again lead to the restriction of black voting rights, as occurred following Reconstruction. Speaking in the early 1970s, after his retirement from the Court, he said: "What happened in the early part of this century could well happen again if there is any relaxation on the part of those who have fought through the years for the advancements we have made. I believe no one can read the news of these days without realizing that there is, in this nation, a movement to further denigrate the rights of the black people. Left to its own momentum, the nation could again retrace its steps backward and again deny our proud boast that all men are created equal" (Warren 1972). Warren, like President Johnson, considered his most important achievement to have been in the realm of voting rights. While Johnson took special pride in the Voting Rights Act, Warren considered *Reynolds* v. *Sims,* an antecedent of *Allen,* to be his most important decision as chief justice (Katcher 1967, 435).

included attempts to replace single-member district systems with multimember ones, to replace plurality rules by majority-vote requirements, to create numbered-place systems and staggered terms, and to annex disproportionately white suburbs.[73] A tally at the end of 1989 revealed that 2,335 proposed changes had been objected to under section 5.[74] The great majority of objections involved proposals that would have diluted the votes of racial groups or language minorities. Had it not been for section 5 and the *Allen* decision, almost all the proposals would have become law. Moreover, white officials in the South would surely have implemented a much larger number of dilutionary changes had there been no section 5 to deter them.[75]

In 1969 the battle commenced over renewal of the act's temporary features, including section 5, which were scheduled to expire the following year.[76] Many southern officials urged scuttling the act altogether, still asserting that it violated states' constitutional rights. Governor Lester G. Maddox of Georgia, who had earlier gained notoriety by barring blacks from his Atlanta restaurant with a pickax handle, told the Senate Judiciary Committee that the Voting Rights Act was "ungodly, unworkable, unpatriotic and unconstitutional." (He then went to the House restaurant and autographed souvenier pickax handles.) A. F. Summer, Mississippi attorney general, said the act was "rank discrimination." The Nixon administration, following through on the "southern strategy" that had guided the president's 1968 election campaign, originally opposed extension of the act, calling it "regional legislation." Senator Sam Ervin of North Carolina took the lead in opposing civil rights forces and introduced numerous amendments—all defeated—that would have weakened the act, particularly section 5.[77]

After a yearlong struggle the civil rights forces prevailed, and the special provisions of the act were extended for another five years. Had this not happened, covered states would have been able to reinstate literacy tests in 1970. Congress also amended the section 4 trigger formula to apply to 1968 registration and presidential election turnout data, thereby extending coverage to additional counties. And, as an

73. Department of Justice 1990.

74. Department of Justice 1991.

75. Commission on Civil Rights 1975, 30.

76. Technically, the special provisions were not "scheduled to expire," as Hancock and Tredway 1985, 392, point out. Rather, the provisions were to remain in effect until covered jurisdictions bailed out. But by 1970 the tests and devices would have been outlawed for five years, and this would presumably have enabled a general bailout.

77. *Congressional Quarterly Almanac* 1971, 193–98.

experiment, it suspended the use of literacy tests in all fifty states—not simply the covered ones—until 1975.[78] In addition, Congress amended the bailout provision by requiring covered jurisdictions to demonstrate that they had not used a discriminatory test or device for the previous ten years.

Constitutional Protection against Vote Dilution

Even before the 1970 extension, minority plaintiffs and their attorneys had begun challenging vote dilution practices under the Fourteenth and Fifteenth Amendments and under section 2 of the Voting Rights Act. These actions had roots in a case filed in the 1950s. In *Gomillion* v. *Lightfoot* the Supreme Court in 1960 held unconstitutional a law by which the all-white Alabama legislature redrew Tuskegee's municipal boundaries to exclude all but 4 or 5 of the city's 400 black voters (but none of its white ones). In disfranchising the city's blacks the legislature apparently hoped to prevent the rapidly growing black community from gaining representation on the Tuskegee council. In 1951 the legislature had already enacted a full-slate law to accomplish the same end in the same city, which had an unusually large black proportion. This dilutionary scheme had not been sufficient, and so the more straightforward step was taken to disfranchise blacks in municipal elections by redrawing city boundaries. The Supreme Court saw a clear violation of Fifteenth Amendment rights in this latter action.

As noted by the opinion's author, Justice Felix Frankfurter, the violation was one of vote denial rather than vote dilution. But the case drew attention to the importance of districting as an indirect means for curtailing black voting strength. The Court emphasized that subtle efforts to debase voting rights are constitutionally prohibited, citing one of its earlier decisions—also written by Frankfurter—in support of the proposition that the Fifteenth Amendment "nullifies sophisticated as well as simple-minded modes of discrimination." In the legislature's blatant effort to prevent Tuskegee's blacks from voting and electing candidates of their choice, it had not resorted to the straightforward means of literacy tests, fraud, poll taxes, violence, and the like; it had accomplished its goal

78. *Congressional Quarterly Almanac* 1971, 192–93. Congress had come to perceive literacy tests as a widespread barrier to voting that extended far beyond the South. See Commission on Civil Rights 1975, 19–20.

through boundary manipulation, an "essay in geometry and geography," as Frankfurter put it.[79]

Two years after *Gomillion,* the Supreme Court in *Baker* v. *Carr* held that the apportionment of votes among legislative districts was justiciable.[80] Like the *Gomillion* decision it invoked, *Baker* helped shift the focus in voting rights law from disfranchisement to dilution. Then, in quick succession, the Court handed down three apportionment decisions overturning practices that diluted the weight of votes through malapportioned districts. The most noteworthy was *Reynolds* v. *Sims,* announced the year before passage of the Voting Rights Act.[81] The complainants, white voters, argued that the apportionment of the Alabama legislature diluted their votes because the districts contained unequal numbers of voters. (The district populations varied as much as 41:1.) In so doing, plaintiffs argued, the scheme violated the equal protection clause of the Fourteenth Amendment. The Court agreed, and the legislature was required to reapportion itself, creating substantially equal districts in both houses.

Although race was not an issue in the Court's opinion, it had clear racial implications, as did *Gray* v. *Sanders,* which stated explicitly that the Fifteenth and Nineteenth Amendments prohibit a state from overweighting or diluting votes on the basis of race or sex, respectively.[82] As post-Reconstruction historiography makes clear, one form of minority vote dilution employed by southern whites was malapportionment, drawing overpopulated black districts and underpopulated white ones. *Reynolds* destroyed this as a legal option for whites in the Deep South immediately before the Voting Rights Act enfranchised blacks there the following year.

Within months of the act's passage, the Court in *Fortson* v. *Dorsey* went a step further toward finding unconstitutional forms of minority vote dilution besides malapportionment. In rejecting a claim by Georgia plaintiffs that multimember state senatorial districts diluted their votes, the Court held that while such districts were not inherently unconstitutional, they might be if they "designedly or otherwise" operated "to

79. *Gomillion* v. *Lightfoot,* 364 U.S. 339 at 342, 347 (1960), quoting *Lane* v. *Wilson,* 307 U.S. 268 at 275 (1939). On the implications of *Gomillion* for the Voting Rights Act, see Karlan and McCrary 1988, 755–59. It is ironic that the city of Tuskegee played a major role in black voting rights actions. It is the home of the Tuskegee Institute, whose first director, Booker T. Washington, had come close to renouncing the Negro's right to vote in his famous Atlanta speech in 1895. See Logan 1954, 280.

80. *Baker* v. *Carr,* 369 U.S. 186 (1962).

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

82. *Gray* v. *Sanders,* 372 U.S. 368 at 379 (1963).

minimize or cancel out the voting strength of racial or political elements of the voting population."[83]

This was an invitation to plaintiffs to specify the nature of evidence that would demonstrate such illegal cancellation of voting strength, and several cases were filed. Various district and appeals court decisions quickly invoked *Fortson* in upholding black plaintiffs' claims that certain at-large schemes were unconstitutional. However, none of these cases had reached the Supreme Court by the time *Allen* v. *State Board of Elections* was argued in 1969—a fact that apparently caused the black plaintiffs' lawyers in that case to cast the issue in terms of section 5 coverage rather than a constitutional violation.[84] In 1971 the Court gave a further hint as to how minimization or cancellation might be demonstrated. In *Whitcomb* v. *Chavis,* it reversed a district court's finding that an Indiana multimember legislative district diluted the vote of black ghetto dwellers. The issue, said the Court, was not whether black candidates were defeated. Rather, it was whether the defeat was simply the result of their running on a Democratic slate that usually lost or, on the contrary, the result of ghetto dwellers having "less opportunity than did other . . . residents . . . to participate in the political processes and to elect legislators of their choice."[85] In other words, was the absence of minorities from legislative bodies the result of racial discrimination as such, or did it stem from such extraneous factors as the unpopularity of Democratic candidates in a Republican stronghold? If it were the latter, then to require a remedy that guaranteed safe seats to blacks, as the trial court had ordered, might be taken to imply that any group whose interests were unrepresented in a legislative assembly had a constitutional claim to proportional representation.

In 1973 Texas plaintiffs took up the *Whitcomb* challenge and finally convinced the Supreme Court that the pathetically small number of minority legislators elected from their counties was the result of unconstitutional minority vote dilution. *White* v. *Regester,* which involved multimember House districts in Bexar (San Antonio) and Dallas counties, was a signal victory in the battle for minority voting rights, all the more so because it was rendered by a unanimous Court.[86] But it was a dubious decision, nonetheless; it left practically unanswered the question of what were the

83. *Fortson* v. *Dorsey,* 379 U.S. 433 at 439 (1965).
84. Parker 1990, 171.
85. *Whitcomb* v. *Chavis,* 403 U.S. 124 at 149 (1971).
86. *White* v. *Regester,* 412 U.S. 755 (1973).

criteria by which judges could determine if a voting system diluted minority votes.

Two Alabama voting rights attorneys, James Blacksher and Larry Menefee, described the decision this way:

> The trial court findings of fact selected for inclusion in the Supreme Court's opinion . . . are difficult to catalogue. There was a history of *de jure* discrimination against black voters in Texas, and Mexican Americans "had long suffered from . . . invidious discrimination and treatment in the fields of education, employment, economics, health, politics and others." In Dallas County, only two blacks had been elected to the house since Reconstruction, and in Bexar County only five Mexican Americans had been elected. The Court did not, however, say whether others had been defeated by racially polarized voting. There was a powerful, white-dominated Democratic Party organization in Dallas that ignored blacks' concerns and used racial campaign tactics to defeat candidates supported by the black community, but no mention was made of any similar slating group in San Antonio. Cultural and language barriers had resulted in depressed Mexican American voter registration in Bexar County, but no mention was made of the black registration rate in Dallas. The district court had found "that the Bexar County legislative delegation in the House was insufficiently responsive to Mexican-American interests." Requirements that candidates run for numbered places and win by a majority of the total vote, "neither in themselves improper nor invidious, enhanced the opportunity for racial discrimination . . ." The Court gave no hint of the priority it attached to any of these facts; instead, it approved the district court's conclusion of unconstitutionality based on the "totality of the circumstances."[87]

The "totality of the circumstances," including the "cultural and economic realities" as well as the existence of multimember systems, was said to reveal that blacks and Mexican Americans "had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice."[88] The most distressing fact, from the point of view of practicing voting rights lawyers such as Blacksher

87. Blacksher and Menefee 1984, 215–16.
88. *White* v. *Regester,* 412 U.S. 755 at 769, 766.

and Menefee, was that the Court did not even attempt "to explain exactly why the record in this case demonstrated an equal protection violation when that in *Whitcomb* v. *Chavis* did not."[89]

After *White,* minority plaintiffs who challenged multimember systems had to make what they could of the hodgepodge of criteria enumerated by the justices. Subsequent cases that did not reach the Supreme Court, most notably *Zimmer* v. *McKeithen,* refined and systematized the criteria mentioned in *White* without specifying which ones were decisive. *Zimmer,* decided the same year as *White* by the Court of Appeals for the Fifth Circuit sitting *en banc,* enunciated eight criteria, four "primary" and four "enhancing" ones, that became the guideposts for litigation during the remainder of the decade. Notably absent from the list was evidence of intentional discrimination in the creation of dilutionary election rules.[90]

89. Blacksher and Menefee 1984, 215.

90. *Zimmer* v. *McKeithen,* 485 F.2d 1297 (5th cir. 1973), appealed and reversed on other grounds. The *Zimmer* "factors" were as follows: "where a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multimember or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts. The fact of dilution is established upon proof of the existence of an aggregate of these factors" (485 F.2d 1297 at 1305).