THE COMPLEX HISTORY OF VOTING RIGHTS AND THE CIVIL RIGHTS MOVEMENT: THE HISTORY OF STATE ATTEMPTS TO SUPPRESS VOTING BY BLACK CITIZENS

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 in 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 Grovey 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, described by Professor Jack Bass 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 demolishment 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 may ask the applicant to interpret a state or federal constitutional provision, or 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." [Keep in mind that the registrars were themselves not experts in the provisions of the State's constitution, and many in fact were illiterate].

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 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 evolving from a long, connected series of socio-political events, rooted in Louisiana's determination to maintain white supremacy in state and local government by denying black citizens 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 black citizens, 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 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 black 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 disenfranchisement 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 in *Unlikely Heroes* 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 also 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 one half of 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 have no other peaceful 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 intimidation, coercion, and threatening (indeed brutal) conduct 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 "posse" herding the demonstrators by using electrical shocking "cattle prods." Judge Johnson then turned his attention 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 the revival of the petition clause as the capstone of the five freedoms when the subject is democracy itself.

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." 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 * * *]

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." 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.

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. Finally, the Court held that the Virginia procedure governing write-in votes was a procedure subject to the approval requirements of Section 5.

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, employed different methodology 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 elections to at-large elections of Aldermen.

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 to the federal government before enforcement, and the Supreme Court 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.]"

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.

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.

[Note: 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"].

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 purposeful racial gerrymandering in the Gomillion case. 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.

Apart from the issue of annexation, Fourteenth Amendment Equal Protection issues were also the subject of the legal history of voting rights after 1965. An example is Ferguson v. Williams, 343 F.Supp. 654 (1972). 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. 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 an Equal Protection Clause case, a state could justify residency requirements that were essential to the holding of orderly elections. However, the state may not meet this threshold by asserting that longer residency requirements were required because of part-time or 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.

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 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. 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.

Armand Derfner would again appear in the Supreme Court in another annexation case in 1975. In City of Richmond, Virginia v. United States, reported in 1975 at 422 U.S. 358. Mr. Derfner, representing Crusade for Voters of Richmond, brought the case to the Supreme Court to challenge ongoing proposed annexations which 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.

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. With these findings and conclusions having resolved one 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 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.

As would be expected, the line of cases arising from the mandates of Sections 2 and 5 of the Voting Rights Act continued, 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.

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.

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 that there was

insufficient information to evaluate the 1971 submissions as a request for clearance. The DOJ 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 the1966 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.

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 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 southern state 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 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.

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 clearly more than ministerial The Court observed that the filing period must be viewed in the context of the election of which it is a part. 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." 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 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 might 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 Supreme Court observed *ab initio*, that 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." 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. 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 the Reagan 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: 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: ***"I speak tonight for the dignity of man and the destiny of democracy." * * * "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.*"**

AFTERWORD: THE LEGACY OF THE VOTING RIGHTS ACT

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 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). And for much of the 20th century, the U.S. Supreme Court has been a bulwark protecting the right to vote. However, voting rights jurisprudence remains complex, and the lessons of the past do not necessarily carry forward to the future.

Three early cases are noteworthy: 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." (See also Crawford v. Marion County Bd. of Elections, 553 U.S. 81 (2008), on the subject of photo ID laws).

But it is the Court's decisions beginning in 2010 that have reconsidered a fundamental Constitutional aspect of voting rights: Campaign spending. In 1976, in Buckley .v Valeo, 424 U.S. 1), the Court had begun rejecting campaign finance regulations, saying that money in campaigns is a form of speech. The Buckley decision, however, left many regulations in place, including a ban on contributions from corporations (dating from 1907) and labor unions. But the Supreme Court significantly altered campaign finance law in its 2010 decision in Citizens' United v. Federal Elections Commission (538 U.S. 310), by holding that corporations have as much First Amendment right to contribute to political campaigns as real people do. The Court overturned the ban on corporate and union contributions in a decision that led to the birth of super PACs.

After deciding Citizen's United, the Court then held, in a 5-4 vote, in Shelby County v. Holder, 570 U.S. 529 (2013), that Section 4 of the Voting Rights Act was unconstitutional. The Court's ruling specifically rendered unconstitutional the preclearance system that had blocked more than a thousand discriminatory voting changes, after Congress had overwhelmingly reenacted the law in 2006.

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 of the Act 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.

The five Justice majority observed that there was no longer a need for subjecting the previously covered southern jurisdictions to the preclearance system and that these Sections contravene 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 that, while the long history of deliberate 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, 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*., devices such as "understanding" and "interpretation" tests, created for the purpose of rejecting efforts of qualified 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."

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 in 2006. The majority qualified its holding, 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.

Justice Ruth Bader Ginsburg, writing for herself and Justices Breyer, Sotomayor, and Kagan, reasoned that the evidence Congress gathered to determine whether to renew the Voting Rights Act in 2006 sufficiently proved that there was still a current need to justify the burdens placed on the states in question. Justice Ginsburg also argued that, by holding Section 4 unconstitutional, the majority's opinion made it impossible to effectively enforce Section 5 of the Voting Rights Act.

Other noteworthy cases: In 2018, 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. The Supreme Court also revisited the issue of gerrymandering. While the Court has consistently held that racial gerrymandering is unconstitutional, several cases in recent years have had mixed outcomes. In 2018 and 2019, the Court decided Abbott v. Perez, 138 S.Ct. 2305, and Rucho v. Common Cause (588 U.S. __).

In Rucho, the majority of the Justices held 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 thus still open for judicial challenges: That (1) State courts could still consider political gerrymandering claims; and (2) political gerrymanders often also amount to racial gerrymanders, which federal courts (as well as state courts) could still hear and hold unconstitutional, or perhaps in violation of a remaining Section of the Voting Rights Act.

The future: To show that there is always something new to watch for in the Supreme Court voting rights docket, the Court decided two cases in June 2023 that were most important *for what they did not do*. Notably, in Brnovich v. DNC, 594 U.S. __, the Court considered the issue of redistricting in Allen v. Milliggan, 599 U.S. __. Plaintiffs won a preliminary injunction below, but the Supreme Court immediately issued a stay, and then stayed a similar lower court ruling involving Louisiana's congressional districts. Chief Justice Roberts and Justice Kavanagh supplied the fourth and fifth votes to strike down Alabama's plan under Section 2 for failing to create a second potentially minority-winnable district. The decision was a close copy of Thornburg v. Gingles (decided in 1986), so it should not have been a surprise; but the Roberts Court's previous voting cases made the new decision very notable to voting rights observers, and, apparently, to the four dissenters. (Note that application of this case may be limited mostly to the "Deep South" because part of the Gingles doctrine requires proof that, to a great extent, white voters in the relevant districts will not vote for a minority candidate.)

The second case, Moore v. Harper, 600 U.S. __ (decided in June 2023), involved the quaintly named "independent state legislature" theory, which argues that state legislators are free to gerrymander congressional districts completely free of *State* court oversight, because of the language in Article I, Section 4 ("the times, places and manner" of federal elections "shall be prescribed in each State by the Legislature thereof"). Chief Justice Roberts (who had written that Rucho still left room for state court oversight of gerrymandering) rejected the independent state legislature theory, but wrote that "state courts may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections."

Undoubtedly the Supreme Court will continue deciding voting rights cases as the years go forward, and the notable differences of perspective within the Court itself, on Constitutional and statutory law, the balance of federal and state authority, and the rights of individual citizens guaranteed by The Fifteenth Amendment, remain unsettled and will likely keep evolving.

[Having completed Part Five of the text materials, the reader is encouraged to return to the Oral Histories Section of this web site's Home Page and view Professor Bickel's video interview with Armand Derfner].