

VOTING RIGHTS IN GEORGIA: 1982–2006

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INTRODUCTION

In 1965, black citizens of Georgia were profoundly disadvantaged in their ability to exercise the franchise that Congress had meant to extend nearly a century earlier:

On the eve of passage of the [Voting Rights Act], fewer than a third of age-eligible blacks in Georgia were registered to vote. The disparities were even greater in the state's twenty-three counties with black voting-age majorities, where an average of 89 percent of whites, but only 16 percent of blacks, were registered. Despite the fact that blacks were 34 percent of the voting-age population, there were only three black elected officials in the entire state, and they had been elected only in the preceding three years. This exclusion from the normal political processes was not fortuitous; it was the result of two centuries of deliberate and systematic discrimination by the state against its minority population.¹

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¹ Laughlin McDonald et al., *Georgia, in QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990* 67, 67 (Chandler Davidson & Bernard Grofman eds., 1994). The fact that even this many black citizens were registered to vote in the early 1960s spoke to their courage and determination to overcome the best efforts of Georgia state officials to stop them. Table 3.9 in *Quiet*

As much as any state, Georgia had contributed to the series of cases in which the Supreme Court found it necessary to overcome its previous hesitation to apply the Constitution to legislative apportionment. These landmark cases included *Gray v. Sanders*,² *Wesberry v. Sanders*³ and *Fortson v. Dorsey*.⁴ But these cases were not enough.

Congress addressed the ongoing racial discrimination occurring in Georgia and other states by adopting the Voting Rights Act of 1965.⁵ In addition to its permanent provisions, temporary provisions in Sections 4 through 8 of the Act targeted those states and political subdivisions that used suspect voter registration practices and showed depressed voter participation.⁶ The temporary provisions in Sections 6, 7 and 8 of the Act en-

Revolution in the South lists the major disfranchising devices that were used in Georgia between Reconstruction and 1965. *Id.* at 101 tbl.3.9. These included a poll tax (established in 1868; repealed in 1870; reenacted in 1871; made cumulative in 1877; and abolished in 1945); payment of taxes (established in 1868; abolished in 1931); durational residency requirements (established in 1868; lengthened in 1873; and abolished in 1972); grand jury appointment of school boards (established in 1872; abolished gradually by local referenda in individual counties, and statewide in 1992); white primary elections established by party rules in the late nineteenth century; abolished in 1945 following a Supreme Court decision); disfranchising criminal offenses (established in 1877 and still in use); voter registration by race (established in 1894 and still required); literacy, good character and understanding tests (established in 1908; abolished in 1965 by the Voting Rights Act); a grandfather clause (established in 1908; abolished in 1915); a property ownership alternative (established in 1908; abolished in 1945); the county unit system (established by party rules in the late nineteenth century and by statute in 1917; abolished in 1963 by *Gray v. Sanders*, 372 U.S. 368 (1963)); a “[t]hirty-questions test” (established in 1949 and revised in 1958; abolished in 1965 by the Voting Rights Act); and majority vote and numbered post requirements (established in the late nineteenth century as a local option; replaced by statute by county, and statewide in 1964; operative for municipalities in 1968; and still in use). *Id.*

² 372 U.S. 368 (1963) (holding county unit system of electing statewide officials unconstitutional).

³ 376 U.S. 1 (1964) (holding Georgia’s malapportioned congressional districts unconstitutional).

⁴ 379 U.S. 433 (1965) (first recognizing the potential of unconstitutional minority vote dilution in Georgia’s State Senate redistricting).

⁵ Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)).

⁶ Section 4 established the coverage criteria for the Act’s temporary provisions. See 42 U.S.C. § 1973b (2006). Under Section 4 a state or political subdivision was covered if—as of November 1, 1964—(1) it maintained any “test or device” and (2) less than 50% of its voting age population was registered to vote, or less than 50% of such persons voted in the presidential election of November 1964. *Id.* § 1973b(a)(9)(b). Tests and devices were defined as:

any requirement that a person as a prerequisite for voting or registration for voting (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.

Id. § 1973b(c). When the temporary provisions were extended for five years in 1970, and then for seven years in 1975, Section 4 was amended to provide for additional determinations using a formula similar to that used in 1965. See Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, §§ 3, 4, 84 Stat. 314, 315 (1970); Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, §§ 101–102, 89 Stat. 400 (1975). The 1975 extension expanded the scope of tests or devices to include the use of Eng-

abled federal examiners to register voters who met their respective states' eligibility requirements⁷ and allowed for federal observers to enter polling places and observe the voting process.⁸ The temporary provisions in Section 5 required preclearance of new voting procedures by the U.S. District Court for the District of Columbia or by the Attorney General.⁹ Section 5 placed the burden upon covered jurisdictions to show that their new procedures would have neither the purpose, nor the effect, of denying or abridging the right to vote on account of race.¹⁰

Although Section 5 initially received less attention than the federal registration procedures, it soon became a central tool of voting rights enforcement, blocking attempts by states and subdivisions to change their election systems and political boundaries so as to minimize the impact of newly-registered black voters.¹¹ In addition to a stream of Section 5 objections between 1965 and 1981,¹² Georgia gave rise to a series of leading cases defining the scope and substance of Section 5. These included *Georgia v. United States*,¹³ *Wilkes County v. United States*¹⁴ and *City of Rome v. United States*.¹⁵

By the time Congress considered the extension of the Act's temporary provisions in 1981 and 1982, the Department of Justice (DOJ) had interposed Section 5 objections to a total of 104 voting changes in Georgia, of which sixty-three (60.6%) represented attempts to change the jurisdictions' methods of election to include such discriminatory features as at-large elec-

lish-only elections. Voting Rights Act Amendments of 1975 §§ 101–102. No additional Section 4 determinations were made in 1982, when the existing temporary provisions were extended until 2007. See Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982).

⁷ This prevented local election officials from conducting the registration process in a discriminatory fashion.

⁸ See 42 U.S.C. §§ 1973d–1973f.

⁹ See *id.* § 1973c.

¹⁰ See *id.* Under Section 5, new voting procedures are legally unenforceable until preclearance has been obtained; federal courts are required to issue injunctions against the use of unprecleared voting changes by jurisdictions that have failed to comply with Section 5.

¹¹ These structural changes usually centered upon the adoption of at-large elections and the incorporation of numbered post, majority vote or staggered term requirements into at-large systems. In addition, cities began to expand their boundaries by annexing majority-white areas, thereby reducing the impact of new black voter registration.

¹² See Department of Justice, Section 5 Objection Determinations: Georgia, http://www.usdoj.gov/crt/voting/sec_5/ga_obj2.htm (last visited Mar. 12, 2008).

¹³ 411 U.S. 526 (1973).

¹⁴ 450 F. Supp. 1171 (D.D.C. 1978), *aff'd mem.*, 439 U.S. 999 (1978).

¹⁵ 446 U.S. 156 (1980). In addition to *Quiet Revolution in the South*, detailed discussions of the effect of the Voting Rights Act from 1965 to 1982 in Georgia are found in works by Chandler Davidson and Laughlin McDonald. See MINORITY VOTE DILUTION (Chandler Davidson ed., 1984); LAUGHLIN MCDONALD, A VOTING RIGHTS ODYSSEY: BLACK ENFRANCHISEMENT IN GEORGIA (2003).

tions, numbered posts, staggered terms and majority vote requirements.¹⁶ Congress also received other evidence of serious and extensive voting rights problems in Georgia, including the need for litigation both to obtain Section 5 compliance and to eliminate existing discriminatory practices, with particularly detailed testimony submitted by ACLU attorney Laughlin McDonald¹⁷ and State Senator Julian Bond.¹⁸ Although there were increases in black voter registration between 1968 and 1980, and the number of black elected officials in Georgia had increased from thirty-one to 249,¹⁹ the Section 5 objections and related litigation led Congress in 1982 to extend the Act's temporary provisions for twenty-five years.

Georgia's history since 1982 shows that the state has not moved beyond the need for Section 5 preclearance and the other temporary provisions of the Voting Rights Act. Unquestionably, sustained efforts to increase black voter registration in the state have led to great progress. As of February 1, 2006, data reported by the Georgia Secretary of State showed that blacks made up 27% of the state's 4,236,855 total active registered voters.²⁰ In most counties, the rate of black registration is comparable to that of whites. The 1982 amendments to Section 2 of the Voting Rights Act prompted a wave of litigation that eliminated at-large election systems in cities, counties and school district across the state. Furthermore, the dominance of the Democratic Party in the state as of 1982 has given way with the increasing success of the Republican Party, and this realignment appears to have created new opportunities for black candidates to capture Democratic Party nominations and enjoy occasional success in statewide elections. Thus, it is not a coincidence that there has been a dramatic increase in the number of black elected officials in Georgia since passage of the Voting Rights Act.²¹ Georgia has four black Congressional Represen-

¹⁶ See Department of Justice, *supra* note 12.

¹⁷ See *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 97th Cong., 610-23 (1981) (testimony of Laughlin McDonald, Director, Southern Regional Office, American Civil Liberties Union Foundation, Inc.).

¹⁸ *Id.* at 226-27 (testimony of State Sen. Julian Bond of Georgia).

¹⁹ *Id.* at 9.

²⁰ See GA. SEC'Y OF STATE, VOTER REGISTRATION SYSTEM, ACTIVE VOTERS BY RACE/GENDER WITHIN COUNTY TOTALS AS OF FEBRUARY 1, 2006, available at <http://www.sos.ga.gov/elections> (on file with author).

²¹ A nationwide survey of black elected officials reported that Georgia had a total of 611 black elected officials as of 2001, including three federal representatives (out of eleven), three state administrators, eleven State Senators (out of fifty-six), thirty-six State House Representatives (out of 180), one county executive, ninety-five members of county governing bodies, six other county officials, thirty mayors, 261 members of municipal governing bodies, two members of municipal boards, two state supreme court justices, one other judge of a statewide court, thirty judges of other courts, five other judicial offices, five police chief sheriffs or marshals, two members of university and college boards and 118 members of local school boards. See DAVID A. BOSITIS, JOINT CTR. FOR POLITICAL & ECON.

tatives,²² and the number of black legislators has increased to thirty-eight in the State House and eleven in the State Senate.²³ Yet the fundamental question as Congress deliberates the extension of Section 5 and the Act's other temporary provisions is not whether there has been progress, but, rather, whether that progress is at risk of being undone if there is no extension.²⁴

Since 1982, the Department of Justice has interposed ninety-one Section 5 objections in Georgia, with the most numerous category of objections involving method of election changes, including at-large elections and numbered post, staggered term and majority vote requirements.²⁵ However, there has been repeated noncompliance with Section 5. Federal courts have continued to find racially polarized voting and voting rights violations in the state under Section 2 of the Voting Rights Act and other federal laws,²⁶ and numerous cases continue to change voting practices via pre-trial settlements.²⁷

In the city of Augusta alone, there were two 1987 Section 2 lawsuits (settled in 1988), a 1987 Section 5 objection to eight annexations enacted with a "racial quota" policy, a 1988 objection to referendum election schedule and a 1989 objection to the city's consolidation with Richmond County.²⁸ The series of racially-charged political battles as the city of Augusta developed a black population majority exemplify the tensions that can arise when jurisdictions approach majority-black status and how the Voting Rights Act checks the unfortunate impulse to frustrate black politi-

STUDIES, BLACK ELECTED OFFICIALS: A STATISTICAL SUMMARY 2001 14–15 tbl.2 (2003), available at <http://www.jointcenter.org/publications1/publication-PDFs/BEO-pdfs/2001-BEO.pdf>.

²² Sanford D. Bishop, Jr., Hank Johnson, John Lewis and David Scott.

²³ See Georgia House of Representatives, http://www.legis.state.ga.us/legis/2007_08/house/07alpha.html (last visited Mar. 14, 2008); Georgia State Senate, http://www.legis.state.ga.us/legis/2007_08/senate/senatelist.php (last visited Mar. 14, 2008). The number of black representatives and senators is still substantially short of the black share of the state's voter registration (27%), which would equal 48.6 representatives and 15.1 senators.

²⁴ After this report was written and submitted to Congress, the minority language and preclearance provisions of the VRA were renewed. See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006).

²⁵ See Department of Justice, *supra* note 12.

²⁶ See *infra* Part II, Part III.

²⁷ See *infra* Part I.B.

²⁸ These were preceded by a March 1981 objection to a majority vote requirement for the city. A detailed account of the repeated attempts to change the method of election and boundaries and, indeed, the very existence of the city of Augusta after it became majority-black, and the central role played by the Richmond County legislative delegation in that process, is provided in Binny Miller, *Who Shall Rule and Govern? Local Legislative Delegations, Racial Politics, and The Voting Rights Act*, 102 YALE L.J. 105, 131–37 (1992).

cal empowerment that regularly has arisen in Georgia (as it has elsewhere).²⁹

As detailed below, Section 5 has not merely blocked a series of inadvertently retrogressive changes—as important as that would be—but rather has been a bulwark against repeated attempts to impose racially discriminatory election changes in a variety of forms. Moreover, the Department of Justice has sent federal observers to monitor nearly twice the number of elections in Georgia from 1982 onward as it did between 1965 and 1981.³⁰ The experience of Spanish-surnamed registered voters in Long and Atkinson Counties, who were mass-challenged in 2004 for no apparent reason other than their surnames—leading to a Justice Department lawsuit and consent decree against Long County—also suggests that growing numbers of other racial and ethnic minority groups will be subject to discrimination in voting.³¹ As recently as 2005, a federal court issued a preliminary injunction against a new state voter identification law, adopted over the strong objection of the state's black legislators, finding that it both imposed a poll tax and that it unconstitutionally infringed on the fundamental right to vote.³² With the continued presence of racially polarized voting and other racial tensions, the record since 1982 makes clear that Georgia and its political subdivisions have not progressed beyond the need for the temporary provisions of the Voting Rights Act.

²⁹ Georgia has had a very dynamic population pattern since 1980. Even as the state's total population grew dramatically, the black share kept slightly ahead of the overall growth rate, so that the black share of the state's total population increased from 26.8% in 1980, to 27% in 1990 and to 29.2% in 2000. See U.S. CENSUS BUREAU, 1980 CENSUS OF POPULATION: CHARACTERISTICS OF THE POPULATION: GENERAL POPULATION CHARACTERISTICS: GEORGIA 12–28 tbl.17 (1982); U.S. Census Bureau, 1990 Census Summary File 1, at tbls.P001, P006, available at <http://factfinder.census.gov> (last visited Mar. 14, 2008); U.S. Census Bureau, 2000 Census Summary File 1, at tbl.P3, available at <http://factfinder.census.gov> (last visited Mar. 14, 2008). The county-by-county data show a substantial shift between 1980 and 2000 in the distribution of the state's black population: in 1980, 36.6% of the state's black population resided in counties that were 40% black or more; by 2000 that figure had increased to 63.6%. This type of population shift often leads to efforts to enact discriminatory voting changes, as was seen in Augusta.

³⁰ See *infra* Part IV.

³¹ See *infra* Part V.

³² See *infra* Part III.A.

I. SECTION 5 OF THE VOTING RIGHTS ACT

A. SECTION 5 OBJECTIONS

Under Section 5 of the Voting Rights Act,³³ voting changes in specific, covered jurisdictions (including all levels of government in Georgia) may not legally be enforced until they are “precleared.”³⁴ The overwhelming number of covered jurisdictions seek Section 5 preclearance via administrative submissions to the Attorney General.³⁵ The Attorney General (or more precisely, the designee of the Attorney General, who is the Assistant Attorney General of the Civil Rights Division), may interpose an objection within sixty days of the administrative submission of a voting change from a Section 5 covered jurisdiction.³⁶ In the absence of an objection, such a submission is deemed “precleared.”³⁷ Section 5 objections are entered in the form of letters mailed to the official who made the submission and are signed by the Assistant Attorney General for civil rights.

Between 1982 and the present, there were ninety-one Section 5 objections in Georgia.³⁸ It is most useful to discuss these objections according

³³ 42 U.S.C. § 1973c (2006).

³⁴ See Mark Posner, *Post-1990 Redistrictings and the Preclearance Requirement of Section 5 of the Voting Rights Act*, in RACE AND REDISTRICTING IN THE 1990S 80 (Bernard Grofman ed., 1998) (summarizing the procedures for Section 5 submission and review); see also Department of Justice, About Section 5 of the Voting Rights Act, http://www.usdoj.gov/crt/voting/sec_5/about.htm (last visited Nov. 21, 2007).

³⁵ The substantive standards for Section 5 administrative determinations follow the holdings of the District Court for the District of Columbia and the Supreme Court.

Section 5 provides for submission of a voting change to the Attorney General as an alternative to the seeking of a declaratory judgment from the U.S. District Court for the District of Columbia. Therefore, the Attorney General shall make the same determination that would be made by the court in an action for a declaratory judgment under Section 5: Whether the submitted change has the purpose or will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. The burden of proof is on a submitting authority when it submits a change to the Attorney General for preclearance, as it would be if the proposed change were the subject of a declaratory judgment action in the U.S. District Court for the District of Columbia.

Department of Justice Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as Amended, 28 C.F.R. § 51.52(a) (2007).

³⁶ *Id.* § 51.9.

³⁷ See *id.* § 51.42. Thus, a Section 5 objection does not render a change unenforceable; rather, it formalizes that status and provides the federal courts with a basis to enter permanent injunctive relief against unprecleared voting changes. Although it is not strictly necessary, it is the practice of the Department of Justice to also issue letters advising jurisdictions when no objection will be interposed to submitted changes.

³⁸ See Department of Justice, *supra* note 12. Between 1965 and 1981, there were 104 Section 5 objections to voting changes from Georgia. See *id.*

to the type of voting change, as is done below.³⁹ But it is important to note first that the great majority of Section 5 objections have affected local governments. While twenty-three of these objections involved federal and state offices and procedures,⁴⁰ another twenty-six involved county-level offices and procedures,⁴¹ and forty-two involved changes at the municipal level.⁴² When discussing Section 5, there is a natural tendency to focus on statewide changes, in particular, congressional and state legislative redistricting plans, but Section 5 is just as crucial—if not more so—at the local level as it is at the statewide level.⁴³

The Supreme Court has broadly construed the scope of Section 5 coverage. Therefore, Section 5 review involves changes to many types of practices and procedures. The counts in Table 1 do not include all possible categories, but only cover the range of objections in Georgia from 1982 onward:

³⁹ Section 5 letters from the Attorney General correspond to the voting changes contained in particular submissions. Such submissions frequently contain multiple voting changes, which can prompt multiple objections in a single letter. Thus, the number of objections is somewhat greater than the number of objection letters. During the post-1982 period, five objections were withdrawn and twelve requests for reconsideration were denied. A letter continuing a previously interposed objection is not counted as an objection itself and is counted separately; letters withdrawing objections are also counted separately but do not reduce the number of objections that were interposed.

⁴⁰ These included three objections to congressional redistricting plans, four objections to State Senate redistricting plans, five objections to State House redistricting plans, six objections to the addition of state judicial positions, one objection to changing the method of selecting the board of the Georgia Military College from elective to appointive, two objections to state voter registration procedures, one objection to an election schedule and one objection to a state plurality vote requirement. *See id.*

⁴¹ These included twelve objections to changes involving county boards of education, nine objections to changes involving county commissions, two objections to polling place changes, one objection to the creation of a county chief magistrate, one objection to an election schedule and one objection to voter registration procedures. *See id.*

⁴² These included twenty-four objections to method of election changes, five objections to annexations, four objections to redistricting plans, two objections to municipal/county consolidations, two objections to districting plans, two objections to election schedules, two objections to referendum procedures and one objection to a deannexation. *See id.*

⁴³ To understand why this is so, one need only consider the range of issues directly affecting day-to-day life for which local government is the primary agency: education, land use and planning, property taxation, business inspection and licensing, road maintenance, recreation and election administration are primarily, if not exclusively, administered at the local level, either directly by local elected officials or by those whom they appoint or hire.

Table 1.
Section 5 Objections by Type, 1982–2006

	Objections	Withdrawn	Continued
Method of Election	32	1	6
Redistricting	26	2	1
State Judicial	6	2	1
Annexation	5	2	1
Districting	4	0	1
Election Schedule	4	0	0
Candidate Qualification	3	0	1
Voter Registration	3	0	0
Consolidation	2	0	0
Polling Place	2	0	0
Referendum Procedures	2	0	0
Elected to Appointive	1	0	1
Deannexation	1	0	0
Total	91	7	12

Below I discuss the Section 5 objections by the following categories of voting changes: (1) method of election changes, including at-large elections and numbered post, staggered term and majority vote requirements; (2) redistricting and districting plans; (3) annexations, deannexations and consolidations; (4) judicial seats; and (5) other, which includes voter registration procedures, candidate qualifications, election schedules, referendum procedures, polling place changes and changes from elective to appointive offices.

1. Section 5 Objections to Method of Election Changes

Thirty-two method of election objections blocked a variety of discriminatory election features. Overall, twenty objections involved majority vote requirements (that is, alone or in combination),⁴⁴ thirteen involved

⁴⁴ See Letter from Ralph F. Boyd, Jr., Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Tommy Coleman, Hodges, Erwin, Hedrick & Coleman (Oct. 1, 2001), available at http://www.usdoj.gov/crt/voting/sec_5/pdfs/l_100101.pdf [hereinafter Oct. 1, 2001 Boyd Letter]; Letter from Bill Lann Lee, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Melvin P. Kopecky, Kopecky & Roberts (Mar. 17, 2000), available at http://www.usdoj.gov/crt/voting/sec_5/pdfs/l_031700.pdf [hereinafter Mar. 17, 2000 Lee Letter]; Letter from Deval L. Patrick, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Harold Lambert, Decatur County Attorney (Nov. 29, 1994) [hereinafter Nov. 29, 1994 Patrick Letter] (on file with author); Letter from Deval L. Patrick, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Gary

numbered post requirements,⁴⁵ three involved staggered term requirements⁴⁶ and fourteen involved at-large election requirements.⁴⁷

A. Glover, Glover & Blount (May 23, 1994) [hereinafter May 23, 1994 Patrick Letter] (on file with author); Letter from James P. Turner, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Robert P. Westin (Nov. 9, 1993) [hereinafter Nov. 9, 1993 Turner Letter] (on file with author); Letter from James P. Turner, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Milton F. "Rick" Gardner, Gardner & Gardner (Oct. 22, 1993) [hereinafter Oct. 22, 1993 Turner Letter] (on file with author); Letter from Brian K. Landsberg, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Milton F. "Rick" Gardner, Jr., Gardner & Gardner (Aug. 13, 1993) [hereinafter Aug. 13, 1993 Landsberg Letter] (on file with author); Letter from James P. Turner, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Alex Davis, Butler City Attorney (June 25, 1993) [hereinafter June 25, 1993 Turner Letter] (on file with author); Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Alex L. Zipperer, Zipperer & Lorberbaum (July 20, 1992) [hereinafter July 20, 1992 Dunne Letter] (on file with author); Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to James W. Smith (July 15, 1991) [hereinafter July 15, 1991 Dunne Letter] (on file with author); Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Knox Bell, Mayor, Monroe, Ga. (July 3, 1991) [hereinafter July 3, 1991 Dunne Letter] (on file with author); Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to William L. Tribble, E. Dublin City Attorney (Apr. 26, 1991) [hereinafter Apr. 26, 1991 Dunne Letter] (on file with author); Letter from James P. Turner, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Ken W. Smith, Wilkes, Johnson & Smith (Nov. 13, 1989) [hereinafter Nov. 13, 1989 Turner Letter] (on file with author); Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Ken W. Smith, Wilkes, Johnson & Smith (July 8, 1988) [hereinafter July 8, 1988 Reynolds Letter] (on file with author); Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Neal L. Conner, Jr., Kopp, Peavy and Conner (Feb. 16, 1988) [hereinafter Feb. 16, 1988 Reynolds Letter] (on file with author); Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to J. J. Rayburn, Mayor, City of Wrens (Oct. 20, 1986) [hereinafter Oct. 20, 1986 Reynolds Letter] (on file with author); Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Bradford M. Shealy, Quitman City Attorney (Apr. 28, 1986) [hereinafter Apr. 28, 1986 Reynolds Letter] (on file with author); Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Robert B. Smith, Jesup City Attorney (Mar. 28, 1986) [hereinafter Mar. 28, 1986 Reynolds Letter] (on file with author); Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to C. Robert Melton, Forsyth City Attorney (Dec. 17, 1985) [hereinafter Dec. 17, 1985 Reynolds Letter] (on file with author); Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to George M. Stemberge, Baldwin County Attorney (Sept. 19, 1983) [hereinafter Sept. 19, 1983 Reynolds Letter] (on file with author). In addition, there was an objection (subsequently withdrawn) to a 45% statewide plurality vote requirement. See Letter from Isabelle Katz Pinzler, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Michael J. Bowers, Ga. Attorney Gen. (Aug. 29, 1994) [hereinafter Aug. 29, 1994 Pinzler Letter] (on file with author) (withdrawn by Assistant Attorney Gen. Loretta King, Sept. 11, 1995).

⁴⁵ See Oct. 1, 2001 Boyd Letter, *supra* note 44; Mar. 17, 2000 Lee Letter, *supra* note 44; Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Debbie K. Mosley, Sparta City Adm'r (Feb. 4, 1992) [hereinafter Feb. 4, 1992 Dunne Letter] (on file with author); Apr. 26, 1991 Dunne Letter, *supra* note 44; Nov. 13, 1989 Turner Letter, *supra* note 44; July 8, 1988 Reynolds Letter, *supra* note 44; Oct. 20, 1986 Reynolds Letter, *supra* note 44; Mar. 28, 1986 Reynolds Letter, *supra* note 44; Dec. 17, 1985 Reynolds Letter, *supra* note 44; Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to M. Theodore Solomon, Jones, Solomon, and Boatwright (June 11, 1984) [hereinafter June 11, 1984 Reynolds Letter] (on file with author); Sept. 19, 1983 Reynolds Letter, *supra* note 44; Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Alex Davis, Taylor County Attorney (Aug. 19, 1983) [here-

Seventeen method of election objections involved the adoption of a single discriminatory feature: seven cited the adoption of a majority-vote requirement as the reason for the objection,⁴⁸ six cited the adoption of at-large elections,⁴⁹ two cited the adoption of numbered posts,⁵⁰ one con-

inafter Aug. 19, 1983 Reynolds Letter] (on file with author); Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to John J. Ossick (Jan. 3, 1983) [hereinafter Jan. 3, 1983 Reynolds Letter] (on file with author).

⁴⁶ See Mar. 17, 2000 Lee Letter, *supra* note 44; Nov. 13, 1989 Turner Letter, *supra* note 44; Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Robert M. Brinson, Brinson, Askew & Berry (Aug. 11, 1987) [hereinafter Aug. 11, 1987 Reynolds Letter] (on file with author).

⁴⁷ See Nov. 29, 1994 Patrick Letter, *supra* note 44; Letter from Deval L. Patrick, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to James R. Lewis, Lewis, Taylor & Lee (Oct. 11, 1994) [hereinafter Oct. 11, 1994 Patrick Letter] (on file with author); Letter from James P. Turner, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to James R. Lewis, Lewis, Taylor & Lee (Dec. 13, 1993) [hereinafter Dec. 13, 1993 Turner Letter] (on file with author); Oct. 22, 1993 Turner Letter, *supra* note 44; July 20, 1992 Dunne Letter, *supra* note 44; Apr. 28, 1986 Reynolds Letter, *supra* note 44; Mar. 28, 1986 Reynolds Letter, *supra* note 44; Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Norman Smith, Lamar County Attorney (Mar. 18, 1986) [hereinafter Mar. 18, 1986 Reynolds Letter] (on file with author); Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Alvin L. Layne, Layne and Layne (Nov. 29, 1985) [hereinafter Nov. 29, 1985 Reynolds Letter] (on file with author); Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Andrew J. Whalen, III, Christopher, Mullins & Whalen (Sept. 25, 1985) [hereinafter Sept. 25, 1985 Reynolds Letter] (on file with author); Letter from James P. Turner, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to A. Mitchell Powell, Jr., Sanders, Mottola, Haugen & Goodson (Aug. 31, 1984) [hereinafter Aug. 31, 1984 Turner Letter] (on file with author); June 11, 1984 Reynolds Letter, *supra* note 45; Aug. 19, 1983 Reynolds Letter, *supra* note 45.

⁴⁸ See May 23, 1994 Patrick Letter, *supra* note 44; Nov. 9, 1993 Turner Letter, *supra* note 44; Aug. 13, 1993 Landsberg Letter, *supra* note 44; June 25, 1993 Turner Letter, *supra* note 44; July 15, 1991 Dunne Letter, *supra* note 44; July 3, 1991 Dunne Letter, *supra* note 44; Feb. 16, 1988 Reynolds Letter, *supra* note 44. Six of these seven objections to the adoption of a majority-vote requirements involved municipalities; the seventh was incident to the creation of a county chief magistrate. These included objections for the city of Butler (June 1993) (majority requirement for mayor), the city of Hinesville (July 1991) (majority-vote requirement for mayor), the city of Waynesboro (May 1994) (majority-vote requirement for mayor), the town of McIntyre (November 1993) (majority-vote requirement in special elections for city council vacancies), the city of Waycross (February 1988) (creation of a single-position mayor to be elected by majority vote), the city of Monroe (July 1991) (majority-vote requirement for all citywide offices, including mayor, later narrowed to the mayor only) and Baldwin County (August 1993) (creation of chief magistrate elected using majority-vote requirement).

⁴⁹ See Oct. 11, 1994 Patrick Letter, *supra* note 47; Dec. 13, 1993 Turner Letter, *supra* note 47; Mar. 18, 1986 Reynolds Letter, *supra* note 47; Nov. 29, 1985 Reynolds Letter, *supra* note 47; Sept. 25, 1985 Reynolds Letter, *supra* note 47; Aug. 31, 1984 Turner Letter, *supra* note 47. Five of these six objections to the adoption of at-large elections involved municipalities, including the city of Griffin (September 1985) (use of one at-large seat in a "mixed" plan with four single-member districts), the city of LaGrange (October 1993 and December 1994) (the 1993 objection involved the use of two at-large seats in a mixed city council plan with four single-member districts; the 1994 objection involved the use of one at-large seat in a mixed city council plan with two "super-districts" and four single-member districts), the city of Lyons (November 1985) (use of an at-large seat in a mixed plan with four single-member districts) and the city of Newnan (August 1984) (use of two at-large seats in a mixed plan with

cerned the adoption of staggered terms⁵¹ and one concerned a plurality-vote runoff requirement.⁵² In eleven cases, Section 5 objections blocked combinations of *two* discriminatory features: five objections were based upon the adoption of a majority vote requirement in combination with numbered posts,⁵³ four cited the adoption of a majority vote requirement in combination with at-large elections⁵⁴ and two were based upon the adoption of at-large elections in combination with residency districts (the functional equivalent of numbered posts).⁵⁵ In four other cases, Section 5 objections blocked combinations of three discriminatory features: two objections cited the adoption of a majority vote requirement in combination with both num-

four single-member districts). The sixth was a March 1986 objection for Lamar County (use of an at-large seat in a mixed plan with four single-member districts).

⁵⁰ See Feb. 4, 1992 Dunne Letter, *supra* note 45; Jan. 3, 1983 Reynolds Letter, *supra* note 45. These included objections for the city of Sparta (February 1992) (adding a numbered post requirement to the at-large city council election system) and the city of Kingsland (January 1983) (1976 legislation adopting numbered posts for the at-large election city council system).

⁵¹ See Aug. 11, 1987 Reynolds Letter, *supra* note 46. An August 1987 objection for the city of Rome school board identified the city's proposed adoption of staggered terms, in conjunction with an increase in the number of school board members from six to seven, as the reason for the objection, which cited the factors discussed in *City of Rome v. United States*, 446 U.S. 156 (1980).

⁵² See Aug. 29, 1994 Pinzler Letter, *supra* note 44.

⁵³ See Oct. 1, 2001 Boyd Letter, *supra* note 44; Apr. 26, 1991 Dunne Letter, *supra* note 44; July 8, 1988 Reynolds Letter, *supra* note 44; Oct. 20, 1986 Reynolds Letter, *supra* note 44; Dec. 17, 1985 Reynolds Letter, *supra* note 44. These included objections for the city of Ashburn (October 2001) (numbered posts for city council elections and majority-vote requirement for all city offices), the city of Lumber City (July 1988) (majority-vote requirement for mayor and city council and numbered posts for city council), the city of Wrens (October 1986) (majority-vote and numbered post requirement for mayor and city council) and the city of Forsyth (December 1985) (numbered post and majority-vote requirement for city council elections). In addition, in April 1991 the DOJ precleared a change in the method of election for the city of East Dublin (from five at-large seats) to a mixed plan with three single-member districts and two at-large seats; however, an objection was interposed to a majority vote requirement that was to be used in combination with numbered posts for the two at-large seats.

⁵⁴ See Nov. 29, 1994 Patrick Letter, *supra* note 44; Oct. 22, 1993 Turner Letter, *supra* note 44; July 20, 1992 Dunne Letter, *supra* note 44; Apr. 28, 1986 Reynolds Letter, *supra* note 44. These included objections for Decatur County (November 1994) (changing its six-member single-member district plan to a mixed plan with six single-member districts and one at-large seat with a majority-vote requirement), Effingham County (July 1992) (changing its five-member single-member district plan to a mixed plan with five single-member districts and one at-large seat with a majority-vote requirement), the city of Monroe (October 1993) (changing six at-large seats to four single-member districts and two single-member "super-districts"), and the city of Quitman (April 1986) (changing its five-member council elected at-large by plurality vote to a mixed system with two dual-member districts and an at-large chair elected by majority vote).

⁵⁵ See June 11, 1984 Reynolds Letter, *supra* note 45; Aug. 19, 1983 Reynolds Letter, *supra* note 45. These included objections for the Bacon County Commission (June 1984) (changing eight-member plan with seven single-member districts and one at-large seat to an at-large system with residency districts), and the Taylor County Board of Education (August 1984) (changing nine-member single-member district system to an at-large system with five members from residency districts).

bered posts and staggered terms,⁵⁶ and two other objections blocked combinations of numbered posts, at-large seats and majority vote requirements.⁵⁷

It is critical to recognize circumstantial evidence of intentional discrimination by state and local officials, inasmuch as the days of overt public statements of racial antipathy (largely) have passed.⁵⁸ For example, several method of election objections involved efforts to add at-large seats to single-member district plans under circumstances that strongly suggested a discriminatory purpose. The July 1992 objection for the Effingham County Commission blocked an attempt to change the county's then-existing five-member single-member district plan, which had been adopted in response to a vote dilution lawsuit, to a mixed plan with five single-member districts and an at-large chair to be elected with a majority-vote requirement. The objection letter noted:

Under the proposed election system, the chairperson would be elected as a designated position by countywide election with a majority vote requirement. In the context of racial bloc voting which pertains in Effingham County, the opportunity that currently exists for black voters to elect the commissioner who will serve as chairperson would be negated.

Moreover, it appears that these results were anticipated by those responsible for enactment of the proposed legislation. The proposed change to an at-large chairperson followed the elimination of the position of vice chairperson, which had been held by a black commissioner since 1987. Although we have been advised that the proposed system was adopted in order to avoid the possibility of tie votes in the selection of the chairperson and for other proposals before the board, this rationale appears tenu-

⁵⁶ See Mar. 17, 2000 Lee Letter, *supra* note 44; Nov. 13, 1989 Turner Letter, *supra* note 44. These included objections for the city of Tignall (March 2000 objection) (changing system of at-large, plurality-vote elections with concurrent terms), and the city of Lumber city (November 1989) (changing system from six members, elected at-large by plurality vote to two-year staggered terms, to a mixed plan with four single-member districts and two at-large seats, elected by majority-vote to four-year staggered terms).

⁵⁷ See Mar. 28, 1986 Reynolds Letter, *supra* note 44; Sept. 19, 1983 Reynolds Letter, *supra* note 44. These included objections for the city of Jesup (March 1986) (changing system of six commissioners elected at-large by plurality vote to staggered terms), and the Baldwin County Board of Education (September 1983) (1972 adoption of at-large elections in combination with both numbered posts and a majority-vote requirement for new elective system). The Baldwin County Board of Education submission was made only after a federal suit, including Section 5 enforcement claims, had been filed against it. See *Boddy v. Hall*, Civ. A. File No. 82-406-1-MAC (M.D. Ga. 1983).

⁵⁸ See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977); see also *Washington v. Davis*, 426 U.S. 229, 242 (1976) (“[I]nvidious discriminatory purpose may often be inferred from the totality of the relevant facts.”).

ous since the change to an even number of commissioners would invite tie votes to a greater extent than the existing system.⁵⁹

Similarly, the November 1994 objection for the Decatur County Commission involved a proposal to change the then-existing six-member single-member district system for electing the county commission to a mixed plan with six single-member districts and one at-large seat to be elected with a majority vote requirement.⁶⁰ The objection letter noted:

Under these circumstances, it appears that black voters will not have an equal opportunity to elect candidates of their choice to the at-large position, and will therefore enjoy a smaller share of representation under the expanded commission than is available to them under the current system. Hence, it appears that the proposed increase in the number of county commissioners to seven, the establishment of an elected chairperson, and the change in method of election will “lead to a retrogression in the position of . . . minorities with respect to their effective exercise of the electoral franchise.”

Alternatives were available that would have addressed the county’s apparent concern regarding tie votes on the commission, but would not similarly diminish minority voting strength. Those include an increase to seven or a decrease to five single-member districts. The county appears to have rejected such alternatives in favor of the proposed expansion and election method without a satisfactory race-neutral justification, and no effort appears to have been made to obtain the views of the minority community regarding the effect of the proposed changes prior to their adoption.⁶¹

Moreover, each of these types of changes—majority vote and numbered post requirements, staggered terms and at-large elections—was recognized before 1982 by practicing politicians and in leading voting rights cases involving Georgia as having the potential for diluting minority voting strength in racially polarized elections.⁶² The Supreme Court had recog-

⁵⁹ July 20, 1992 Dunne Letter, *supra* note 44, at 1–2.

⁶⁰ Nov. 29, 1994 Patrick Letter, *supra* note 44, at 1.

⁶¹ *Id.* at 1–2.

⁶² Objection letters for method of election changes, as well as those for redistricting plans, annexations and others involving dilution of minority voting strength, routinely cite the existence of racially polarized voting. This is not because polarized voting is assumed to exist; to the contrary, it is evaluated on a case by case basis. Because a pattern of racially polarized voting is a predicate for objections involving minority vote dilution, I have not included it in summarizing individual objections. But any review of the record must bear in mind that the Supreme Court has identified the presence of racially polarized voting as important circumstantial evidence of intentional discrimination in the electoral process. In *Rogers v. Lodge*, the Supreme Court stated:

There was also overwhelming evidence of bloc voting along racial lines. Hence, although there had been black candidates, no black had ever been elected to the Burke County Commission. These facts bear heavily on the issue of purposeful discrimination. Voting along ra-

nized in 1969 the discriminatory potential of at-large elections,⁶³ and the adoption of at-large elections was widely used in Georgia in response to black enfranchisement immediately preceding and after passage of the Voting Rights Act.⁶⁴ In 1973, the Supreme Court explicitly recognized that multi-member districts had the potential for diluting black voting strength in Georgia.⁶⁵ In 1980, the Supreme Court explained—in yet another case arising from Georgia—how “enhancing devices” that prevent single-shot

cial lines allows those elected to ignore black interests without fear of political consequences, and without bloc voting the minority candidates would not lose elections solely because of their race. Because it is sensible to expect that at least some blacks would have been elected in Burke County, the fact that none have ever been elected is important evidence of purposeful exclusion.

458 U.S. 613, 623–24 (1982) (citations omitted).

⁶³ See *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969). In *Allen*, the Court stated: No. 25 involves a change from district to at-large voting for county supervisors. 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.

Id. at 569.

⁶⁴ McDonald notes:

A favorite voting change was from district to at-large elections. The vast majority of the state’s counties elected their county governments at large, but some used single-member districts. In a scenario reminiscent of the attempt by the legislature in 1962 to prevent the election to the Senate of a black from the single-member district in Fulton County, a substantial number of the single-member district counties switched to at-large voting. And most of them did so without complying with Section 5.

. . . .

Two of the single-member district counties, Bacon and Crisp, adopted at-large elections shortly before the Voting Rights Act was passed, but with implementation of the changes to take place after November 1, 1964, which became the effective date for compliance with Section 5. Other single-member district counties that had significant black populations, and that almost certainly would have had one or more majority-black districts under a fair apportionment plan, followed suit and switched to at-large voting: Calhoun, Clay, Dooly, and Miller in 1967; Early, Henry, and Tattnall in 1968; and Meriwether and Walton in 1970. The only county that complied with Section 5 was Meriwether.

Fourteen counties also adopted at-large elections for their boards of education immediately before or shortly after passage of the Voting Rights Act: Greene and Screven in 1964; Terrell and Marion in 1965; Henry in 1966; Cook and Dooly in 1967; Miller, Coffee, Wayne, and Jenkins in 1968; Walton in 1969; and Bulloch and Mitchell in 1970. As with county commissions, at-large elections for school boards were a proven way to minimize black influence in the political process. All of the school boards implemented the changes without seeking Section 5 review.

MCDONALD, *supra* note 15, at 131–32.

⁶⁵ See *Georgia v. United States*, 411 U.S. 526 (1973). The Court in *Georgia* noted: In the present posture of this case, the question is not whether the redistricting of the Georgia House, including extensive shifts from single-member to multimember districts, in fact had a racially discriminatory purpose or effect. The question, rather, is whether such changes have the potential for diluting the value of the Negro vote and are within the definitional terms of [Section] 5. It is beyond doubt that such a potential exists. In view of the teaching of *Allen*, reaffirmed in *Perkins v. Matthews*, we hold that the District Court was correct in deciding that the changes enacted in the 1972 reapportionment plan for the Georgia House of Representatives were within the ambit of [Section] 5 of the Voting Rights Act.

Id. at 534–35 (citations omitted).

voting serve to exacerbate the discriminatory potential of at-large elections.⁶⁶ The Court strongly credited Congress' findings that preventing such changes was an important reason to extend Section 5 in 1970 and 1975.⁶⁷ Of course, this historical context does not prove, per se, that the objected-to changes were adopted because they would adversely affect black voting strength, but it does make it more likely that racial considerations played a role.⁶⁸

The adoption of multiple discriminatory features is further circumstantial evidence that these changes were not merely coincidental, but rather were intended to move toward—or preserve—white hegemony over the election process, in the face of growing black electoral participation. As detailed previously, eleven methods of election objections involved combinations of two discriminatory features and four others involved combinations of three discriminatory features. Short of outright denying the right to cast a ballot, a system of at-large elections with numbered posts and a majority-vote requirement is generally the most effective way of frustrating

⁶⁶ *City of Rome v. United States*, 446 U.S. 156 (1980). In *City of Rome*, the Supreme Court affirmed the District Court's finding that

the electoral changes from plurality-win to majority-win elections, numbered posts, and staggered terms, when combined with the presence of racial bloc voting and Rome's majority white population and at-large electoral system, would dilute Negro voting strength. The District Court recognized that, under the pre-existing plurality-win system, a Negro candidate would have a fair opportunity to be elected by a plurality of the vote if white citizens split their votes among several white candidates and Negroes engage in "single-shot voting" in his favor.

Id. at 183–84.

⁶⁷ *See id.* at 181. Specifically, the *City of Rome* Court noted that:

Congress gave careful consideration to the propriety of readopting [Section] 5's preclearance requirement. It first noted that "[i]n recent years the importance of this provision has become widely recognized as a means of promoting and preserving minority political gains in covered jurisdictions." After examining information on the number and types of submissions made by covered jurisdictions and the number and nature of objections interposed by the Attorney General, Congress not only determined that [Section] 5 should be extended for another seven years, it gave that provision this ringing endorsement:

"The recent objections entered by the Attorney General . . . to Section 5 submissions clearly bespeak the continuing need for this preclearance mechanism. As registration and voting of minority citizens increases [*sic*], other measures may be resorted to which would dilute increasing minority voting strength.

...
 "The Committee is convinced that it is largely Section 5 which has contributed to the gains thus far achieved in minority political participation, and it is likewise [Section] 5 which serves to insure that that progress not be destroyed through new procedures and techniques. Now is not the time to remove those preclearance protections from such limited and fragile success."

Id.

⁶⁸ *See Rogers v. Lodge*, 458 U.S. 613, 625 (1980). In *Rogers*, the Court stated that:

Evidence of historical discrimination is relevant to drawing an inference of purposeful discrimination, particularly in cases such as this one where the evidence shows that discriminatory practices were commonly utilized, that they were abandoned when enjoined by the courts or made illegal by civil rights legislation, and that they were replaced by practices which, though neutral on their face serve to maintain the status quo.

Id.

minority voters' effective exercise of the franchise,⁶⁹ and many of the objections here were moves toward imposing such systems, either in incremental steps or by one piece of legislation.⁷⁰

A number of the objected-to changes had also been illegally implemented for years, or even decades, without Section 5 preclearance. For example, four of the five objections to majority-vote requirements in combination with numbered posts came after the objected-to changes had been enforced illegally—that is, without Section 5 preclearance—before they were submitted.⁷¹ Some changes finally were submitted only as the result of litigation; in other cases, it appears that the unprecleared changes were detected by the DOJ during the Section 5 review of other changes (such as annexations) that were later submitted by the jurisdiction.⁷² This noncompliance is further evidence of a pattern of deliberate racially discriminatory conduct by local officials.⁷³

⁶⁹ For example, in a city with racially polarized voting and a black population of 35%, the use of a “pure” at-large election system with concurrent terms would not necessarily guarantee the defeat of black voters' candidates of choice. By adding a numbered post or staggered term provision, the field of candidates for each open seat would typically be reduced, concomitantly reducing black voters' ability to effectively use single-shot voting within large fields of candidates. If a majority-vote requirement is added to the numbered post requirement, the city's majority would then be able to control the outcome of any resulting one-on-one runoffs in which a black-preferred candidate would be pitted against one of several candidates, among whom white voters divided their initial support. In some situations, however, racial gerrymandering of single-member district boundaries might be equally effective, but this tends to be more obvious.

⁷⁰ Of the 104 objections between 1965 and 1981, sixty-three concerned method of election changes (60.6%). See Department of Justice, *supra* note 12. These included many of the initial round of election system changes adopted in response to the large numbers of black voters who were newly enfranchised as a result of the Voting Rights Act.

⁷¹ See Oct. 1, 2001 Boyd Letter, *supra* note 44 (city of Ashburn; changes used since 1966 and 1973); July 8, 1988 Reynolds Letter, *supra* note 44 (city of Lumber City; majority vote requirement used since 1973); Oct. 20, 1986 Reynolds Letter, *supra* note 44 (city of Wrens; changes used since 1970); Dec. 17, 1985 Reynolds Letter, *supra* note 44 (city of Forsyth; changes used in at least two previous election cycles).

⁷² Some jurisdictions also repeatedly sought to implement objectionable changes through requests for reconsideration; of course, that was their right under the Attorney General's guidelines for the administration of Section 5. See Department of Justice, Procedures for the Administration of Section 5 of The Voting Rights Act of 1965, as Amended, 28 C.F.R. § 51.45 (2007). However, these efforts also could reflect a determination to push forward with discriminatory voting changes.

⁷³ Even when the submission had been made, some jurisdictions remained uncooperative. For example, the August 1983 objection for the Taylor County Board of Education noted, “Indeed, the board has been most uncooperative throughout the review process.” Aug. 19, 1983 Reynolds Letter, *supra* note 45, at 1. The October 2001 objection for the city of Ashburn blocked numbered posts for city council elections and a majority-vote requirement for all city offices that had been adopted in 1973 and 1966, respectively, but never were submitted for preclearance until decades later. Even then, the city delayed its response to a December 1995 request for additional information until August 2001. Oct. 1, 2001 Boyd Letter, *supra* note 44, at 1–2.

Congress also will consider whether it intends a different interpretation of Section 5 than the “intent to retrogress” standard adopted by the Supreme Court in 2000 in *Reno v. Bossier Parish School Board (Bossier II)*.⁷⁴ The *Bossier II* decision would have a mixed effect on the outcomes of these post-1982 method-of-election objections if it were applied to them today.⁷⁵ Some of these objections were not retrogressive in nature and, under *Bossier II*, would have to be precleared today no matter how egregious the evidence of racially discriminatory purpose in their adoption. However, every case in which a numbered post, staggered term or majority vote requirement was added to an at-large system was a retrogression objection. Similarly, those cases in which jurisdictions sought to replace district elections with at-large elections also would be unaffected by *Bossier II* because they were retrogressive. Thus, there were significant Section 5 violations among the method of election objections regardless of the *Bossier II* reinterpretation of Section 5.

2. Section 5 Objections to Redistricting and Districting Plans

Redistricting plans and districting plans (the first boundaries for a new single- or multi-member district system) comprised the second-largest category of Section 5 objections from 1982 forward. There were twenty-six objections to redistricting plans⁷⁶ and four objections to districting plans during this period.⁷⁷

⁷⁴ 528 U.S. 320 (2000). In the *Bossier II* decision, the Supreme Court abandoned the longstanding construction of Section 5 as prohibiting voting changes that did not worsen (or “retrogress”) the position of minority voters, but had a racially discriminatory purpose. See *infra* Part I.B.1 (discussing *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982), *aff’d*, 459 U.S. 1166 (1983)).

⁷⁵ It is assumed for purposes of this discussion that the *Bossier II* decision applies equally to method of election changes as to the school board redistricting plan at issue in that case.

⁷⁶ See Letter from Ralph F. Boyd, Jr., Assistant Attorney Gen., Dep’t of Justice, to Wayne Jernigan, Phillip L. Hartley, Cory O. Kirby, Harben & Hartley (Oct. 15, 2002) (Marion County Board of Education), *available at* http://www.usdoj.gov/crt/voting/sec_5/pdfs/l_101502.pdf [hereinafter Oct. 15, 2002 Boyd Letter]; Letter from J. Michael Wiggins, Assistant Attorney Gen., Dep’t of Justice, to Al Grieshaber, Jr., Albany City Attorney (Sept. 23, 2002) (city of Albany), *available at* http://www.usdoj.gov/crt/voting/sec_5/pdfs/l_092302.pdf [hereinafter Sept. 23, 2002 Wiggins Letter]; Letter from J. Michael Wiggins, Assistant Attorney Gen., Dep’t of Justice, to Robert T. Prior (Aug. 9, 2002) (Putnam County Commission, Board of Education), *available at* http://www.usdoj.gov/crt/voting/sec_5/pdfs/l_080902.pdf [hereinafter Aug. 9, 2002 Wiggins Letter]; Letter from Bill Lann Lee, Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice, to James M. Skipper, Ellis Easterlin Peagler Gatewood & Skipper (Jan. 11, 2000) (Webster County Board of Education), *available at* http://www.usdoj.gov/crt/voting/sec_5/ltr/l_011100.pdf [hereinafter Jan. 11, 2000 Lee Letter]; Letter from Isabelle Katz Pinzler, Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice, to Dennis R. Dunn, Ga. Senior Assistant Attorney Gen. (Mar. 15, 1996) [hereinafter Mar. 15, 1996 Pinzler Letter] (on file with author) (State House and Senate); Letter from Loretta King, Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice, to Joan W. Harris, Macon City Attorney (Dec. 20, 1994) [hereinafter Dec. 20, 1994 King Letter] (on file with author) (city of Macon); Letter from Wil-

There were twelve objections to statewide redistricting plans, including three congressional plans,⁷⁸ four State Senate plans⁷⁹ and five State

liam Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to George E. Glaze, Glaze and McNally (Dec. 12, 1983) [hereinafter Dec. 12, 1983 Reynolds Letter] (on file with author) (city of College Park); Letter from James P. Turner, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Jesse Bowles III, Bowles & Bowles (June 28, 1993) [hereinafter June 28, 1993 Turner Letter] (on file with author) (Randolph County Commission); Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Andrew J. Whalen III, Mullins & Whalen (Nov. 30, 1992) [hereinafter Nov. 30, 1992 Dunne Letter] (on file with author) (city of Griffin); Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Mark H. Cohen, Ga. Senior Assistant Attorney Gen. (Mar. 29, 1992) [hereinafter Mar. 29, 1992 Dunne Letter] (on file with author) (State House); Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Mark H. Cohen, Ga. Senior Assistant Attorney Gen. (Mar. 20, 1992) [hereinafter Mar. 20, 1992 Dunne Letter] (on file with author) (congressional, State House and Senate); Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Mark H. Cohen, Ga. Senior Assistant Attorney Gen. (Jan. 21, 1992) [hereinafter Jan. 21, 1992 Dunne Letter] (on file with author) (congressional, State House and Senate); Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Henry L. Crisp, Crisp, Oxford & Gatewood (Sept. 6, 1983) [hereinafter Sept. 6, 1983 Reynolds Letter] (on file with author) (Sumter County School District); Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Henry L. Crisp, Crisp, Oxford & Gatewood (Dec. 17, 1982) [hereinafter Dec. 17, 1982 Reynolds Letter] (on file with author) (Sumter County School District); Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Arthur Griffith, Jr., Chairman, Macon-Bibb County Bd. of Elections (Nov. 26, 1982) [hereinafter Nov. 26, 1982 Reynolds Letter] (on file with author) (Bibb County Board of Education); Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to C. Nathan Davis, Lee and Davis (July 12, 1982) [hereinafter July 12, 1982 Dougherty Letter] (on file with author) (Dougherty County Commission); Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Terry H. Floyd, Lee, Macmillan & Floyd (July 12, 1982) [hereinafter July 12, 1982 Glynn Letter] (on file with author) (Glynn County Commission); Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Michael Bowers, Ga. Attorney Gen. (Feb. 11, 1982) [hereinafter Feb. 11, 1982 Congressional Letter] (on file with author) (congressional); Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Michael Bowers, Ga. Attorney Gen. (Feb. 11, 1982) [hereinafter Feb. 11, 1982 Reynolds Letter] (on file with author) (State House and Senate).

⁷⁷ See June 28, 1993 Turner Letter, *supra* note 76; Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to S. T. Ellis, McDonough City Attorney (Dec. 3, 1984) [hereinafter Dec. 3, 1984 Reynolds Letter] (on file with author) (city of McDonough); Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to R. Bruce Warren, Whitehurst, Cohen & Blackburn (July 23, 1984) [hereinafter July 23, 1984 Reynolds Letter] (on file with author) (Thomas County Commission); Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to S. T. Ellis, McDonough City Attorney (Nov. 22, 1982) [hereinafter Nov. 22, 1982 Reynolds Letter] (on file with author) (city of McDonough). Between 1965 and 1981 there had been eight redistricting objections. However, a far smaller share of local jurisdictions with sizable minority populations used single-member districts at the time of the 1970 and 1980 redistricting cycles. It was the passage of the 1982 Amendments to Section 2 of the Voting Rights Act which prompted many jurisdictions to adopt districting plans during the 1980s and 1990s, often as the result of Section 2 litigation.

⁷⁸ See Mar. 20, 1992 Dunne Letter, *supra* note 76; Jan. 21, 1992 Dunne Letter, *supra* note 76; Feb. 11, 1982 Congressional Letter, *supra* note 76.

House plans.⁸⁰ Three of these objections occurred during the 1980s, and the remainder were during the 1990s.

In the post-1980 redistricting cycle, a February 1982 objection to Georgia's 1981 congressional redistricting plan⁸¹ ultimately led to a Section 5 declaratory judgment action, *Busbee v. Smith*,⁸² which denied Section 5 preclearance to the state's (non-retrogressive) plan on the grounds that the plan had a racially discriminatory purpose. The *Busbee* case and the associated objections are discussed elsewhere in this report. The DOJ also objected to Georgia's 1981 House and Senate redistricting plans in February 1982.⁸³

In the post-1990 redistricting cycle, two objections to congressional redistricting plans in 1992⁸⁴ were followed by constitutional litigation (under the newly-announced claim of *Shaw v. Reno*) against the precleared plan, finally resulting in the decision in *Abrams v. Johnson*.⁸⁵ Georgia's post-1990 House and Senate redistrictings went through several stages. There were Section 5 objections to Georgia's 1991 House and Senate redistricting plans in January 1992, to revised House and Senate plans in March 1992 and to a further revised House plan on March 29, 1992.⁸⁶ After new House and Senate plans were precleared, both were challenged in another *Shaw* case captioned *Miller v. Johnson*, in which the State admitted to constitutional violations, some of which were contested by the United States and private intervenors.⁸⁷ The State adopted new plans, which it claimed to be remedies in response to the admitted constitutional violations that re-

⁷⁹ See Mar. 15, 1996 Pinzler Letter, *supra* note 76; Mar. 20, 1992 Dunne Letter, *supra* note 76; Jan. 21, 1992 Dunne Letter, *supra* note 76; Feb. 11, 1982 Reynolds Letter, *supra* note 76.

⁸⁰ See Mar. 15, 1996 Pinzler Letter, *supra* note 76; Mar. 29, 1992 Dunne Letter, *supra* note 76; Mar. 20, 1992 Dunne Letter, *supra* note 76; Jan. 21, 1992 Dunne Letter, *supra* note 76; Feb. 11, 1982 Reynolds Letter, *supra* note 76. In addition, the DOJ opposed the preclearance of Georgia's 2001 State Senate redistricting plan in a declaratory judgment action, *Georgia v. Ashcroft*, 539 U.S. 461 (2003). The district court ruled against the State in the *Ashcroft* case, but the Supreme Court vacated and remanded the case, which ultimately was dismissed due to the decision in *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), *aff'd*, 542 U.S. 947 (2004), with no final resolution of the State's claim. The *Ashcroft* case is discussed *infra* Part I.B.1.

⁸¹ See Feb. 11, 1982 Congressional Letter, *supra* note 76, at 3.

⁸² 549 F. Supp. 494 (D.D.C. 1982), *aff'd mem.*, 459 U.S. 1166 (1983).

⁸³ See Feb. 11, 1982 Reynolds Letter, *supra* note 76, at 4.

⁸⁴ See Mar. 20, 1992 Dunne Letter, *supra* note 76, at 4; Jan. 21, 1992 Dunne Letter, *supra* note 76, at 6.

⁸⁵ 521 U.S. 74 (1997).

⁸⁶ See Mar. 29, 1992 Dunne Letter, *supra* note 76, at 2; Mar. 20, 1992 Dunne Letter, *supra* note 76, at 4; Jan. 21, 1992 Dunne Letter, *supra* note 76, at 6.

⁸⁷ See *infra* Part III.B for a discussion of the *Abrams* and *Miller* cases.

duced the black populations of numerous districts, prompting objections in March 1996.⁸⁸

There have been fourteen objections to local redistricting plans since 1982, including objections for four counties,⁸⁹ five county boards of education⁹⁰ and four municipalities.⁹¹ In addition, there have been four objections to initial districting plans for one county, one county board of education and one city (with two objections).⁹² Broken out by decade, there have been six local redistricting objections during the 1980s—three during the 1990s and five from 2000 onward.

Some redistricting objections involved compelling evidence of a racially discriminatory purpose. The best-documented case involved Georgia's 1981 congressional redistricting legislation. The U.S. District Court for the District of Columbia specifically found that the committee chairman responsible for the state's plan—Representative Joe Mack Wilson—was a “racist,”⁹³ and tied that racism to gerrymandered district boundaries in the Atlanta area. The court found that the unnecessary division of black neighborhoods was a means of effectuating the determination to limit black voting strength in the Atlanta area to the extent possible.⁹⁴ Representative

⁸⁸ See Mar. 15, 1996 Pinzler Letter, *supra* note 76, at 11 (withdrawn October 15, 1996). The objections were withdrawn following a settlement of the case.

⁸⁹ See Aug. 9, 2002 Wiggins Letter, *supra* note 76; June 28, 1993 Turner Letter, *supra* note 76; July 12, 1982 Dougherty Letter, *supra* note 76; July 12, 1982 Glynn Letter, *supra* note 76.

⁹⁰ See Oct. 15 2002 Boyd Letter, *supra* note 76; Aug. 9, 2002 Wiggins Letter, *supra* note 76; Jan. 11, 2000 Lee Letter, *supra* note 76; Sept. 6, 1983 Reynolds Letter, *supra* note 76; Dec. 17, 1982 Reynolds Letter, *supra* note 76; Nov. 26, 1982 Reynolds Letter, *supra* note 76.

⁹¹ See Sept. 23, 2002 Wiggins Letter, *supra* note 76; Dec. 20, 1994 King Letter, *supra* note 76; Nov. 30, 1992 Dunne Letter, *supra* note 76; Dec. 12, 1983 Reynolds Letter, *supra* note 76.

⁹² See June 28, 1993 Turner Letter, *supra* note 76; Dec. 3, 1984 Reynolds Letter, *supra* note 77; July 23, 1984 Reynolds Letter, *supra* note 77; Nov. 22, 1982 Reynolds Letter, *supra* note 77. The Department of Justice distinguishes redistricting plans (the revision of existing district boundaries) from districting plans (the first use of electoral district boundaries following a method of election change, as occurs when a jurisdiction changes from at-large elections to single-member districts).

⁹³ The bill for the 1981 plan was developed in the House Permanent Standing Committee on Legislative and Congressional Reapportionment; Representative Wilson was its chair. The D.C. District Court's fact findings included:

17. Representative Joe Mack Wilson is a racist. Wilson uses the term “nigger” to refer to black persons. He stated to one Republican member of the Reapportionment Committee that “there are some things worse than niggers and that's Republicans.” Wilson opposes legislation of benefit to blacks, which he refers to as “nigger legislation.” His views on blacks are well known to members of the General Assembly. From the House reapportionment committee to the Conference committee, Wilson played the instrumental role in 1981 Congressional reapportionment and he was guided by the same racial attitudes throughout the reapportionment process that guided his other legislative work.

Busbee v. Smith, 549 F. Supp. 494, 500 (D.D.C. 1982) (citations omitted), *aff'd*, 459 U.S. 1166 (1983).

⁹⁴ See *id.* at 518. “Act No. 5 is being denied Section 5 preclearance because State officials successfully implemented a scheme designed to minimize black voting strength to the extent possible; the plan drawing process was not free of racially discriminatory purpose.” *Id.*

Wilson, of course, was not alone in his views.⁹⁵ McDonald quotes a white Republican legislator's deposition testimony during *Busbee*:

"To call someone a racist in Georgia is not necessarily flaming that person," said Felton. "You might call someone a racist, but that isn't the height of an insult, I'm sorry to say, but that's true."⁹⁶

District boundaries in some local plans were drawn to meet explicit racial quotas to limit the number of majority-black districts. For example, the July 1984 objection for the Thomas County Commission noted that the proposed eight-district plan had been drawn with an instruction to the Georgia State Reapportionment Office "that the number of districts in which black voters could elect candidates of their choice be limited to two" (in a county with a black population percentage of 38%).⁹⁷ The September 2002 objection for the city of Albany found that the redistricting plan reduced the black population in one ward from 51% to 31% specifically to forestall the creation of an additional majority-black district.⁹⁸

Other objections involved gerrymandered district boundaries that plainly were intended to constrain black district populations. The December 1983 objection for the city of College Park stated that the proposed redistricting packed the black population into one district at a level of 90%, while dividing the remainder of the city's black population concentrations into four other districts,⁹⁹ to the point that one heavily-black Census block was (unnecessarily) split among several districts.¹⁰⁰ Similarly, objections in November 1982 and December 1984 for the city of McDonough were based on a "three-way fragmentation of the black community [that] appeared calculated to carve up the city's black voting strength among several districts in an unnatural and wholly unnecessary way."¹⁰¹

The January 2000 objection for the Webster County School Board is especially noteworthy for the pretextual justifications offered for its retrogressive changes. The objection letter stated that shortly after the 1996

⁹⁵ Representative Wilson had been appointed as chair of the redistricting committee by Speaker of the Georgia House Thomas Murphy, who had served as floor leader for former Governor Lester Maddox. *Id.* at 500. Representative Murphy does not appear to have suffered politically for the *Busbee* debacle; he remained Speaker through the 1990 and 2000 redistricting cycles.

⁹⁶ MCDONALD, *supra* note 15, at 171.

⁹⁷ July 23, 1984 Reynolds Letter, *supra* note 77, at 1–2.

⁹⁸ Sept. 23, 2002 Wiggins Letter, *supra* note 76, at 1–2.

⁹⁹ The city had a black population of 48.3% in 1980.

¹⁰⁰ Dec. 12, 1983 Reynolds Letter, *supra* note 76, at 1. The objection letter cited the summary affirmance of *Busbee v. Smith* in noting that the district boundary manipulation and aversion to input from the minority community were indicative of a racially discriminatory purpose.

¹⁰¹ Dec. 3, 1984 Reynolds Letter, *supra* note 77, at 1; *see also* Nov. 22, 1982 Reynolds Letter, *supra* note 77.

elections, in which a third black member was elected to the board for the first time, the school board members were advised that their five-district plan had to be redrawn because it was malapportioned; however, the 5% deviation in the benchmark plan was well within constitutional limits, while the plan that ostensibly was enacted to cure its malapportionment instead had a 13% deviation.¹⁰²

As with the method of election objections, the effect of the Supreme Court's *Bossier II* decision would be mixed. Nine objections involved retrogressive redistricting plans,¹⁰³ and so to the extent that they were based on discriminatory purpose, they would remain objectionable. It is fairly clear that the November 1992 objection for the city of Griffin¹⁰⁴ and the December 1983 objection for the city of College Park¹⁰⁵ involved non-retrogressive redistricting plans, and the June 1993 objection for Randolph County¹⁰⁶ probably should be counted as non-retrogressive as well. In addition, two redistricting objections for the Sumter County School Board in 1982¹⁰⁷ and 1983¹⁰⁸ applied the special rule of *Wilkes County v. United States*¹⁰⁹ for redistricting plans in which there is no legally enforceable benchmark.¹¹⁰ At a minimum, then, nine of the fourteen local redistricting objections would be unaffected by *Bossier II*. The four objections to initial districting plans probably would be precluded by *Bossier II*, although this is not entirely clear.¹¹¹

¹⁰² Jan. 11, 2000 Lee Letter, *supra* note 76, at 3.

¹⁰³ See Aug. 9, 2002 Wiggins Letter, *supra* note 76; July 12, 1982 Dougherty Letter, *supra* note 76; July 12, 1982 Glynn Letter, *supra* note 76; Oct. 15 2002 Boyd Letter, *supra* note 76; Jan. 11, 2000 Lee Letter, *supra* note 76; Sept. 23, 2002 Wiggins Letter, *supra* note 76; Dec. 20, 1994 King Letter, *supra* note 76; Nov. 26, 1982 Reynolds Letter, *supra* note 76.

¹⁰⁴ Nov. 30, 1992 Dunne Letter, *supra* note 76.

¹⁰⁵ Dec. 12, 1983 Reynolds Letter, *supra* note 76.

¹⁰⁶ June 28, 1993 Turner Letter, *supra* note 76.

¹⁰⁷ Dec. 17, 1982 Reynolds Letter, *supra* note 76.

¹⁰⁸ Sept. 6, 1983 Reynolds Letter, *supra* note 76.

¹⁰⁹ 450 F. Supp. 1171 (D.D.C. 1978), *aff'd*, 439 U.S. 999 (1978).

¹¹⁰ It is uncertain whether *Wilkes County* remains good law following *Bossier II*, and so judgment should be withheld as to whether these plans should be classified as non-retrogressive.

¹¹¹ The June 1993 objection for the Randolph County School Board's districting plan appears to have been based on a discriminatory, but non-retrogressive, purpose; however, the objection letter does not specifically discuss this point. See June 28, 1993 Turner Letter, *supra* note 76. The objections in July 1984 for Thomas County and November 1982 and December 1984 for the city of McDonough each involved the transition from an at-large election system to a single-member district plan, which can be retrogressive (especially if the benchmark at-large system does not include anti-single-shot devices), since district boundaries can readily be gerrymandered. In Thomas County the proposed plan was adopted in response to a Section 2 lawsuit, which suggests that the change, which provided for two districts in which black voters were likely to elect candidates of their choice, was non-retrogressive. The mixed plans for the city of McDonough both provided for one district (among a total of six seats) in which black voters were likely to be able to elect candidates of their choice; the November 1982 and

3. Section 5 Objections to Annexations, Deannexations and Consolidations

There were five objections to municipal annexations since 1982, one objection to a municipal deannexation and two objections to consolidations of cities and counties.¹¹² Several of these objections involved clear evidence of a racially discriminatory purpose.

The April 1987 objection for the city of Macon involved an area that admittedly had been denannexed in order to remove a particular legislator from the city's legislative delegation.¹¹³ Although the numeric decrease in the city's black population was small, the objection was based primarily on the conclusion that race was a factor—if not the predominant factor—in the decision to remove the legislator together with the voters in the surrounding neighborhood.¹¹⁴ This is reminiscent of the landmark Fifteenth Amendment case, *Gomillion v. Lightfoot*.¹¹⁵

December 1984 objection letters did not include retrogression discussions, and so these plans probably also represented some improvement over the then-existing system.

¹¹² These included objections to annexations for the city of Union City (Fulton County) (October 1992), the city of Elberton (Elbert County) (July 1991), the city of Augusta (Richmond County) (July 1987), the city of Forsyth (Monroe County) (December 1985) and the city of Adel (Cook County) (June 1982). See Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to William R. McNally, McNally, Fox, Cameron & Stevens (Oct. 23, 1992) (on file with author); Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to R. Chris Phelps, Heard, Leverett & Phelps (July 2, 1991) (on file with author); Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Charles A. DeVaney, Mayor, Augusta, Ga. (July 27, 1987) [hereinafter July 27, 1987 Reynolds Letter] (on file with author); Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to C. Robert Melton, Forsyth City Attorney (Dec. 17, 1985) (on file with author); Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Howard E. McClain, Thomas and McClain (June 29, 1982) (on file with author). There were also objections to a deannexation from the city of Macon (Bibb and Jones Counties) (April 1987), and to the proposed consolidations of the city of Brunswick with Glynn County (August 1982), and the city of Augusta with Richmond County (May 1989). See Letter from James P. Turner, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Linda W. Beazley, Executive Dir., Richmond County Bd. of Elections (May 30, 1989) [hereinafter May 30, 1989 Turner Letter] (on file with author); Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Roy W. Griffis, Jr., Macon Assistant City Attorney (Apr. 24, 1987) [hereinafter Apr. 24, 1987 Reynolds Letter] (on file with author); Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Terry K. Floyd, Lee, MacMillan and Floyd (Aug. 16, 1982) [hereinafter Aug. 16, 1982 Reynolds Letter] (on file with author). Two annexation objections were later withdrawn, one after the presentation of new information (Union City), the other after a change in the city's method of election (Augusta). See Department of Justice, *supra* note 12. The consolidation of Augusta and Richmond Counties under a different election system was later precleared.

¹¹³ Apr. 24, 1987 Reynolds Letter, *supra* note 112, at 1.

¹¹⁴ *Id.*

¹¹⁵ 364 U.S. 339 (1960). In *Gomillion*, the Supreme Court invalidated the infamous 1957 racial gerrymander of Tuskegee, Alabama, by which the city had attempted to remove nearly all of its black voters by changing its boundaries "from a square to an uncouth twenty-eight-sided figure." *Id.* at 340.

The city of Augusta prompted repeated Section 5 objections and lawsuits.¹¹⁶ The May 1989 objection to the consolidation of Augusta with Richmond County summarized the evidence of racial purpose in that effort:

[T]here remains the question of purpose. In that regard, much of our information suggests that the prospect that the city, which has a black population majority, finally would have an election system that fairly reflected black voting strength was the primary, if not the sole, motivation for the proposed consolidation.¹¹⁷

A July 1987 objection to eight annexations to the city of Augusta had previously described the city as following a “racial quota policy”:

While the city’s efforts to increase its size do not, *per se*, violate the Voting Rights Act, we are concerned regarding the annexation standards applied to black and white residential areas. In this regard, it appears that the city’s present annexation policy centers on a racial quota system requiring that each time a black residential area is annexed into the city, a corresponding number of white residents must be annexed in order to avoid increasing the city’s black population percentage.¹¹⁸

¹¹⁶ The racial tension in Augusta was not always concealed. In *Who Shall Rule and Govern? Local Legislative Delegations, Racial Politics, and the Voting Rights Act*, Miller cites a public meeting in 1985 held by the Augusta legislative delegation to gauge the reaction to an annexation plan, at which a white county resident bluntly assessed the city’s expansion: “The niggers are going to take over Augusta and they have done it.” Miller, *supra* note 28, at 136 (quoting Chris Peacock, *Flared Tempers Mark Annexation Discussion*, AUGUSTA CHRON., Oct. 18, 1985, at 1B).

¹¹⁷ May 30, 1989 Turner Letter, *supra* note 112, at 3. The letter continues:

Just prior to the 1988 legislative session a biracial committee appointed to study the feasibility of consolidation recommended against uniting the city and county governments at that time. In spite of that recommendation and strong black opposition, a bill to effect consolidation nevertheless was vigorously pursued and eventually adopted. Further, analysis of the results of the November 8, 1988, referenda on the consolidation question serves to corroborate other information we have received which indicates that consolidation is a racial issue, with opinions sharply divided along racial lines reflecting that most white voters favored consolidation and most black voters oppose the merger of the two governments.

....

Indeed, our information is that there have been considerations given in the past to what might be legitimate expansion of the City’s boundaries through annexation but, as earlier explained to us in another context, that contemplated action does not support consolidation of the entire county-city nor has there been any other showing of a need for such a change. This is especially the case since the last study commission was negative, the present one has just started and the plan excludes predominantly white municipalities in the county. While it may be possible in the future to make a showing of present need as was done in *Richmond*, the fact that the proposal is not just to match city boundaries to urban growth (as in *Richmond* and *Port Arthur*), but to consolidate urban and rural areas in an historical context that suggests race has been a constant consideration will not make that an easy task.

Id. at 3, 5.

¹¹⁸ July 27, 1987 Reynolds Letter, *supra* note 112, at 1. The letter continues:

Our information indicates that several black communities adjacent to the city actively had sought annexation but that such annexation requests have been delayed or denied until a white residential area containing approximately the same number of people can be identified for annexation. We are aware of efforts by the city’s Annexation Office to conduct door-to-door surveys in identifying areas for annexation and it appears that these efforts have been concentrated in white residential areas to balance the black residential areas that actively have sought

4. Section 5 Objections to Changes in State Judicial Positions

Between 1989 and 1995, there were six objections to the creation of new state judicial positions and the realignment of certain judicial circuits.¹¹⁹ Some of these objections were precleared in 1995 by the U.S. District Court for the District of Columbia and the remainder were withdrawn by the DOJ.¹²⁰

5. Other Section 5 Objections

Among the remaining Section 5 objections were four objections to proposed election schedules,¹²¹ three objections to candidate educational requirements¹²² and three objections to voter registration procedures.¹²³

annexation. The annexations now submitted for Section 5 review appear to have been effectuated pursuant to this racial quota policy.

Id. The objection was withdrawn in July 1988 after the city settled Section 2 litigation and adopted a new method of election. See Department of Justice, *supra* note 12.

¹¹⁹ See Letter from Deval L. Patrick, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Susan B. Forsling, Fulton County Attorney (Jan. 24, 1995) (on file with author); Letter from Loretta King, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to William R. McNally, McNally, Fox & Cameron (Sept. 16, 1994) (on file with author); Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Denny C. Galis, Galis & Packer (Oct. 1, 1991) (on file with author); Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Michael J. Bowers, Ga. Attorney Gen. (June 7, 1989) (on file with author); Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Michael J. Bowers, Ga. Attorney Gen. (Apr. 25, 1990) [hereinafter Apr. 25, 1990 Dunne Letter] (on file with author); Letter from James P. Turner, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Carol Atha Cosgrove, Ga. Senior Assistant Attorney Gen. (June 16, 1989) [hereinafter June 16, 1989 Turner Letter] (on file with author). Analytically, these objections could have been included with the previous section concerning method of election objections, because it was the at-large, numbered post and majority-vote features of those judgeships that prompted the objections. However, the history and judicial treatment of these changes is so distinct that they should be treated as a separate category.

¹²⁰ See *infra* Part I.A.5 for a discussion of these objections in the context of their associated litigation.

¹²¹ See Letter from James P. Turner, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Roy E. Paul, Bouhan, Williams & Levy (Aug. 2, 1993) (on file with author) (city of Millen); Letter from James P. Turner, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Rabun Faulk, Twiggs County Attorney (Mar. 12, 1993) [hereinafter Mar. 12, 1993 Turner Letter] (on file with author) (Twiggs County); Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Linda W. Beazley, Executive Dir., Richmond County Bd. of Elections (July 15, 1988) [hereinafter July 15, 1988 Reynolds Letter] (on file with author) (city of Augusta); Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Michael J. Bowers, Ga. Attorney Gen. (Aug. 12, 1982) (on file with author) (State of Georgia).

¹²² See Letter from James P. Turner, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to William H. Mills (Oct. 15, 1993) (on file with author) (Early County Board of Education); Letter from James P. Turner, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to William H. Mills (Oct. 12, 1992) (on file with author) (Clay County Board of Education); June 28, 1993 Turner Letter, *supra* note 76 (Randolph County Board of Education).

¹²³ See Letter from Deval L. Patrick, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Dennis R. Dunn, Ga. Senior Assistant Attorney Gen. (Oct. 24, 1994) [hereinafter Oct. 24, 1994 Pat-

There were two objections to consolidation referendum procedures,¹²⁴ two objections to polling place changes¹²⁵ and one objection to changing an elective office to an appointed office.¹²⁶ Once again, a number of these objections point directly or indirectly to evidence that state and local election officials acted for racially discriminatory reasons.

Two of the four objections to election schedules involved setting racially-charged referendum votes on dates that would likely produce low black voter turnout. One was the July 1988 objection to a proposal to conduct a mid-summer referendum on the highly controversial Augusta/Richmond County consolidation.¹²⁷ The letter stated:

Considering all the information presented to us, we have been made aware of no compelling justification for holding this election on the date chosen. On the other hand, the circumstances of which we are aware lend some merit to the concern, expressed by some, that the setting of the July 19 date was calculated to disadvantage the black constituency by timing the election so as to take advantage of conditions that would suppress the black voter turnout.¹²⁸

The March 1993 objection for Twiggs County, which concerned a tax and bond referendum election, similarly stated:

We understand that the purpose for which the special tax would be used—renovation of the county courthouse—has been an issue that has divided the county along racial lines, with white voters generally supporting the referendum and black voters generally opposing the referendum.

....

rick Letter] (on file with author) (State of Georgia); Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Mark H. Cohen, Ga. Senior Assistant Attorney Gen. (Feb. 11, 1992) [hereinafter Feb. 11, 1992 Dunne Letter] (on file with author) (State of Georgia); Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Norma S. Lyons, DeKalb County Elections Supervisor (Mar. 5, 1982) [hereinafter Mar. 5, 1982 Reynolds Letter] (on file with author) (DeKalb County).

¹²⁴ See Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Terry K. Floyd, Attorney, Glynn County Charter Comm'n (Feb. 21, 1984) (on file with author) (city of Brunswick); Aug. 16, 1982 Reynolds Letter, *supra* note 112 (city of Brunswick).

¹²⁵ See Letter from Deval L. Patrick, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to William E. Woodrum, Jenkins County Attorney (Mar. 20, 1995) (on file with author) (Jenkins County); Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Charlotte Beall, Probate Judge (Oct. 28, 1992) (on file with author) (Johnson County).

¹²⁶ See Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Michael E. Hobbs, Ga. Senior Assistant Attorney Gen. (Mar. 11, 1991) [hereinafter Mar. 11, 1991 Reynolds Letter] (on file with author) (State of Georgia).

¹²⁷ See July 15, 1988 Reynolds Letter, *supra* note 121, at 1.

¹²⁸ *Id.* at 2. As discussed previously, the DOJ later objected to the consolidation itself.

All of these circumstances suggest that the timing of the referendum and the procedures employed may have been chosen in order to diminish black voting potential, and the county has not provided persuasive evidence to the contrary.¹²⁹

The August 1982 objection to the state's proposed special congressional primary election schedule followed the decision in *Busbee v. Smith*; the state's failure (or refusal) to propose a nondiscriminatory schedule finally required an extraordinary order by the D.C. District Court.¹³⁰

Voter registration continued to be a problem in DeKalb County, where, by 1980, black voter registration was rising significantly but still depressed relative to the white population.¹³¹ The county's attempt to discontinue neighborhood voter registration without obtaining Section 5 pre-clearance had prompted a successful Section 5 enforcement action in 1980, followed by a September 1980 Section 5 objection.¹³² A March 1982 objection blocked another DeKalb County proposal to restrict neighborhood voter registration to even-numbered years.¹³³ A similar objection in February 1992 blocked State Election Board Rules that restricted satellite voter registration to only six months out of every two-year election cycle and re-

¹²⁹ Mar. 12, 1993 Turner Letter, *supra* note 121, at 1, 2.

¹³⁰ See *Busbee v. Smith*, 549 F. Supp. 494, 519–26 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983). The *Busbee* court found that:

Although the state's failure to respond to repeated assertions by the Government and the intervenors that its schedule would discriminate against black voters arguably is itself persuasive evidence that the schedule would have that effect, we need not rely on the state's silence alone. The reapportionment plan significantly altered the configuration and racial composition of the Fourth and Fifth Congressional Districts, and neither voters nor potential candidates knew where the lines would fall until the state secured section 5 approval on August 24. Under the state's schedule, the primary—arguably the most important election in at least the Fifth District—was to be held only three weeks later. This schedule not only would have prevented potential candidates from mounting effective campaigns, but more important, would have frustrated voters' attempts to prepare themselves to make a reasoned choice among the candidates. We concluded, therefore, that Georgia's defense of its proposed schedule fell far short of meeting the state's statutory burden of proof.

Id. at 521.

¹³¹ See Mar. 5, 1982 Reynolds Letter, *supra* note 123, at 1.

¹³² See NAACP, DeKalb County Chapter v. Georgia, 494 F. Supp. 668 (N.D. Ga. 1980) (three-judge court); Letter from Drew S. Days, III, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Harry E. Schmid, DeKalb County Elections Supervisor (Sept. 11, 1980) (on file with author).

¹³³ Mar. 5, 1982 Reynolds Letter, *supra* note 123, at 1–2. The letter noted that although black residents of the county remained under-registered in comparison to the white population, a substantial portion of significant new voter registration activity in the county had occurred in 1981 via neighborhood registration. These circumstances strongly suggest that the attempts to eliminate neighborhood registration were intended to slow the growth of black voter registration in the county. The March 1982 objection also blocked a new policy that would have required a written advance Section 5 preclearance determination before starting a neighborhood voter registration drive. *Id.* at 2.

duced the number of satellite registration locations that some counties would have to provide.¹³⁴

In addition, a 1991 objection for the board of the Georgia Military College in Milledgeville blocked the state from changing the locally-elected board to a state-appointed body.¹³⁵ In denying a request for reconsideration, the DOJ identified circumstances that strongly implicated a racially discriminatory purpose:

Our objection . . . was based, in major part, upon concerns that this proposed change would deprive minority voters in the City of Milledgeville of an opportunity to elect candidates of their choice to a board which also governs the essentially local GMC preparatory school. These concerns were heightened by the controversy over low black enrollment at the preparatory school, its tuition charges, and the fact that the submitted change was proposed immediately after the election of the first black members of the GMC Board of Trustees in its history.¹³⁶

B. SECTION 5 LITIGATION

1. Section 5 Declaratory Judgment Actions

Section 5 provides that, as an alternative to making an administrative submission to the Attorney General, covered jurisdictions may institute a declaratory judgment action before the U.S. District Court for the District of Columbia in order to obtain judicial preclearance from a three-judge

¹³⁴ Feb. 11, 1992 Dunne Letter, *supra* note 123, at 1–2. An October 1994 objection to a portion of the state’s legislation implementing the National Voter Registration Act, 42 U.S.C. 1973gg (2006), on the grounds that it would violate Section 8(b)(2) of that Act, currently would be precluded on the basis of the Supreme Court’s decision in *Reno v. Bossier Parish School Board*, 520 U.S. 471 (1997). See Oct. 24, 1994 Patrick Letter, *supra* note 123.

¹³⁵ Mar. 11, 1991 Reynolds Letter, *supra* note 126, at 1–2 (continued by Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice, to Michael J. Bowers, Ga. Attorney Gen. (Oct. 15, 1991)). A 1989 consent decree in the Section 2 case *Barnes v. Baugh*, Civ. A. File No. 88-262-1-MAC (M.D. Ga. May 12, 1989), changed the system used to elect the board from at-large elections to a single-member district plan. The Supreme Court identified this type of change as potentially discriminatory as early as 1969:

In No. 26 an important county officer in certain counties was made appointive instead of elective. The power of a citizen’s vote is affected by this amendment; after the change, he is prohibited from electing an officer formerly subject to the approval of the voters. Such a change could be made either with or without a discriminatory purpose or effect; however, the purpose of [Section] 5 was to submit such changes to scrutiny.

Allen v. State Bd. of Elections, 393 U.S. 544, 569–70 (1969).

¹³⁶ Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice, to Michael J. Bowers, Ga. Attorney Gen., at 1 (Oct. 15, 1991) (on file with author) (continuing Mar. 11, 1991 Reynolds Letter, *supra* note 126). The letter went on to conclude that Georgia still had not met its burden of showing the absence of either discriminatory purpose or effect. See *id.* at 2.

court.¹³⁷ The D.C. District Court hears these cases *de novo*—without regard to any previous administrative determinations—and a right of direct appeal lies to the Supreme Court.¹³⁸ There were eight declaratory judgment actions arising from Georgia from 1982 onward, three of which resulted in reported decisions.

After the DOJ objected to Georgia's 1981 congressional redistricting plan, the State filed a declaratory judgment action, *Busbee v. Smith*, in the D.C. District Court.¹³⁹ The United States conceded that the proposed plan was not retrogressive within the meaning of *Beer v. United States*,¹⁴⁰ but opposed preclearance on the ground that the plan had a racially discriminatory purpose.¹⁴¹ The three-judge court agreed and denied preclearance, finding that the plan was intended to limit black voting strength in the Atlanta area to the greatest extent possible.¹⁴²

Busbee v. Smith was extremely important to the subsequent application of Section 5 by the DOJ because its summary affirmance was controlling precedent for the D.C. District Court—and, therefore, for the Department of Justice's administrative decisions—on the critical question of whether a non-retrogressive redistricting plan may be denied Section 5 preclearance on the grounds that it had a racially discriminatory purpose.¹⁴³ This holding was overruled in 2000 by the Supreme Court in the *Bossier II* case, which held that only a retrogressive purpose could support a Section 5 purpose objection.¹⁴⁴

Following the 2000 Census, the State of Georgia instituted a declaratory judgment action, *Georgia v. Ashcroft*,¹⁴⁵ seeking Section 5 judicial preclearance for its 2001 congressional, State Senate and State House redis-

¹³⁷ See 42 U.S.C. § 1973c(a) (2006).

¹³⁸ *Id.*; Department of Justice, About Section 5, http://www.usdoj.gov/crt/voting/sec_5/about.htm (last visited Mar. 12, 2008).

¹³⁹ 549 F. Supp. 494 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983).

¹⁴⁰ 425 U.S. 130 (1976).

¹⁴¹ This was the same position the DOJ had taken in its February 1982 objection letter. See Feb. 11, 1982 Congressional Letter, *supra* note 76, at 2–3.

¹⁴² *Busbee*, 549 F. Supp. at 518. The district court's findings about the intent of the plan are discussed *supra* Part I.A.2.

¹⁴³ The question presented in Georgia's Jurisdictional Statement in *Busbee* was "Whether a Congressional reapportionment plan that does not have the purpose of diminishing the existing level of black voting strength can be deemed to have the purpose of denying or abridging the right to vote on account of race within the meaning of Section 5 of the Voting Rights Act." Brief for the Federal Appellant at 28, *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000) (Nos. 98-405, 98-406), 1999 WL 133834 (quoting Georgia's Jurisdictional Statement in *Busbee v. Smith*, 459 U.S. 1166 (1983)).

¹⁴⁴ *Reno v. Bossier Parish Sch. Bd. (Bossier II)*, 528 U.S. 320 (2000). Somewhat surprisingly, the Supreme Court did not discuss the fact that it was overruling *Busbee*.

¹⁴⁵ 195 F. Supp. 2d 25 (D.D.C. 2002), *vacated*, 539 U.S. 461 (2003).

tricting plans, none of which had been submitted for administrative pre-clearance.¹⁴⁶ The Department of Justice did not contest preclearance of the congressional and State House plans (although private intervenors were permitted to do so), but it argued that the Senate plan was retrogressive due to reductions in the black percentages of three Senate districts (in Savannah, Albany and Macon) that were not offset elsewhere in the plan. The three-judge court denied preclearance to the Senate plan and precleared the congressional and State House plans.¹⁴⁷ A 2002 interim plan for use during the pendency of the State's appeal was precleared by the three-judge court without objection by the DOJ.¹⁴⁸

On appeal, the Supreme Court vacated the district court's judgment and remanded the case for further consideration, primarily based upon the Supreme Court's belief that Georgia had created a number of new "influence districts" that should be weighed against the retrogression in majority-black districts.¹⁴⁹ Ultimately the *Ashcroft* case was dismissed on remand following the decision of a three-judge federal court in Georgia, which found the population deviations in the 2002 interim plan—which were nearly identical to those in the 2001 plan—to be unconstitutional in a "one-person, one-vote" case.¹⁵⁰

Due to the extensive attention that the *Ashcroft* case has received in its own right, this report will not go into its broader implications here. It should be emphasized, however, that the Supreme Court did not reverse any of the district court's findings of racially polarized voting—in particular, the finding that voting was more polarized in local elections than in the statewide elections on which the State relied—or retrogression; indeed, the gist of the Supreme Court decision was that the State would have to produce evidence that it had compensated for the retrogression.¹⁵¹

¹⁴⁶ This was unprecedented and meant that, unlike most declaratory judgments actions, which are filed only after there already has been a Section 5 objection, the DOJ had no background information on the three plans when the case was filed.

¹⁴⁷ *Ashcroft*, 195 F. Supp. 2d at 130 (Judge Oberdorfer dissented with respect to the Senate plan).

¹⁴⁸ *Georgia v. Ashcroft*, 539 U.S. 461, 475 (2003).

¹⁴⁹ *Id.* at 483.

¹⁵⁰ *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), *aff'd*, 542 U.S. 947 (2004). The *Larios* court ultimately imposed a court-drawn remedy for both the State House and State Senate plans. *See Larios v. Cox*, 314 F. Supp. 2d 1357 (N.D. Ga. 2004).

¹⁵¹ The Court noted:

Like the dissent, we accept the District Court's findings that the reductions in black voting age population in proposed Districts 2, 12, and 26 to just over 50% make it marginally less likely that minority voters can elect a candidate of their choice in those districts, although we note that Georgia introduced evidence showing that approximately one-third of white voters would support a black candidate in those districts, and that the United States' own expert admitted that the results of statewide elections in Georgia show that "there would be a 'very

A 1995 Section 5 declaratory judgment decision, which concerned numerous changes to Georgia's elective judicial system, ended a sequence of private litigation in Georgia and Section 5 objections by the Attorney General.¹⁵² In July 1988, private plaintiffs filed a Section 5 enforcement action, which also raised Section 2 claims, with respect to legislation involving seventy-seven new judgeships and five judicial circuits enacted after November 1, 1964, but never submitted for Section 5 review.¹⁵³ This action prompted the State to make Section 5 submissions for most of the unprecleared changes. In August 1988, the DOJ precleared twenty-nine new judgeships and three new circuits, but requested more information regarding the remaining changes, to which the State did not fully respond.¹⁵⁴ In June 1989, the DOJ objected to forty-eight new judgeships and the redistricting of two judicial circuits.¹⁵⁵ In December 1989, the three-judge court held that the unprecleared changes were covered by Section 5 and considered what relief was required, settling on an order that allowed sitting judges to hold over in unprecleared seats, but blocked elections for seats that had not been precleared.¹⁵⁶ *Georgia v. Reno*¹⁵⁷ was filed in August 1990, seeking judicial preclearance for the creation of sixty-two superior court judgeships; the case appeared at one point to be mooted, but ulti-

good chance' that . . . African American candidates would win election in the reconstituted districts."

Ashcroft, 539 U.S. at 486 (citations omitted). The Court continued:

The dissent's analysis presumes that we are deciding that Georgia's Senate plan is not retrogressive. To the contrary, we hold only that the District Court did not engage in the correct retrogression analysis because it focused too heavily on the ability of the minority group to elect a candidate of its choice in the majority-minority districts. While the District Court engaged in a thorough analysis of the issue, we must remand the case for the District Court to examine the facts using the standard that we announce today. We leave it for the District Court to determine whether Georgia has indeed met its burden of proof.

Id. at 490.

¹⁵² See *Georgia v. Reno*, 881 F. Supp. 7 (D.D.C. 1995).

¹⁵³ *Brooks v. State Bd. of Elections*, 775 F. Supp. 1470, 1472-74 (S.D. Ga. 1989), *aff'd*, 498 U.S. 916 (1990).

¹⁵⁴ *Id.* at 1473-74.

¹⁵⁵ *Id.* at 1474; see also June 16, 1989 Turner Letter, *supra* note 119, at 2 (withdrawn in part and continued in part by Apr. 25, 1990 Dunne Letter, *supra* note 119).

¹⁵⁶ *Brooks*, 775 F. Supp. at 1484. In the course of its decision, the three-judge court found that the addition of new seats within Georgia's judicial system had the potential to discriminate against black voters in violation of Section 5 due to the use of numbered post and at-large elections by majority vote:

We think that, given Georgia's majority-vote, designated-post, and circuit-wide election rules, the creation of new judgeships does have the potential for discrimination. Where more than one judicial post exists in a given circuit, these election rules require a candidate to run for a specific seat. Georgia law thus precludes the alternative system where all candidates compete against each other and where judgeships are awarded to the highest vote-getters out of the field of candidates.

Id. at 1479. District Judge Dudley Bowen dissented from this aspect of the majority opinion. *Id.* at 1486-90 (Bowen, J., concurring in part and dissenting in part).

¹⁵⁷ *Reno*, 881 F. Supp. at 8.

mately proceeded to trial in 1994.¹⁵⁸ In 1995, the D.C. District Court held that the changes before it were entitled to Section 5 preclearance.¹⁵⁹ Following the D.C. District Court's decision, Georgia filed two additional declaratory judgment actions in June and July of 1995, both of which were dismissed after administrative preclearance of the changes at issue in September and December 1995, respectively.¹⁶⁰ The objections to those judicial changes that were not precleared by the court were withdrawn by the DOJ.¹⁶¹

The three other Section 5 declaratory judgment actions filed by Georgia jurisdictions from 1982 onward were dismissed. A case filed in January 1990 by the city of Augusta was dismissed as moot in August 1992.¹⁶² A suit filed in October 1983 by the Baldwin County School District was dismissed in September 1984, after a Section 5 administrative submission was precleared to replace the challenged change.¹⁶³ A February 1986 suit by the Brunswick-Glynn County Charter Commission was dismissed in July 1986 for lack of standing.¹⁶⁴

¹⁵⁸ On August 30, 1993, Acting Assistant Attorney General James P. Turner had withdrawn the judicial objections interposed to date, subject to the approval of a consent decree in *Brooks v. Georgia State Board of Elections*. See Letter from James P. Turner, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Michael J. Bowers, Ga. Attorney Gen., at 4 (Aug. 30, 1993) (on file with author). The consent decree provided, among other changes, for the appointment of a number of minority judges, but it was rejected by the court, leaving the objections in effect for the time being.

¹⁵⁹ *Reno*, 881 F. Supp. at 11. Judge Norma Johnson dissented from the majority decision in *Reno*, which was not appealed. See *id.* at 8. The D.C. District Court adopted a narrow scope of review of the new judicial seats, summarily dismissing the DOJ's argument that there was a racially discriminatory purpose in the State's choice to reincorporate the numbered post, at-large and majority-vote features in the new positions; this echoed the dissent of Judge Bowen and rejected the majority's reasoning in the *Brooks* case. See *id.* at 14. The D.C. District Court appears to have fashioned an exception for judicial changes to *City of Lockhart v. United States*, 460 U.S. 125, 131-32 (1983) (holding that when new seats are added to an electoral system, the entire system must be examined). The D.C. District Court also held that Congress did not intend a violation of Section 2 of the Voting Rights Act to justify the denial of Section 5 preclearance. See *Reno*, 881 F. Supp. at 12-13. This interpretation later was adopted by the Supreme Court in *Reno v. Bossier Parish School Board (Bossier I)*, 520 U.S. 471 (1997).

¹⁶⁰ See *Georgia v. Reno*, No. 95-1379 (D.D.C. filed July 25, 1995) (twenty-nine additional judgeships); *Georgia v. Reno*, No. 95-1046 (D.D.C. filed June 1, 1995) (ten additional judgeships).

¹⁶¹ In *Haith v. Martin*, 618 F. Supp. 410 (E.D.N.C. 1985), *aff'd mem.*, 477 U.S. 901 (1986), which held that judicial changes require Section 5 preclearance, the district court noted that the DOJ at one time had taken the position that they did not. The application of vote dilution principles to judicial elections at one point appeared to be relatively straightforward. See *Houston Lawyers' Ass'n v. Tex. Attorney Gen.*, 501 U.S. 419 (1991). But the Supreme Court later denied *certiorari* in several court of appeals decisions that all but overruled *Houston Lawyers*.

¹⁶² *City Council of Augusta v. United States*, No. 90-0171 (D.D.C. Aug. 24, 1992).

¹⁶³ *Baldwin County Sch. Dist. v. United States*, No. 83-3240 (D.D.C. Sept. 13, 1984).

¹⁶⁴ *Brunswick-Glynn County Charter Comm'n v. United States*, No. 86-0309 (D.D.C. July 22, 1986).

2. Section 5 Enforcement Actions

Section 5 enforcement actions have continued to play an important role in ensuring that Georgia and its subjurisdictions comply with the preclearance requirements of Section 5.¹⁶⁵ For its 2006 report, the staff of the National Commission on the Voting Rights Act reported seventeen successful Section 5 enforcement actions (raising eighteen successful Section 5 claims) in Georgia after 1982.¹⁶⁶ These included three cases against the state of Georgia: *Bryant (Hill) v. Miller*,¹⁶⁷ *Brooks v. Georgia Board of Elections*¹⁶⁸ and *Project Vote! v. Ledbetter*.¹⁶⁹ There were successful Section 5 enforcement actions against one county,¹⁷⁰ three cities¹⁷¹ and eleven county boards of education.¹⁷² In addition, there was a successful private

¹⁶⁵ Either the Attorney General or residents of the covered jurisdictions may bring these actions against covered jurisdictions that have implemented voting changes without having first obtained Section 5 preclearance. These cases are heard by three-judge courts in the covered states; however, the jurisdiction of such courts is limited to whether the challenged practice is a covered change within the meaning of Section 5, whether Section 5 preclearance has been obtained and, if not, what remedy is appropriate. The presumptive remedy is to issue an injunction against future use of the unprecleared practice and to make an equitable determination as to further relief. Many courts delay a final remedy while allowing the defendant jurisdiction an opportunity to obtain Section 5 preclearance, either from the D.C. District Court or the Attorney General.

¹⁶⁶ See NAT'L COMM'N ON THE VOTING RIGHTS ACT, PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK, 1982–2005 130 tbl.4 (2006). I have relied upon the list of those cases provided by the staff of the Commission unless otherwise noted. See also LAUGHLIN MCDONALD & DANIEL LEVITAS, AM. CIVIL LIBERTIES UNION, THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT; VOTING RIGHTS LITIGATION, 1982–2006: A REPORT OF THE VOTING RIGHTS PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION (2006), available at <http://www.votingrightsact.org/report/finalreport.pdf> (providing additional details about Georgia VRA cases). A Section 5 enforcement action is counted as successful if unprecleared changes are submitted for preclearance or abandoned.

¹⁶⁷ Civ. A. File No. 1:92-01042-ODE (N.D. Ga. June 2, 1992).

¹⁶⁸ 775 F. Supp. 1470 (S.D. Ga. 1989), *aff'd*, 498 U.S. 916 (1990). *Brooks*, which involved the implementation of new, unprecleared judicial seats, is discussed *supra* Part I.B.1.

¹⁶⁹ Civ. A. File No. C86-1946A (N.D. Ga. Sept. 12, 1986); see also MCDONALD & LEVITAS, *supra* note 166, at 168.

¹⁷⁰ See *Presley v. Coffee County Bd. of Comm'rs*, Civ. A. File No. 592-124 (S.D. Ga. Mar. 16, 1994); see also MCDONALD & LEVITAS, *supra* note 166, at 267. The *Presley* case also included successful Section 2 claims discussed *infra* Part III.

¹⁷¹ See *Chatman v. Spillers*, 44 F.3d 923 (11th Cir. 1995) (city of Butler, Taylor County); *Woodard v. Mayor & Town Council*, Civ. A. File No. 387-027 (S.D. Ga. 1990) (city of Lumber City, Telfair County); *Gresham v. Harris*, 695 F. Supp. 1179 (N.D. Ga. 1988) (city of Keysville, Burke County); see also MCDONALD & LEVITAS, *supra* note 166, at 228, 230–31, 430, 434. One Section 5 objection followed from the *Chatman* case, and two Section 5 objections followed from the *Woodward* case.

¹⁷² See *Hughley v. Adams*, 667 F.2d 25 (11th Cir. 1982) (Pike County); *Lyde v. Glynn County Bd. of Elections*, Civ. A. File No. 204-091 (S.D. Ga. 2005) (Glynn County); *Presley*, Civ. A. File No. 592-124 (Coffee County); *NAACP v. Culpepper*, Civ. A. File No. 684-21 (S.D. Ga. Dec. 12, 1986) (Toombs County); *Culver v. Krulic*, Civ. A. File No. 484-139 (S.D. Ga. 1984) (Screven County); *Boddy v. Hall*, Civ. A. File No. 82-406-1-MAC (M.D. Ga. 1983) (Baldwin County); *Keebler v. Burch*,

Section 5 enforcement action against the Bibb County School Board.¹⁷³ While some of these actions resulted in the defendant simply abandoning the unprecleared changes, the *Brooks*, *Woodward* and *Chatman* cases led to Section 5 objections once the changes had been submitted.

II. LITIGATION UNDER SECTION 2 OF THE VOTING RIGHTS ACT

The preceding discussion described how Section 5 of the Voting Rights Act prevented the use of new discriminatory voting practices and procedures at all levels of Georgia government and in varied aspects of the election system, with perhaps the greatest impact at the local level. Section 5 operates in parallel, however, with Section 2 of the Voting Rights Act, as amended in 1982.¹⁷⁴ When a jurisdiction changes its election system in response to a Section 2 court order or to avoid Section 2 liability, Section 5 helps ensure that succeeding redistricting plans will not water down the remedy. Just as most Section 5 objections in Georgia have been at the local level, most Section 2 cases have been brought at the local level.

Prior to the 1982 amendments to Section 2, challenges to election systems that diluted black voting strength were brought under the Constitution and the original, coextensive provision of Section 2 enacted in 1965. In *Rogers v. Lodge*,¹⁷⁵ the Supreme Court found that the egregious pattern of discrimination against black citizens in Burke County was sufficient to infer that the at-large system was being maintained for an unconstitutional, racially discriminatory purpose.

The Section 2 vote dilution cases brought after the 1982 amendments against Georgia counties, school boards and cities using at-large election systems are remarkable for their number and their geographic scope. Private litigants by far played the greatest role in bringing these challenges, which had a tremendous effect upon counties and cities in changing their method of election.

The 2006 report by the National Commission on the Voting Rights Act identified numerous successful Section 2 enforcement actions in Geor-

Civ. A. File No. 284-26 (S.D. Ga. May 22, 1984) (Wayne County); Marion County VEP v. Hicks, Civ. A. File No. 84-117-N (N.D. Ga. Sept. 28, 1984) (Marion County); Meriwether County VEP v. Hicks, Civ. A. File No. 84-117-N (Sept. 28, 1984) (Meriwether County); Carter v. Taylor County Bd. of Educ., Civ. A. File No. 84-81-COL (M.D. Ga. Feb. 28, 1986) (Taylor County); Smith v. Gillis, Civ. A. File No. 385-42 (S.D. Ga. 1985) (Treutlen County); see also MCDONALD, *supra* note 15, at 182–83 (discussing the above cited cases).

¹⁷³ Lucas v. Townsend, 486 U.S. 1301 (1988) (not included in *Protecting Minority Voters*).

¹⁷⁴ See 42 U.S.C. § 1973 (2006).

¹⁷⁵ 458 U.S. 613 (1982).

gia after 1982.¹⁷⁶ These cases involve reported and unreported Section 2 decisions resolved favorably to minority voters. The majority were resolved by settlements, which could involve either a formal consent decree or an informal agreement to dismiss the case following the adoption of remedial legislation (and Section 5 preclearance).

Eleven counties gave rise to multiple Section 2 cases (for a total of twenty-four cases). In Coffee County and Jenkins County, Section 2 cases resulted in changes to the county commissions, the county school boards and one city in each County.¹⁷⁷ In nine other counties (Baldwin, Butts, Charlton, Greene, Mitchell, Taylor, Telfair, Wilcox and Wilkes), Section 2 cases resulted in changes to two different jurisdictions' methods of election.¹⁷⁸ Section 2 suits have resulted in the adoption of single-member

¹⁷⁶ See NAT'L COMM'N ON THE VOTING RIGHTS ACT, *supra* note 166, at 131 tbl.5. I have relied on the list of those cases provided by the staff of the Commission unless otherwise noted. The year of the adoption of the new election system, as opposed to year of filing, is provided in the footnotes, unless otherwise noted. Additional details about many of these cases are provided in MCDONALD & LEVITAS, *supra* note 166.

¹⁷⁷ A Section 2 suit in Coffee County, *Presley*, Civ. A. File No. 592-124, resulted in the adoption of single-member districts in 1994 for the city of Douglas, the Coffee County Commission and the Coffee County Board of Education. In Jenkins County a suit, *Green v. Bragg*, Civ. A. File No. 691-078 (S.D. Ga. 1991), resulted in the 1993 adoption of mixed multi-member and single-member district plans for the city of Millen and the Jenkins County Commission, and a single-member district plan for the Jenkins County School District. See MCDONALD & LEVITAS, *supra* note 166, at 329–31.

¹⁷⁸ In Baldwin County, cases against the Baldwin County Commission (*Boddy v. Hall*) and the city of Milledgeville (*NAACP v. City of Milledgeville*) resulted in a change to single-member districts in 1983. MCDONALD & LEVITAS, *supra* note 166, at 201. In Butts County, cases against the county commission (*Brown v. Bailey*) and the city of Jackson (*Brown v. Bailey*) resulted in a change to single-member districts in 1986. *Id.* at 236–37. In Charlton County, a suit against the county commission (*Smith v. Carter*) resulted in a change to single-member districts in 1986, and a suit against the city of Folkston (*Stafford v. Mayor & Council of Folkston*) resulted in a change to multi-member districts in 1997. *Id.* at 255. In Greene County, a Section 2 suit (*Bacon v. Higdon*) resulted in the adoption in 1986 of mixed plans (with single-member districts and at-large chairs) for the county commission and the county board of education. *Id.* at 312. In Mitchell County, a suit against the city of Camilla (*Brown v. City of Camilla*) led to the adoption of a single-member district system in 1985, and a suit against the city of Pelham (*McCoy v. Adams*) led to the adoption of a multi-member district system in 1986. *Id.* at 363. In Taylor County, a 1986 suit against the city of Butler (*Chatman v. Spillers*) was resolved in 1996 with the adoption of a plan using two multi-member districts and a mayor, and a suit against the Taylor County Commission (*Carter v. Jarrell*) resulted in the adoption of a single-member district system in 1985. *Id.* at 429–31. In Telfair County, a 1987 suit (*Woodard v. Mayor & Council of Lumber City*) resulted in the 1990 adoption of a mixed plan with two multi-member districts and one at-large seat for the city of Lumber city, and another 1987 suit (*Clark v. Telfair County*) resulted in the 1988 adoption of a county commission plan with five single-member districts. *Id.* at 152–53, 437–38. In Wilcox County, Section 2 suits resulted in the adoption of single-member district systems in 1986 for the city of Rochelle (*Dantley v. Sutton*), and in 1987 for the Wilcox County Commission (*Teague v. Wilcox County Georgia*). *Id.* at 471–74. In Wilkes County, Section 2 suits led to the 1992 adoption of a mixed plan with two multi-member districts for the city of Washington (*Avery v. Mayor & Council of City of Washington*), and the 1986 adoption of a mixed plan using four single-member districts for the Wilkes County Board of Education (*United States v. Wilkes County Board of Education*). *Id.* at 476.

plans for jurisdictions in twenty-three other counties, including twelve county commissions,¹⁷⁹ ten cities¹⁸⁰ and one county board of education.¹⁸¹ Section 2 suits have also resulted in the adoption of mixed plans (including some single-member districts) for jurisdictions in sixteen additional counties, including five county commissions,¹⁸² two county school boards¹⁸³ and nine cities.¹⁸⁴ In addition, Section 2 suits have resulted in the adoption of multi-member district plans for cities in five additional counties.¹⁸⁵

¹⁷⁹ These included the county commissions for Camden County (*Baker v. Gay*, 1985); Cook County (*Cook County VEP v. Walker*, 1985); Crawford County (*Raines v. Hutto*, 1985); Effingham County (*LOVE v. Conaway*, 1984); Evans County (*Concerned Citizens for Better Government v. DeLoach*, 1984); Hart County (*Mayfield v. Crittendon*, 1989); Long County (*Glover v. Long County*, 1987); Macon County (*Macon County VEP v. Bentley*, 1985); Marion County (*United States v. Marion County*, 2000); Screven County (*Culver v. Krulic*, 1985); Tallnall County (*Carter v. Tootle*, 1984); and Wheeler County (*Howard v. Wheeler County*, 1993). MCDONALD, *supra* note 15, at 182–83; MCDONALD & LEVITAS, *supra* note 166, at 173, 369, 418, 443.

¹⁸⁰ These included the governing bodies for the city of Cochran (Bleckley County) (*Hall v. Holder*, 1986); the city of Eastman (Dodge County) (*Brown v. McGriff*, 1988); the city of Wrightsville (Johnson County) (*Wilson v. Powell*, 1983); the city of Valdosta (Lowndes County) (*United States v. Lowndes County*, 1984); the city of Colquitt (Miller County) (*Merritt v. City of Colquitt*, 2000); the city of Madison (Morgan County) (*Edwards v. Morgan County Board of Commissioners*, 1992); the city of Griffin (Spaulding County) (*Reid v. Martin*, 1986); the city of Lyons (Toombs County) (*Maxwell v. Moore*, 1986); the city of Soperton (Treutlen County) (*Smith v. Gillis*, 1986); and the city of Jesup (Wayne County) (*Freeze v. Jesup*, 1986). MCDONALD & LEVITAS, *supra* note 166, at 302, 364, 383, 427, 465, 485.

¹⁸¹ Ben Hill County School District (*Vereen v. Ben Hill County*, 1993). *Id.* at 163.

¹⁸² These included mixed plans with single-member districts and at least one at-large seat for five county commissions: Jefferson County (*Tomlin v. Jefferson County Board of Commissioners*, 1983); Lamar County (*Strickland v. Lamar County*, 1987); Tift County (*Mims v. Tift County*, 1984); Monroe County (*Simmons v. Monroe County Commission*, 1987); and Webster County (*Nealy v. Webster County*; 1990). *Id.* at 172, 343, 352; MCDONALD, *supra* note 15, at 182.

¹⁸³ These included mixed plans with single-member districts and at least one at-large seat for the governing bodies of seven cities: the city of Carrolton (Carroll County) (*Carrollton Branch NAACP v. Stallings*, 1985); the city of Newnan (Coweta County) (*Rush v. Norman*, 1984); the city of Cordele (Crisp County) (*Dent v. Culpepper*, 1988); the city of Decatur (DeKalb County) (*Thrower v. City of Decatur*, 1984); the city of Warner Robins (Houston County) (*Green v. City of Warner Robins*, 1993); the city of Warrenton (Warren County) (*NAACP v. Haywood*, 1989); and the city of Waycross (Ware County) (*Ware County VEP v. Parks*, 1985). Mixed plans with single-member districts and multi-member districts were also adopted for the governing bodies of two other cities: the city of Douglasville (Douglas County) (*Simpson v. Douglasville*, 1999); and the city of Monroe (Walton County) (*United States v. City of Monroe*, 962 F. Supp. 1501 (1997), *rev'd*, 522 U.S. 34 (1997)). MCDONALD & LEVITAS, *supra* note 166, at 164, 292, 295, 313, 340, 481; MCDONALD, *supra* note 15, at 99, 183.

¹⁸⁴ These included mixed plans with single-member districts and at least one at-large seat for the McIntosh County School District (*Williams v. McIntosh County*, Civ. A. File No. 95-00090-AAA (S.D. Ga. 1996)) and the Sumter County School District (*Edge v. Sumter County School District*, 1986). MCDONALD & LEVITAS, *supra* note 166, at 431.

¹⁸⁵ These included the city of Statesboro (Bulloch County) (*Love v. Dea*, 1983); the city of Moultrie (Colquit County) (*Cross v. Baxter*, 1985); the city of Augusta (Richmond County) (*United States v. City of Augusta*, 1988) (mixed multi-member districts); the city of Donaldsonville (Seminole County) (*Moore v. Shingler*, 1985); and the city of LaGrange (Troup County) (*Cofield v. City of LaGrange*, 1997). *Id.* at 231, 287, 411, 421, 467.

However, two reported cases arising from Georgia in the 1990s took a limited view of Section 2. In *Holder v. Hall*,¹⁸⁶ the Supreme Court held that Section 2 could not be used to challenge the single-commissioner form of government used in Bleckley County (although the plaintiffs had been successful in persuading the lower courts of a Section 2 violation). In *Brooks v. Miller*,¹⁸⁷ the Eleventh Circuit affirmed a district court's finding that the state's 1964 majority vote requirement did not violate Section 2 or the Constitution. The court took a very narrow view of the legislature's intent, discounting evidence of racially discriminatory purpose in similar legislation proposed at about the same time, and focused on the present-day effect of the state majority vote requirement, giving the same weight to elections in majority-black districts that had been drawn to remedy or avoid Section 2 violations as elections in majority-white at-large jurisdictions.¹⁸⁸

The Department of Justice has also brought five cases charging that the defendant counties engaged in a practice of hiring poll workers that violated Section 2, each of which was settled.¹⁸⁹

Section 2 cases since 1982 have played a major role in changing the political landscape—especially at the local level—across Georgia. They also bear out the need for Section 5. A Section 2 claim against an at-large system or redistricting plan must meet the three preconditions set out in *Thornburg v. Gingles*: geographic compactness, cohesive minority voting and racially polarized voting that usually results in the defeat of minority voters' candidate(s) of choice.¹⁹⁰ While a jurisdiction may have many reasons to settle a lawsuit, it is likely that many, if not most, of the jurisdictions that settled these lawsuits did so because they concluded that they were vulnerable to a Section 2 claim, including a finding of racially polarized voting. The presence of racially polarized voting, in turn, is important both as a predicate to many Section 5 objections and as an indicator of potential racial discrimination in the political process.

¹⁸⁶ 512 U.S. 874 (1994).

¹⁸⁷ 158 F.3d 1230 (11th Cir. 1998).

¹⁸⁸ See *id.* at 1236–42.

¹⁸⁹ See *United States v. Johnson County*, Civ. A. File No. 393-45 (S.D. Ga. 1993); *Cook v. Randolph County*, Civ. A. File No. 93-113-COL (M.D. Ga. 1993); *United States v. Talbot County*, Civ. A. File No. 4:93-00095-HL (M.D. Ga. 1993); *United States v. Screven County*, Civ. A. File No. 692-154 (S.D. Ga. Dec. 16, 1992); *United States v. Brooks County*, Civ. A. File No. 6:90-00105-HL (M.D. Ga. 1990); see also MCDONALD & LEVITAS, *supra* note 166, at 403, 407; DEP'T OF JUSTICE, VOTING SECTION CASES IN WHICH THE UNITED STATES' PARTICIPATION BEGAN SINCE OCTOBER 1, 1976 3 (2005) (on file with author).

¹⁹⁰ *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986).

III. OTHER SIGNIFICANT LITIGATION

In addition to the litigation and Section 5 objections discussed above, there have been several voting rights lawsuits since 1982 brought under the Constitution that must be mentioned.

A. PHOTO I.D. LITIGATION

One of the most contentious and extraordinary pieces of legislation affecting the right to vote in Georgia in recent times did not result in a Section 5 objection. Act No. 53 of 2005¹⁹¹ amended the state's election code to impose a photographic identification requirement for all persons voting in person in the State of Georgia. The state previously had required some form of identification for voting in person, but the new legislation significantly narrowed the types of identification that could be used.¹⁹² The deliberations regarding this legislation were extraordinarily contentious; the Georgia Black Legislative Caucus was nearly unanimous in opposing the legislation.¹⁹³ The legislation was precleared by the DOJ on August 26, 2005.¹⁹⁴

Private plaintiffs, including the Georgia Legislative Black Caucus, filed suit in the Northern District of Georgia alleging several constitutional and statutory claims.¹⁹⁵ On October 18, 2005, the district court issued an order and preliminary injunction against the use of Act No. 53, finding that

¹⁹¹ 2005 Ga. Laws 53 (codified as amended at GA. CODE ANN. § 21-2-417 (2007)).

¹⁹² *See id.*

¹⁹³ *See* MCDONALD & LEVITAS, *supra* note 166, at 185.

¹⁹⁴ Dan Eggen, *Criticism of Voting Law was Overruled: Justice Dept. Backed Georgia Measure Despite Fears of Discrimination*, WASH. POST, Nov. 17, 2005, at A1. The Department of Justice's administrative review of the Georgia photo I.D. requirement was unusual in several regards. An internal recommendation memorandum prepared by the Voting Section staff was published in *The Washington Post* after the submission had been precleared, providing an unprecedented look at the Department's Section 5 review of a major and controversial submission. The submission was precleared by the Chief of the Voting Section on the same day as new factual information had been received by the Department of Justice, making it doubtful that the Section staff had a reasonable opportunity to review that information. From newspaper accounts, it appears that the decision to preclear the submission had overridden the recommendation of the Section's Deputy Chief and a senior trial attorney who had prepared the recommendation. Further, it appeared that this recommendation was not forwarded to the Civil Rights Division's political appointees, which typically would occur under these circumstances, even if the Section Chief believed that preclearance was the appropriate outcome. *See id.*

¹⁹⁵ *See* Common Cause/Ga. v. Billups, 406 F. Supp. 2d 1326 (N.D. Ga. 2005). These claims did not involve the substantive standards of Section 5. Under current law, there is no private right of action available to private plaintiffs to challenge Section 5 administrative determinations, either in the District Court for the District of Columbia, where covered jurisdictions can go to obtain judicial preclearance of voting changes, or in the district courts of the respective states. *See* Morris v. Gressette, 432 U.S. 491 (1977). The circumstances present in this submission suggest a need for Congress to consider making such a private right of action available.

the plaintiffs were likely to prevail on both their claim that the photo I.D. requirement lacked a rational basis, as well as their claim that the photo I.D. requirement constituted an unconstitutional poll tax.¹⁹⁶ The State's tenuous justification for this bill weighed heavily in the court's decision.¹⁹⁷ The State immediately appealed the district court's injunction to the Eleventh Circuit, which denied a stay, meaning that the injunction was in effect for the State's 2005 municipal elections.¹⁹⁸ The State has adopted new legislation to replace Act 53,¹⁹⁹ which, as of March 2006, had been submitted for Section 5 preclearance; the *Common Cause* plaintiffs have moved to amend their pleadings to challenge the new legislation while awaiting the preclearance decision.²⁰⁰

B. SHAW LITIGATION

Beginning with the Supreme Court's decision in *Shaw v. Reno*,²⁰¹ the federal courts shifted toward a more limited and skeptical view of what steps could be taken to improve minority voters' electoral prospects. One of the signal examples of this trend arose in Georgia as a constitutional challenge to the majority-black Eleventh Congressional District. The three-judge district court held that the Eleventh District was an unconstitutional racial gerrymander; on appeal, the Supreme Court affirmed, holding that the district subordinated traditional districting principles to racial con-

¹⁹⁶ *Common Cause*, 406 F. Supp. 2d at 1376–77.

¹⁹⁷ The district court concluded as follows:

Finally, the Court must examine the extent to which the State's interest in preventing voter fraud makes it necessary to burden the right to vote. As discussed above, the Photo ID requirement is not narrowly tailored to the State's proffered interest of preventing voter fraud, and likely is not rationally based on that interest. Secretary of State Cox testified that her office has not received even one complaint of in-person voter fraud over the past eight years and that the possibility of someone voting under the name of a deceased person has been addressed by her Office's monthly removal of recently deceased persons from the voter rolls. Further, the Photo ID requirement does absolutely nothing to preclude or reduce the possibility for the particular types of voting fraud that are indicated by the evidence: voter fraud in absentee voting, and fraudulent voter registrations. The State imposes no Photo ID requirement or absolute identification requirement for registering to vote, and has removed the conditions for obtaining an absentee ballot imposed by the previous law. In short, HB 244 opened the door wide to fraudulent voting via absentee ballots. Under those circumstances the State Defendants' proffered interest simply does not justify the severe burden that the Photo ID requirement places on the right to vote. For those reasons the Court concludes that the Photo ID requirement fails even the *Burdick* test.

...

In reaching this conclusion, the Court observes that it has great respect for the Georgia legislature. The Court, however, simply has more respect for the Constitution.

Id. at 1366, 1376.

¹⁹⁸ MCDONALD & LEVITAS, *supra* note 166, at 191.

¹⁹⁹ *Id.*

²⁰⁰ *See Common Cause/Ga. v. Billups*, 504 F. Supp. 2d 1333, 1337–39 (N.D. Ga. 2007).

²⁰¹ 509 U.S. 630 (1993).

siderations that were not required by the Voting Right Act.²⁰² In arriving at this conclusion, the majority of the sharply-divided Court criticized the DOJ for its Section 5 objections that had influenced the adoption of the plan.²⁰³ The *Miller* plaintiffs then challenged the majority-black Second Congressional District, which also was found unconstitutional, and the district court imposed a remedial redistricting plan after the legislature failed to enact a new plan; this was affirmed by the Supreme Court in *Abrams v. Johnson*.²⁰⁴ The *Miller* plaintiffs also challenged the State Senate and State House redistricting plans as racial gerrymanders; after the legislature redrew the two plans, the DOJ objected to both in March 1996, but withdrew the objections in October 1996 after a settlement of the case.²⁰⁵ In May 1996, the district court had imposed interim remedial redistricting plans largely based upon the state's 1995 plans; again, the district court was critical of the DOJ's 1992 Section 5 objections.²⁰⁶

Although *Shaw* and *Miller* occasioned substantial scholarly comment and concern as to how they would affect the post-2000 redistricting cycle, in retrospect, it appears that their effect was far less than expected, at least in terms of litigation raising *Shaw* challenges to new redistricting plans.²⁰⁷

²⁰² *Miller v. Johnson*, 515 U.S. 900 (1995).

²⁰³ *See id.* at 917–18. The DOJ did not appeal the *Miller* district court's factual findings about its so-called maximization policy. It is beyond the scope of this report to address that issue with respect to the *Miller* litigation, but the preceding review of all redistricting objections in Georgia during the 1990s demonstrates that there is little empirical basis—apart from the findings in the *Miller* cases—to support the conclusion that a “maximization policy” was enforced there. There were only three local Georgia redistricting objections during all of the 1990s; had there been a “maximization policy” in effect, one would expect to have seen many more objections, given the number of redistrictings. Of those three objections, one was clearly retrogressive in nature, and the other two involved gerrymandered district boundaries intended to limit black voting strength—which the Supreme Court had summarily affirmed as violating Section 5 in *Busbee v. Smith*. The *Busbee* district court specifically had cautioned that “[t]he Court's decision does not require the State of Georgia to maximize minority voting strength in the Atlanta area. The State is free to draw the districts pursuant to whatever criteria it deems appropriate so long as the effect is not racially discriminatory and so long as racially discriminatory purpose is absent from the process.” *Busbee v. Smith*, 549 F. Supp. 494, 518 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983). Only if one stretches the term to include any objection to a non-retrogressive redistricting plan could these objections be considered evidence of maximization; and even so, two cases hardly comprise a policy.

²⁰⁴ 521 U.S. 74 (1997).

²⁰⁵ *See* Mar. 15, 1996 Pinzler Letter, *supra* note 76, at 11 (withdrawn October 15, 1996). While recognizing that changes would be required in order to comply with the standards set out by the Supreme Court, the letter concluded that the state had reduced minority voting strength beyond what was necessary to remedy the constitutional violations.

²⁰⁶ *Johnson v. Miller*, 929 F. Supp. 1529, 1535–36 (S.D. Ga. 1996).

²⁰⁷ The 2002 objection to the Putnam County redistricting plan followed a *Shaw* suit in which the county's 1992 redistricting plan was found unconstitutional, requiring the county's 1982 plan to be used as the Section 5 benchmark. *See Clark v. Putnam County*, 293 F.3d 1261 (11th Cir. 2002); *Abrams*, 521 U.S. at 96–98.

IV. FEDERAL OBSERVER COVERAGE

Under Sections 6²⁰⁸ and 8²⁰⁹ of the Voting Rights Act, the Department of Justice can dispatch federal observers to monitor voting in the polls in Section 5 covered jurisdictions. Data from the Department of Justice show a significantly increased level of federal observer activity in Georgia after 1982, both in the number of elections at which observers were present as well as the counties to which observers were sent.²¹⁰

Federal observers were present for a total of eighty-seven elections in twenty-eight different Georgia counties since 1965, among which 65.5% occurred from 1982 onward.²¹¹ Eleven of the twenty-eight counties that had elections covered by federal observers post-1982 had not previously been covered,²¹² nine had elections covered both before and after 1982²¹³ and eight had elections covered only before 1982.²¹⁴

V. LANGUAGE MINORITY ISSUES

Because the 2000 Census showed that the total Latino population in Georgia had increased substantially since 1990,²¹⁵ there was some expectation that one or more Georgia counties would be covered for Spanish-language under the 2002 determinations for Section 203 of the Voting Rights Act.²¹⁶ However, according to the reported statewide Section 203 determination data and selected county-level data, neither the state nor any of its counties met the triggers for Section 203 coverage.²¹⁷

²⁰⁸ 42 U.S.C. § 1973d (repealed 2006).

²⁰⁹ *Id.* § 1973f.

²¹⁰ See DEP'T OF JUSTICE, GEOGRAPHIC PUBLIC LISTING: ELECTIONS IN ALL STATES, DURING ALL DATES 9–13 (Nov. 10, 2003). Each county/election combination for which federal observers were present is counted as a separate election. For example, observers in four counties in a single November general election would be counted as four elections.

²¹¹ *See id.*

²¹² *See id.* (Baldwin, Brooks, Burke, Chattahoochee, Jefferson, McIntosh, Pike, Randolph, Talbot, Twiggs and Worth Counties).

²¹³ *See id.* (Baker, Calhoun, Johnson, Meriwether, Peach, Stewart, Sumter, Taliferro and Telfair Counties).

²¹⁴ *See id.* (Bulloch, Early, Hancock, Lee, Mitchell, Screven, Terrell and Tift Counties).

²¹⁵ See U.S. Census Bureau, 2000 Census Summary File 1, at tbl.P4, available at <http://factfinder.census.gov> (last visited Mar. 14, 2008); U.S. Census Bureau, 1990 Census Summary File 1, at tbl.P008, available at <http://factfinder.census.gov> (last visited Mar. 14, 2008).

²¹⁶ See Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48,871 (July 26, 2002).

²¹⁷ See U.S. Census Bureau, Voting Rights Determination Data, available at http://www2.census.gov/census_2000/datasets/determination (last visited Mar. 14, 2008). Section 203, as amended in 1982, contains three “triggers” for coverage. See 42 U.S.C. § 1973aa-1a (2006). First, a state or political subdivision will be covered if more than 5% of its voting age citizens of a single lan-

At the statewide level, the Census Bureau reported data for Latinos, total Asian Americans and twelve single-language Asian groups, and total American Indians and eleven single-language Indian groups.²¹⁸ No single language-minority LEP group made up more than 0.5% of the state's voting age citizens, well short of triggering any statewide coverage.²¹⁹

At the county level, only Latinos constituted more than 1% of the voting age population and were members of a single language minority group (one-fifth of the 5% trigger), and/or contained more than 2000 LEP voting age citizens of a single language minority group (one-fifth of the 10,000 trigger) in any of the state's counties.²²⁰ While some of the counties had appreciable numbers or concentrations of Latino LEP voting age citizens, none could be said to have "just missed" being covered. The recent dynamic population growth patterns in Georgia do suggest, however, that counties such as Gwinnett and Fulton are likely to be covered in the next set of Section 203 determinations if the current criteria are extended.

Of course, there is more than just the issue of Section 203 coverage. There presently are two Hispanic members of the Georgia House and one Hispanic Senator.²²¹ They were elected from districts in which the Latino share of the voter registration is below 5%, which means they were elected with substantial support from non-Hispanic voters.

Nonetheless, Congress has reason to find that discrimination against Latinos in the voting process is a tangible threat. At an August 2, 2005 hearing in Americus, Georgia, the National Commission on the Voting Rights Act heard testimony from Tisha R. Tallman, the Southeast Regional Counsel for the Mexican American Legal Defense and Educational

language minority group do not speak English well enough to participate effectively in the electoral process (and are thus limited English-proficient, or "LEP"), and have an illiteracy rate greater than the national average. For purposes of the Section 203 determinations, persons who speak English less than very well are considered LEP, and illiteracy is defined as the failure to complete the fifth grade. *See id.* § 1973aa-1a(b)(3)(B), (E). Second, a political subdivision will be covered if it contains more than 10,000 LEP voting age citizens of a single language minority group who have an illiteracy rate greater than the national average. Third, a political subdivision will be covered if it contains all or part of an Indian reservation with 5% or greater LEP voting age citizens of a single language minority group who have an illiteracy rate greater than the national average. *Id.* § 1973aa-1a(b)(2)(A).

²¹⁸ *See* U.S. Census Bureau, *supra* note 217. Other single-language groups had insufficient numbers, even statewide, to meet the Bureau's criteria for disclosure avoidance, leading to those data being suppressed in the public data.

²¹⁹ *See id.*

²²⁰ *See id.*

²²¹ They are Representative Pedro Marin (House District 96); Representative David Casas (House District 103) and Senator Sam Zamarripa (Senate District 36). Their districts have 4.3%, 2.6% and 0.6% Hispanic voter registration, respectively, according to the February 2006 report of the Georgia Secretary of State. *See* GA. SEC'Y OF STATE, *supra* note 20, at 1-4.

Fund.²²² Tallman testified that the eligibility of Spanish-surnamed registered voters had been mass-challenged in Long County prior to the 2004 primary election and in Atkinson County prior to the 2004 general election.²²³

While the fact that such challenges occurred is grounds for concern in its own right, it is the reaction of election officials to the challenge that implicates the need for federal intervention. It was Tallman's testimony that, despite her meetings with county registrars and state officials, nothing had been done to provide guidance to counties about how to handle this type of mass challenge or to prevent this challenge procedure from being used to harass and intimidate other eligible voters in the future.²²⁴

On February 8, 2006, the Department of Justice filed suit under Section 2 of the Voting Rights against Long County with regard to the mass challenges in the 2004 primary election.²²⁵ A consent decree was entered on February 10, 2006.²²⁶ This appears to be the first case brought under Section 2 with regard to Latinos in Georgia and is further evidence that Georgia has not outgrown the need for heightened federal scrutiny of its electoral process.

VI. CONCLUSION

It is the nature of voting rights cases that each objection and lawsuit mentioned above involved a unique story and set of circumstances that, on its own, could occupy a report of this length. It would be unrealistic to at-

²²² *Hearing Before the Nat'l Comm'n on the Voting Rights Act in Americus, Georgia*, 11–22 (Aug. 2, 2005) (testimony of Tisha R. Tallman).

²²³ *See id.* In both cases, the challenges appear to have been based simply on the voters' Spanish surnames and/or the fact that they were Hispanic, as opposed to personal knowledge of the voters' qualifications. In Atkinson County, the challenged voters were summoned to appear at a hearing before the county election officials, at which they were to present proof of their citizenship; the challenges were dismissed before individual inquiries took place. The Section 203 determination data for Atkinson County show Atkinson with 175 Latino voting age citizens (of whom ninety-five reported being LEP). This is wholly consistent with the state's current report of the number of registered Hispanic voters in Atkinson County (eighty-five). A similar comparison cannot be made for Long County because its data were suppressed.

²²⁴ *Id.* at 20–21.

²²⁵ *See* *United States v. Long County*, Civ. A. File No. CV206-040 (S.D. Ga. filed Feb. 8, 2006).

²²⁶ The consent decree provided that:

Defendants shall provide to each person who wishes to challenge the right to vote of any elector and to each person who wishes to challenge the qualifications of any elector on the list of registered voters a notice that states: "A challenger must have a legitimate non-discriminatory basis to challenge a voter. Challenges filed on the basis of race, color, or membership in a language-minority group are not legitimate bases for attacking a voter's eligibility."

Consent Decree at 3, *United States v. Long County*, Civ. A. File No. CV206-040 (S.D. Ga. Feb 10, 2006).

tempt to predict what would happen in every community, or in any particular community, if the constraint of Section 5 were to be removed. But while it is true that there have been fewer Section 5 objections in recent years, I would submit that this can better be understood as a recognition that Section 5 prevents attacks on black voting rights than as a loss of the desire to do so. One would hope that many communities have outgrown their pasts but the patterns over time leave little doubt that the impetus to reduce and negate black voting strength and participation in Georgia is real and has not vanished. The great gains achieved since 1965 in black citizens' political participation as voters and candidates probably would not be subject to a massive, obvious effort at disfranchisement if Section 5 is allowed to expire; it is more likely that a series of marginal steps, each one difficult to challenge individually under Section 2 or the Constitution, would gradually erode those gains. One could expect more consolidations like that originally proposed for the city of Augusta; more retrogressive re-districtings like those for Putnam County and the Webster County school board; the gradual readoption of at-large elections, as attempted by Effingham and Decatur Counties; and more arbitrary registration procedures, as in DeKalb County. Local jurisdictions and legislative delegations would have the advantage of being able to implement new discriminatory procedures and await a challenge for which the plaintiffs would bear the initial cost and the ultimate burden of proof. This is what Congress consistently has sought to prevent in the past through Section 5, and this is why Section 5 should be extended in Georgia.