

VOTING RIGHTS IN ALABAMA: 1982–2006

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INTRODUCTION

For decades, Alabama has been at the center of the battle for voting rights equality. Several of the pre-1965 voting cases brought by the Department of Justice and private parties were in Alabama. The events of Bloody Sunday in Selma, Alabama, in 1965 served as a catalyst for the introduction and passage of the Voting Rights Act of 1965.¹ Between passage of the Act in 1965 and the last major reauthorization of the Act in 1982, the temporary provisions of the Act that apply to Alabama—the Section 5 preclearance provisions and the federal observer provisions—were employed repeatedly to prevent voting discrimination.

Since the 1982 reauthorization, significant voting discrimination in Alabama has continued. Not only has the Department of Justice objected to forty-six submissions under Section 5 and sent observers to Alabama ninety-one times, but the federal courts have also found several times that the state of Alabama and/or its political subdivisions have engaged in intentional discrimination. Though there has been significant progress in electoral access and equality for Alabama's black citizens, it has largely been as the result of extensive voting rights enforcement. Indeed, voting remains largely racially polarized, and black candidates rarely are elected in majority-white districts. The recent unsuccessful efforts in 2003 and 2004 to remove discriminatory aspects of Alabama's 1901 Constitution through

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¹ Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)).

voter referenda are indicative of the racial cleavage that exists in Alabama to this day. Under the circumstances, the preclearance and observer provisions continue to be needed.

I. THE TEMPORARY PROVISIONS OF THE VOTING RIGHTS ACT THAT APPLY TO ALABAMA

Alabama is one of nine states covered under the formula found in Section 4(a) of the Act,² which subjects the state and each of its political subdivisions to the preclearance provision of Section 5,³ and the observer and examiner provisions of Sections 6 through 9⁴ and 13.⁵ Since the 1965 inception of the Act, Alabama has been subject to these temporary provisions, which expire in August 2007 if not reauthorized by Congress.⁶

For statewide-covered jurisdictions like Alabama, Section 5 requires federal preclearance of any voting change made by any political jurisdiction.⁷ Any proposed change in voting or electoral procedures must be submitted either to the Attorney General or to a three-member panel of the U.S. District Court for the District of Columbia for preclearance before the change can be implemented.⁸ The submitting authority must demonstrate that the change “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color” or membership in a language minority group.⁹ Unless and until preclearance is obtained, the change cannot be implemented.

The observer provisions enable the Attorney General to send observers to monitor polling place and vote counting activities in any Alabama jurisdiction that has been certified for coverage.¹⁰ The Attorney General can certify a jurisdiction for coverage under one of two circumstances: (1) the Attorney General has received twenty or more complaints from residents of a jurisdiction “that they have been denied the right to vote . . . on account of race or color” or membership in a language minority group and the Attorney General believes the complaints to be meritorious; or (2) the

² 42 U.S.C. § 1973b(a) (2006).

³ *Id.* § 1973c.

⁴ *Id.* §§ 1973d, 1973e, 1973f (§§ 1973d, 1973e and 1973g repealed 2006).

⁵ *Id.* § 1973k.

⁶ After this report was written and submitted to Congress, the expiring 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).

⁷ *See* 42 U.S.C. § 1973c(a).

⁸ *Id.*

⁹ *Id.*

¹⁰ *See id.* § 1973f.

Attorney General determines that certification is necessary to enforce the guarantees of the Fourteenth or Fifteenth Amendments.¹¹

II. ALABAMA DEMOGRAPHICS

According to the 2000 Census, Alabama has a total population of 4,447,100, of whom 3,162,808 (71.1%) are white and 1,155,930 (25.9%) are black.¹² The state has a voting age population of 3,323,678, of whom 2,440,176 are white (73.4%) and 796,342 (23.9%) are black.¹³ The remainder of the population is divided amongst Latinos (1.7% of total population), American Indians (0.5%) and Asians (0.7%).¹⁴ Those of other races or multiple races comprise the remaining 1%.¹⁵ Over 98% of the voting age population is citizens.¹⁶ Alabama ranks sixth amongst states in its percentage of black population.¹⁷

Though the black population is relatively dispersed throughout the state, a large portion of the population is located in the so-called Alabama “Black Belt,” which runs from east to west in the center of the state and, according to the University of Alabama, contains the following counties: Barbour, Bullock, Butler, Choctaw, Clarke, Conecuh, Dallas, Escambia, Greene, Hale, Lowndes, Macon, Marengo, Monroe, Perry, Pickens, Sumter, Washington and Wilcox.¹⁸ The Black Belt, which extends throughout the South, from Texas to Virginia, originally referred to the richness of the soil, but over time, the term also has been used to refer to counties with a large black population.¹⁹ The Black Belt counties have had some of the worst records of discrimination in voting, and many are discussed below.

¹¹ *Id.* § 1973d.

¹² U.S. Census Bureau, 2000 Census Summary File 1, at tbl.P3, available at <http://factfinder.census.gov> (last visited Dec. 30, 2007).

¹³ *Id.* at tbl.P5.

¹⁴ *Id.* at tbls.P3 & P4.

¹⁵ *Id.*

¹⁶ U.S. Census Bureau, Total – Voting-Age Population and Citizen Voting-Age Population by Sex, for the United States and States: 2000, <http://www.census.gov/population/cen2000/phc-t31/tab01-01.pdf> (last visited Mar. 29, 2008).

¹⁷ U.S. Census Bureau, 2000 Census Summary File 1, at tbl.P3, available at <http://factfinder.census.gov> (last visited Dec. 30, 2007).

¹⁸ See University of Alabama, Institute for Rural Health Research, Blackbelt Fact Book, <http://irhr.ua.edu/blackbelt/intro.html> (last visited Dec. 30, 2006).

¹⁹ *Id.*; see also *Hale County v. United States*, 496 F. Supp. 1206, 1207 & n.4 (D.D.C. 1980) (three-judge court).

III. A BRIEF HISTORY OF PRE-1982 VOTING DISCRIMINATION IN ALABAMA

Alabama has historically been at the forefront of discriminating against minority voters.²⁰ In 1901, as part of a Constitutional Convention, Alabama adopted several devices designed to disfranchise black voters, including a poll tax and literacy test.²¹ These devices resulted in the virtual elimination of the black electorate in Alabama; the number of black registered voters decreased from more than 180,000 voters in 1900 to less than 3000 in 1903.²²

Beginning in the 1940s, when courts started taking the first steps toward recognizing the rights of black voters, the Alabama legislature undertook several measures designed to disfranchise black voters.²³ The legislature passed, and the voters ratified, a state constitutional amendment that gave local registrars greater latitude to disqualify voter registration applicants.²⁴ Black citizens in Mobile successfully challenged this amendment as a violation of the Fifteenth Amendment.²⁵ The legislature also changed the boundaries of Tuskegee to a twenty-eight-sided figure designed to fence out blacks from the city limits.²⁶ The Supreme Court unanimously held that this racial “gerrymandering” violated the Constitution.²⁷ In 1961, as discussed more fully below, the Alabama legislature also intentionally diluted the effect of the black vote by instituting numbered place requirements for local elections.²⁸

When the Department of Justice was first given authority to bring voting rights cases on behalf of black citizens in 1957,²⁹ Alabama jurisdictions were a primary area of focus. In Dallas County, the Department of Justice instituted litigation in April 1961.³⁰ At the time, only 1% of blacks in Dallas County were registered.³¹ The Department of Justice would success-

²⁰ The history recounted in this section is indebted to the discussion in Peyton McCrary et al., *Alabama, in QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965–1990*, 38, 38–52 (Chandler Davidson & Bernard Grofman eds., 1994).

²¹ *Id.* at 44.

²² *Id.*

²³ *Id.* at 45.

²⁴ *See id.*; *see also* *Davis v. Schnell*, 81 F. Supp. 872, 874 (S.D. Ala. 1949) (three-judge court), *aff'd*, 336 U.S. 933 (1949).

²⁵ *See Davis*, 81 F. Supp. at 880.

²⁶ *See Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960).

²⁷ *See id.* at 341, 348.

²⁸ McCrary et al., *supra* note 20, at 46–47.

²⁹ *See* H.R. REP. NO. 89-439, at 3 (1965), *as reprinted in* 1965 U.S.C.C.A.N. 2437, 2440.

³⁰ *Id.* at 10.

³¹ *Id.*

fully eliminate one disfranchising device in court, after which Dallas County would implement one or more new disfranchising devices.³² As a result, by 1965, less than 5% of blacks in Dallas County were registered.³³ The experience in Dallas County was used as a prime example by Congress in 1965 for the necessity of Section 5, a provision designed to prevent jurisdictions from devising new ways to discriminate against minority voters.³⁴

Dallas County came to have an even more significant meaning pertaining to the Act. The nationally televised images of the violent assault on unarmed marchers crossing the Edmund Pettus Bridge in Selma—the county seat of Dallas County—on March 7, 1965, provided the impetus for President Lyndon B. Johnson to announce eight days later that he would be sending a voting rights bill to Congress.³⁵ Less than five months later, the Voting Rights Act was signed into law.³⁶

Between the 1965 enactment of the Voting Rights Act and the 1982 reauthorization, the temporary provisions had a substantial impact. The Department of Justice objected fifty-nine times to Section 5 submissions by the State of Alabama or one of its political subdivisions.³⁷ In addition, the Department of Justice sent observers to Alabama jurisdictions 107 times during the same period.³⁸

Moreover, just as Alabama litigation played a substantial role in the 1965 enactment, it played a similar role in the 1982 reauthorization. The amendment of Section 2 of the Voting Rights Act—a major permanent provision—in 1982³⁹ was Congress' response to the Supreme Court's decision in *City of Mobile v. Bolden*,⁴⁰ which imposed a discriminatory intent requirement on constitutional vote dilution claims. Mobile had changed from a mayor-alderman form of government to a city commission form of

³² *Id.* at 10–11.

³³ *Id.*

³⁴ *See id.*

³⁵ *See* McCrary et al., *supra* note 20, at 38.

³⁶ *Id.*

³⁷ NAT'L COMM'N ON THE VOTING RIGHTS ACT, PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK, 1982–2005 Map 5A (2006), available at <http://www.votingrightsact.org/report/finalreport.pdf> [hereinafter Protecting Minority Voters]; *see also* Department of Justice, Section 5 Objection Determinations: Alabama, http://www.usdoj.gov/crt/voting/sec_5/al_obj2.htm (last visited Dec. 30, 2007).

³⁸ *See* DEP'T OF JUSTICE, GEOGRAPHIC PUBLIC LISTING: ELECTIONS IN ALL STATES DURING ALL DATES 1–7 (2003) (document obtained through Freedom of Information Act (FOIA) request; on file with authors).

³⁹ Voting Rights Act Amendments of 1982, Pub. L. 97-205, § 3, 96 Stat. 131, 134 (1982) (codified as amended at 42 U.S.C. § 1973 (2006)).

⁴⁰ 446 U.S. 55 (1980).

government in 1911, in which commissioners were elected at-large, and each ran separate executive departments of the government.⁴¹ This was a period of intense political struggle between white propertied and working classes in Alabama.⁴² A coalition of urban industrialists and Black Belt planters had used race to persuade enough of the white yeoman and working classes to vote against their own interests and approve the disfranchising 1901 Alabama Constitution.⁴³ In *Bolden*, the district court found, “the desire to place the business and professional classes in control of Mobile’s government and to exclude the lower classes from participation was an important factor in adopting the commission government in 1911.”⁴⁴ Mobile’s white middle and working classes, whose numbers mushroomed in the port city’s defense industries during and after World War II, had been trying for years to wrest political power from the old-family elites, who were able to use the at-large city commission form of government to install officials beholden to them.⁴⁵ Alabama’s white yeomanry had historically favored single-member districts to elect candidates of their choice, but their ancestral dedication to the subordination of black Alabamans had caused them to relent to the widespread use of at-large election schemes promoted by the moneyed classes.⁴⁶ This heritage of white supremacy effectively blocked electoral reform in Mobile, which became one of the last cities in the United States to retain the city commission form of government.⁴⁷ Indeed, in 1981, while the *Bolden* case was still pending on remand, Mobile’s white electorate defeated a referendum proposal to change the commission form of government.⁴⁸

The district court’s April 1982 decision on remand in *Bolden*, which found that the 1911 change was adopted with a discriminatory intent, finally provided a federally imposed reason to reform the outmoded commission government.⁴⁹ It pointed out that, unless a legislative remedy was forthcoming, the court would force the three Mobile city commissioners to

⁴¹ *Id.* at 59–60.

⁴² *See Bolden v. City of Mobile*, 542 F. Supp. 1050, 1062 (S.D. Ala. 1982).

⁴³ *See id.* at 1062–63.

⁴⁴ *Id.* at 1075.

⁴⁵ Keith Nicholls, *Politics and Civil Rights in Post-World War II Mobile*, in *MOBILE: THE NEW HISTORY OF ALABAMA’S FIRST CITY* 247, 254–56 (Michael V.R. Thomason ed., 2001).

⁴⁶ “In 1876 the Democratic legislature eliminated elections altogether for county commissions in eight black-majority counties, authorizing the governor to appoint county commissioners.” McCrary et al., *supra* note 20, at 42–43.

⁴⁷ Handbook of Texas Online, Commission Form of City Government, <http://www.tshaonline.org/handbook/online/articles/CC/moc1.html> (last visited Feb. 4, 2008).

⁴⁸ Royce Harrison et al., *Voters Re-Elect Mayor Doyle; City’s At-Large Commission Form Gets OK*, *MOBILE REGISTER*, July 15, 1981, at A1.

⁴⁹ *See Bolden*, 542 F. Supp. at 1075.

run from single-member districts, and the practice of dividing executive department functions among the commissioners would become constitutionally suspect.⁵⁰ This gave Mobile's local legislative delegation in 1985 the impetus it needed to enact a mayor-council system with single-member council districts, which the voters subsequently approved.⁵¹ By this time, Congress had amended Section 2 of the Voting Rights Act to create the discriminatory results standard.⁵² The message sent by this strengthening of the Act was a national determination, finally, to provide racial minorities with effective access to political power.

IV. VOTING DISCRIMINATION IN ALABAMA SINCE 1982

As in the pre-1982 period, Alabama has continued to be a battleground in the effort to achieve voting rights equality in the last twenty-four years. The temporary provisions have been employed frequently: the Department of Justice has objected to forty-six Section 5 submissions from Alabama, seven from the state, and thirty-nine from local jurisdictions.⁵³ Moreover, Department of Justice observers have been dispatched to monitor elections ninety-one times.⁵⁴

Beyond this quantitative data, since 1982, federal courts have found that the system of appointing poll-workers and methods of election for local jurisdictions arose from an intentionally discriminatory state policy. The remedies to these policies affected virtually every county in Alabama. Some jurisdictions proved to be defiant in adopting a method of election that would provide minority voters an equal opportunity to elect candidates of choice. Others attempted to nullify the effect of the affirmative litiga-

⁵⁰ *Id.* at 1077-78.

⁵¹ Act of Mar. 28, 1985, 1985 Ala. Laws 96 (Act No. 85-229); ALA. CODE § 11-44C-2 (2007) (setting "a special election to be held on May 14, 1985, said call for the purpose of determining whether such city shall adopt the court ordered district commission form of government in accordance with the Consent Decree entered into by the parties and approved by the court on April 7, 1983, in the case of Bolden vs. City of Mobile, Civil Action No. 75-297, or in the alternative the mayor-council form of government, authorized by this act. . ."). The Hobson's choice produced by the federal court's remedy also gave the black caucus of the local delegation, led by the late Senator Michael Figures, the leverage to negotiate the famous super-majority provision in Mobile's charter, which requires five votes on the seven-member council to conduct any business. See ALA. CODE § 11-44C-28. Because three of the seven districts have black voting majorities, the council members elected by black voters have potential veto power on matters vital to the interests of the black community. See Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 247 (1989).

⁵² See Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131 (1982) (codified as amended at 42 U.S.C. § 1973 (2006)).

⁵³ See Department of Justice, *supra* note 37.

⁵⁴ See DEPARTMENT OF JUSTICE, *supra* note 38, at 1-7.

tion, and in some cases were prevented from doing so by Section 5. Additionally, in 1987, the Supreme Court found that the city of Pleasant Grove—a racial enclave with no black citizens—failed to demonstrate under Section 5 that its annexation policy was nondiscriminatory. The congressional and legislative redistrictings in the past three decades have also demonstrated the significant impact that the Voting Rights Act has had in creating and maintaining opportunities for minority voters to elect candidates of their choice. While active enforcement of the Voting Rights Act has led to a significant expansion in equality for black voters, there remains a strong undercurrent of racial division. Voting remains racially polarized, and in two recent referenda, Alabama voters refused to remove segregationist and discriminatory provisions of the Alabama constitution.

A. SUMMARY OF ENFORCEMENT OF THE TEMPORARY PROVISIONS

1. Section 5

Since 1982, Section 5 has had a significant impact on the electoral process in Alabama. As noted above, there have been objections to forty-six Section 5 submissions. In addition, Section 5 prevented an additional 181 voting changes from being implemented through the more information request (MIR) process: after the Department of Justice issued a MIR letter regarding a change or changes that had been submitted, the submitting Alabama jurisdictions formally withdrew the change, adopted a new change which superseded the prior change, or did not respond to the letter.⁵⁵ This was the third highest number of changes blocked by MIRs in any state.⁵⁶ In addition, there were twenty-two successful Section 5 enforcement actions, in which the Department of Justice or private plaintiffs filed suit alleging that a voting change had not been submitted for Section 5 preclearance.⁵⁷ This is the second highest state total.⁵⁸

The types of changes blocked include redistrictings, changes to methods of election, candidate qualifying and nominating procedures, voter registration procedures, voter purge and reidentification procedures, annexations and the creation of a separate city school district within a county.⁵⁹

⁵⁵ Luis Ricardo Fraga and Maria Lizet Ocampo, *More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act*, in *VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER* 46, 61 tbl.3.1, 64 (Ana Henderson ed., 2007).

⁵⁶ *Id.*

⁵⁷ *PROTECTING MINORITY VOTERS*, *supra* note 37, at tbl.4.

⁵⁸ *Id.*

⁵⁹ *See* Department of Justice, *supra* note 37.

Many of the objections are described in the subsections below. In addition, the following are two good examples of Section 5 objections that took place in the context of other racially discriminatory actions.

After contested litigation that lasted a decade⁶⁰ and two Section 5 objections,⁶¹ the system for electing the Dallas County Commission and Dallas County School Board switched from an at-large to a racially fair single-member districting plan where black voters had a realistic opportunity to elect a majority of the members on each body. Rather than accept this possibility, the county attempted to prevent the election of a majority-black commission by instituting procedures that would be likely to decrease black participation.⁶² After originally representing that it would not require registered voters to submit forms re-establishing their eligibility to vote, the county implemented procedures that had the effect of requiring voters to do so: “[T]he voter update program has resulted in a voter registration list that actually includes many voters who have been and continue to be qualified to vote, but may not have been permitted to vote on June 5 and may be purged and thus disqualified from voting in subsequent elections simply because they failed to pick up or return a voter update form, when there was no valid requirement that they do so.”⁶³ In 1990, the Department of Justice objected to the “additional procedures for the 1990 implementation of the voter reidentification and purge program” in Dallas County because Dallas County failed to show this change was not motivated by a discriminatory purpose.⁶⁴

In Chambers County, a new city, Valley, was incorporated in 1980.⁶⁵ According to the Department of Justice, “the incorporation was especially motivated by the desire to create a separate city school system. That incorporation defined an irregularly shaped city which included the six schools intended for the Valley School System, but which excluded significant areas of black population concentration.”⁶⁶ At the same time, as discussed

⁶⁰ See *United States v. Dallas County Comm'n*, 850 F.2d 1430 (11th Cir. 1988); *United States v. Dallas County Comm'n*, 850 F.2d 1433 (11th Cir. 1988).

⁶¹ See Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Cartledge E. Blackwell, Jr., Blackwell and Keith (June 2, 1986); Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to John E. Pilcher, Pilcher & Pilcher (June 1, 1987).

⁶² See Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Debbie Barnes, Chairperson, Dallas County Bd. of Registrars (June 22, 1990).

⁶³ *Id.* at 2-3.

⁶⁴ *Id.* at 1, 4.

⁶⁵ Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to David R. Boyd, Balch & Bingham (Oct. 12, 1990).

⁶⁶ *Id.* at 1.

more fully below, the city was resisting the efforts of black citizens to annex into Valley. The Department of Justice objected to the creation of the new school system under Section 5.⁶⁷ It is worth noting that the Department of Justice later withdrew the objection after the city remedied its racially selective annexation policy—in response to both Section 5 objections and Section 2 litigation—and permitted black residents to annex into the city.⁶⁸

2. Observer Provisions

The Department of Justice began sending observers to monitor elections in Alabama in 1966, and it has never stopped, most recently sending observers to Hale County in June 2006.⁶⁹ Since 1966, almost 5000 observers have been sent to Alabama to observe 176 elections in twenty counties.⁷⁰ Since 1982, there have been ninety-one observer coverages in fifteen counties.⁷¹ Not surprisingly, the Black Belt counties have received the bulk of the observer coverage.⁷² Fourteen Black Belt counties (twelve counties since 1982) have had observers monitoring elections.⁷³ The counties of Conecuh, Dallas, Hale, Lowndes, Marengo, Sumter and Wilcox, all of which are located in the Black Belt, have had the most observer activity since 1982.⁷⁴

Shortly after the 1982 reauthorization, black citizens in Alabama challenged the method of appointing poll officials under Section 2 of the Voting Rights Act.⁷⁵ By means of a preliminary injunction, the federal court ordered sixty-five of Alabama's sixty-seven counties to institute programs aimed at appointing more black poll officials.⁷⁶ The court based its ruling on these findings of fact:

⁶⁷ See *id.* at 2.

⁶⁸ See Department of Justice, *supra* note 37 (noting that the October 12, 1990 letter of objection was withdrawn).

⁶⁹ See Department of Justice, Federal Observers and Election Monitoring, http://www.usdoj.gov/crt/voting/examine/activ_exam.htm (last visited Oct. 26, 2007); Press Release, Dep't of Justice, Justice Department to Monitor Elections in Alabama, California, New Jersey, New Mexico and South Dakota (Jun. 5, 2006), available at http://www.usdoj.gov/opa/pr/2006/June/06_crt_347.html [hereinafter 2006 Department of Justice Press Release].

⁷⁰ See DEPARTMENT OF JUSTICE, *supra* note 38, at 1–7.

⁷¹ See *id.*

⁷² See *id.*

⁷³ See *id.*

⁷⁴ See *id.*

⁷⁵ See *Harris v. Graddick*, 593 F. Supp. 128 (M.D. Ala. 1984).

⁷⁶ *Id.* at 138.

The past reality in Alabama has been that black citizens of the state were not only prohibited from participating in the political process, they were taught that this was the rule of law and society, the transgression of which merited severe punishment. In effect, state and local governments intentionally created an atmosphere of fear and intimidation to keep black persons from voting.

The present reality in Alabama is that many black citizens, in particular the elderly and uneducated, still bear the scars of this past, and are still afraid to engage in the simple act of registering to vote and voting. However, these fears can often be substantially allayed by the open and substantial presence of other black persons in the role of poll officials at voting places. Nevertheless, black persons are grossly underrepresented among poll officials, with the result that polling places across the state continue to be viewed by many blacks as areas circumscribed for whites and off-limits for blacks.⁷⁷

The claims against the State of Alabama went to trial. In 1988, the district court held that Alabama laws and processes related to appointing election officials were intentionally discriminatory.⁷⁸

B. INTENTIONAL DISCRIMINATION IN METHODS OF ELECTING LOCAL BODIES

By far the biggest advance in equal access for black voters came after May 28, 1986, when a federal district court made findings that, in the century following Reconstruction, the Alabama State Legislature had purposefully switched from single-member districts to at-large election of local governments in order to prevent black citizens from electing their candidates of choice, and that the general laws of Alabama governing all at-large election systems throughout the state had been manipulated intentionally during the 1950s and 1960s to strengthen their ability to dilute black voting strength.⁷⁹ The court concluded: "From the late 1800's through the pre-

⁷⁷ *Id.* at 133.

⁷⁸ See *Harris v. Siegelman*, 695 F. Supp. 517, 526 (M.D. Ala. 1988).

⁷⁹ *Dillard v. Crenshaw County*, 640 F. Supp. 1347, 1356-60 (M.D. Ala. 1986). The court even found that, following adoption of the 1875 Alabama "Redeemer" Constitution, elections in some Black Belt counties were suspended altogether.

Following this "redemption" by the white-supremacist Democratic party, the state legislature passed a series of local laws that eliminated elections for county commission and instead gave the governor the power to appoint the commissioners. This system of gubernatorial appointment was particularly favored in black belt counties threatened with black voting majorities. According to the plaintiffs' historian, the gubernatorial appointment system is widely understood to have been designed to prevent the election of black county commissioners.

Id. at 1358. The rules imposed by general law on all at-large elections, which still remain in place, included anti-single-shot provisions, numbered places and a majority-vote requirement. *Id.* at 1360.

sent, the state has consistently erected barriers to keep black persons from full and equal participation in the social, economic, and political life of the state.”⁸⁰ Based on these findings, the district court expanded the *Dillard v. Crenshaw County* litigation to include a defendant class of seventeen county commissions, twenty-eight county school boards and one hundred forty-four municipalities that were then employing at-large election systems tainted by the racially motivated general laws.⁸¹

A discussion of the *Dillard* litigation shows just how entrenched discrimination in voting was in Alabama. Section 5 played a major role in preventing several *Dillard* jurisdictions from implementing racially unfair districting systems. This is particularly true in Alabama’s Black Belt counties, where white political control was threatened nearly everywhere by majority-black populations. For example, in Camden, the county seat of Wilcox County, on the eve of trial, the city council, which had been maneuvering to preserve a white voter majority, finally agreed to annex long-excluded black neighborhoods, including a neighborhood called Wilson Quarters.⁸² The council’s assent to the 1990 consent decree resulted not only from the threat of protracted trial proceedings, but also from close scrutiny by the Department of Justice, which declined to preclear white neighborhood annexations to Camden in the 1960s until the city explained adequately why it had refused to annex adjacent black neighborhoods.⁸³

Valley, the municipality that carved white residential areas out of Chambers County, was challenged by the *Dillard* plaintiffs to justify its refusal to annex several adjacent black neighborhoods. The district court stayed the city’s 1988 elections pending resolution of the dispute, and on December 12, 1988, it approved a consent decree in which Valley agreed to facilitate annexation of the black neighborhoods.⁸⁴ The terms of the consent decree provided that Valley would not change to single-member districts until the 1992 elections. Before the districts were drawn, Valley tried to annex another 243 persons, only two of whom were black, but the De-

⁸⁰ *Id.*

⁸¹ *Dillard v. Crenshaw County*, CA No. 85-1332 (M.D. Ala. Apr. 3, 1987) (Docs. 491 and 492). A substantial majority of the counties affected by the *Dillard* litigation had at least one electoral body that was affected.

⁸² *Dillard v. City of Camden*, CA No. 87-T-1169-N (M.D. Ala. Jan. 17, 1990).

⁸³ See Letter from James P. Turner, Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice, to Lynda K. Oswald, Assistant Attorney Gen., Ala. (Jan. 31, 1989) (on file with authors); Letter from James P. Turner, Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice, to Andrew W. Cromer, Jr. (Mar. 13, 1989) (on file with authors) (requesting additional information in Section 5 preclearance process).

⁸⁴ *Dillard v. Crenshaw County (City of Valley)*, CA No. 85-T-1332-N (M.D. Ala. Dec. 12, 1988).

partment of Justice denied preclearance pending completion of the transition to district elections.⁸⁵ Finally, after all of the black annexations were completed, the Valley City Council adopted a seven single-member district plan that included two majority-black districts, and the case was dismissed.⁸⁶

The city of Foley provides yet another example. In 1989, a federal district court found that Foley's at-large method of election violated Section 2, and the city moved to districts.⁸⁷ In 1989 and 1993, the Department of Justice objected to the city's submission of proposed annexations because the city had engaged in a racially selective annexation policy, under which it encouraged majority-white areas to seek annexation and denied the annexation petitions from majority-black areas.⁸⁸ This led to the adoption of a consent decree between the Section 2 plaintiffs and the city whereby the city agreed to annex the majority-black areas that sought annexation.⁸⁹

After publication of the 1990 Census, Section 5 played a significant role in the battle to preserve white control in the Black Belt, which focused on Selma and Dallas County, the city and county where the Voting Rights Act was born in 1965 following the assault of peaceful marchers on the Edmund Pettus Bridge.⁹⁰ The black population of Selma had increased from 52.1% to 58.4%,⁹¹ and the black population of the entire county had increased from 54.5% to 57.8%.⁹² The Department of Justice refused to grant Section 5 preclearance to three different redistricting plans submitted by the Dallas County Board of Education⁹³ and two different redistricting plans submitted by the city of Selma⁹⁴ on the ground that they exhibited a purpose to prevent black residents from electing candidates of their choice

⁸⁵ Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to David R. Boyd, Balch & Bingham (Dec. 31, 1990).

⁸⁶ *Dillard v. Crenshaw County (City of Valley)*, CA No. 85-T-1332-N (M.D. Ala. Jan. 6, 1992).

⁸⁷ *Dillard v. City of Foley*, 926 F. Supp. 1053, 1058 (M.D. Ala. 1996).

⁸⁸ *Id.*

⁸⁹ *Id.* at 1059-60.

⁹⁰ See McCrary et al., *supra* note 20, at 38.

⁹¹ Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Philip Henry Pitts, Pitts, Pitts & Thompson (Nov. 12, 1992).

⁹² Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to John E. Pilcher, Pilcher and Pilcher (May 1, 1992).

⁹³ *Id.* at 2; Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to John E. Pilcher, Pilcher and Pilcher (July 21, 1992); Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to John E. Pilcher, Pilcher and Pilcher (Dec. 24, 1992).

⁹⁴ Letter from John R. Dunne, *supra* note 91, at 2; Letter from James P. Turner, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Philip Henry Pitts, Pitts, Pitts & Thompson (Mar. 15, 1993).

to a majority of the seats on both bodies. Every plan packed as many black voters as possible into a minority of districts, and then fragmented the remainder of the black population.⁹⁵ The plans that eventually were precleared at last provided black citizens with an equal opportunity in these racially polarized constituencies and resulted in the election of black majorities on the Dallas County School Board and the Selma City Council.⁹⁶

In 1988, the Chilton County Commission, with the consent of the state, agreed not only that its at-large election system violated the Voting Rights Act, but also to a remedy that increased the number of commissioners from four to seven, all to be elected at-large by cumulative voting rules.⁹⁷ The consent decree expressly provided:

The defendant shall request the local legislative delegation to enact legislation providing for the form of government agreed to herein. This court ordered form of government shall remain in effect only until such legislation is enacted by the legislature and precleared in accordance with the provisions of the Voting Rights Act of 1965.⁹⁸

Fifteen years later, the Chilton County Commission still had not asked its local delegation to procure passage of a local act adopting the consent decree election system, and members of an all-white group calling themselves the Concerned Citizens of Chilton County intervened to demand a return to the old at-large, numbered-place system.⁹⁹ They had been following developments in *Dillard v. Baldwin County Commission*,¹⁰⁰ in which the Eleventh Circuit held that federal courts under the Voting Rights Act could not order a non-consenting local governing body to increase the number of commissioners or to use cumulative voting.¹⁰¹ They took the

⁹⁵ See *supra* notes 93–94.

⁹⁶ *Blacks Win Control of Selma Council*, N.Y. TIMES, Aug. 27, 1993, at A14.

⁹⁷ *Dillard v. Chilton County Bd. of Educ.*, 699 F. Supp. 870 (M.D. Ala. 1988), *aff'd*, 868 F.2d 1274 (11th Cir. 1989).

⁹⁸ Consent Decree at 1, *Dillard v. Chilton County Comm'n*, CA No. 2:87-1179-T (M.D. Ala. 1988).

⁹⁹ See *Dillard v. Chilton County Comm'n*, 447 F. Supp. 2d 1273, 1275 (M.D. Ala. 2006), *vacated*, 495 F.3d 1324 (11th Cir. 2007); see also *Dillard v. Chilton County Comm'n*, 452 F. Supp. 2d 1193, 1196 (M.D. Ala. 2006), *vacated*, 495 F.3d 1324 (11th Cir. 2007). Chilton County is the home of one of the more active klaverns of the Ku Klux Klan and the site of a huge Confederate battle flag erected by the Sons of Confederate Veterans to fly over Interstate 65 between Montgomery and Birmingham, which black legislators have condemned as offensive. Julie Arrington, *Lawmakers Declare War on Battle Flag*, MONTGOMERY ADVERTISER, July 3, 2005.

¹⁰⁰ *Dillard v. Baldwin County Comm'n*, 222 F. Supp. 2d 1283 (M.D. Ala. 2002), *aff'd*, 376 F.3d 1260 (11th Cir. 2004).

¹⁰¹ The successful operation of Chilton County's cumulative voting system has received considerable scholarly comment. See, e.g., Richard L. Engstrom et al., *One Person, Seven Votes: The Cumulative Voting Experience in Chilton County, Alabama*, in AFFIRMATIVE ACTION AND REPRESENTATION: SHAW V. RENO AND THE FUTURE OF VOTING RIGHTS 285 (Anthony Peacock ed., 1997); Richard H.

argument made in *Baldwin County* a big step further, contending that a court-approved agreement entered into by black citizens and their county and state governments could not be enforced if a remedy to which the state agreed exceeded what a federal court could have imposed had the case gone to trial.¹⁰² This position is contrary to Supreme Court precedent, but the district court kept the issue under submission for over a year, obviously concerned with the rulings that were coming from the Eleventh Circuit.¹⁰³ The Alabama Attorney General, instead of urging the district court to uphold the state's 1988 agreement, first sided with the white intervenors, and then withdrew from any participation in the matter.¹⁰⁴

If there had been no federal requirement that changes in election practices not cause retrogression in the electoral opportunities of protected minorities, and that the jurisdiction must seek and receive preclearance before the changes can be implemented, black voters in Chilton County today would be completely shut out of county commission office. Confronted with the anti-consent decree campaign of the Concerned Citizens, the Chilton County Commission in 2003 adopted a resolution, over the objection of the sole black commissioner,¹⁰⁵ asking the local legislative delegation to pass a local act reducing the size of the commission to four, restoring the probate judge as ex-official chair, repealing cumulative voting and, thus, ending any opportunity for black voters to elect a candidate of their choice.¹⁰⁶ The U.S. Attorney General refused to consider Chilton County's submission of the 2003 local act for preclearance until and unless the district court dissolved the 1988 consent decree.¹⁰⁷ This scenario demonstrates that, without the protections of Section 5 of the Voting Rights Act, some white-majority state and local governments in Alabama will bow to pressure from their white constituents and return to the racially discrimina-

Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. OF CHI. LEGAL FORUM 241. Bobby Agee, the African-American county commissioner stated: "Cumulative voting has done a lot to portray Chilton County in a positive light. I would rather have reporters to interview us for C.V. as opposed to having them come down to talk about the headquarters of the Klan." Interview with Bobby Agee, African-American Comm'r, Chilton County, in Clanton, Ala. (Jan. 23, 2006).

¹⁰² See *Dillard*, 447 F. Supp. 2d at 1275; *Dillard*, 452 F. Supp. 2d at 1196. The Eleventh Circuit ultimately ruled that the intervenors lacked Article III standing to challenge the 1988 consent decree. See *Dillard v. Chilton County Comm'n*, 495 F.3d 1324, 1340 (11th Cir. 2007).

¹⁰³ By order entered June 13, 2006, the Eleventh Circuit held in abeyance for sixty days the white intervenors' petition for writ of mandamus requiring the district court to rule on their complaint. See *In re Green*, No. 06-12939-E (11th Cir. June 13, 2006).

¹⁰⁴ See Hearing, *Dillard v. Chilton County Comm'n*, CA No. 2:87cv1179-T (M.D. Ala. Apr. 22, 2005).

¹⁰⁵ Ed Howell, *Seven-Vote System Scrapped*, CLANTON ADVERTISER, Dec. 10, 2002, at 1A.

¹⁰⁶ See Act of June 17, 2003, 2003 Ala. Laws 548 (Act No. 2003-217).

¹⁰⁷ Letter from Joseph D. Rich, Chief, Voting Section, Civil Rights Div., Dep't of Justice, to John Hollis Jackson & Dorman Walker (Oct. 29, 2003) (on file with authors).

tory election practices of the past. “We would be having a totally different conversation if it didn’t exist,” said Chilton Commissioner Bobby Agee. “A very important protection. We would have been at ground zero without Section 5.”¹⁰⁸

The preclearance provisions of Section 5 were indispensable to the ability of black state and local political leaders and their lawyers to ensure that all of the court-ordered single-member district plans in *Dillard* and other voting rights cases were redrawn fairly with 1990 census data. The no-retrogression rule and the requirement of obtaining preclearance of re-districting plans before holding new elections empowered representatives of black voters to negotiate on an equal basis with white-majority local governments. As a result, with some oversight by the Department of Justice, the gains achieved in the 1980s were protected and, in some instances, the ability of black voters to elect candidates of their choice was advanced further.

On June 29, 1986, one month after the initial *Dillard* decision, the U.S. Supreme Court boosted enforcement of Section 2 significantly when it handed down *Thornburg v. Gingles*.¹⁰⁹ The legal standards established by *Gingles* simplified the elements of proof for racial vote dilution claims. But in Alabama, it was not so much the new legal particulars that influenced majority-white government throughout the state as it was the Supreme Court’s broad message that, in an environment of racially polarized voting, protected minorities have a right to election structures that will provide them an equal opportunity to participate in the political process and to elect candidates of their choice.¹¹⁰ This resounding national mandate essentially provided the political cover Alabama’s elected officials might have needed to justify to their majority-white constituencies their decisions not to continue defending racially discriminatory election systems when they were challenged in court. Most of the local jurisdictions in the defendant class entered into consent decrees negotiated by state and local black political leaders, although a few proceeded to trial and judgment.¹¹¹ Twelve of the seventeen county commissions changed to single-member

¹⁰⁸ Interview with Bobby Agee, *supra* note 101.

¹⁰⁹ 478 U.S. 30 (1986).

¹¹⁰ *See id.* at 80.

¹¹¹ *See Dillard v. Crenshaw County*, 831 F.2d 246 (11th Cir. 1987); *Dillard v. City of Foley*, 926 F. Supp. 1053 (M.D. Ala. 1996); *Dillard v. City of Greensboro*, 865 F. Supp. 773 (M.D. Ala. 1994), *vacated*, 74 F.3d 230 (11th Cir. 1996); *Dillard v. Town of North Johns*, 717 F. Supp. 1471 (M.D. Ala. 1989); *Dillard v. Baldwin County Comm’n*, 701 F. Supp. 808 (M.D. Ala. 1988); *Dillard v. Baldwin County Comm’n*, 694 F. Supp. 836, 837 (M.D. Ala. 1988); *Dillard v. Baldwin County Bd. of Educ.*, 686 F. Supp. 1459 (M.D. Ala. 1988).

districts, one agreed to use cumulative voting rules with its at-large elections¹¹² and four are still pending judgment.¹¹³ Twenty-three of the twenty-eight county boards of education changed to single-member districts, one agreed to use cumulative voting rules with its at-large elections and four are still pending judgment.¹¹⁴ One hundred two of the one hundred forty-four municipalities changed to single-member districts, thirteen agreed to change to multimember districts, twenty agreed to use limited voting rules with their at-large elections,¹¹⁵ five agreed to use cumulative voting rules with their at-large elections, two agreed to use plurality-win rules with their at-large elections and two are still pending judgment.¹¹⁶

Some of the *Dillard* jurisdictions would not agree to consent decrees providing a complete remedy for the dilution of black citizens' votes, and the district court had to adjudicate the remedy issues based on the jurisdictions' admissions of liability. For example, the Baldwin County Board of Education proposed five single-member districts, none of which had an effective black voter majority.¹¹⁷ The court cited both its earlier intent findings¹¹⁸ and the results standard for proving a Section 2 violation,¹¹⁹ re-

¹¹² *Dillard v. Chilton County Bd. of Educ.*, 699 F. Supp. 870, 875 (M.D. Ala. 1988), *aff'd*, 868 F.2d 1274 (11th Cir. 1989). The court stated:

The cumulative voting system proposed by the parties cures the plaintiffs' § 2 claims to the extent the claims rest on intentional discrimination. . . . [T]he system provides black voters in the county with a realistic opportunity to elect candidates of their choice, even in the presence of substantial racially polarized voting.

As stated above, the court must address whether the cumulative voting scheme proposed by the parties is illegal or against public policy. There is nothing in federal constitutional or statutory law that prohibits its use. The scheme is acceptable under federal law.

Id. at 875.

¹¹³ See List of Local Jurisdictions Included in Defendant Class, *Dillard v. Crenshaw County*, CA No. 2:85cv1332-MHT (M.D. Ala.) (on file with authors).

¹¹⁴ See *id.*

¹¹⁵ See, e.g., *Dillard v. Town of Cuba*, 708 F. Supp. 1244, 1246 (M.D. Ala. 1988) ("The court believes that the proposed limited voting system offers all black citizens of Cuba the potential to elect candidates of their choice, even in the face of substantial racially polarized voting, which apparently exists in the town.").

¹¹⁶ See List of Local Jurisdictions Included in Defendant Class, *Crenshaw County*, CA No. 2:85cv1332-MHT.

¹¹⁷ See *Dillard v. Baldwin County Bd. of Educ.*, 686 F. Supp. 1459, 1466 (M.D. Ala. 1988).

¹¹⁸ The court stated:

The plaintiffs have relied on this court's earlier findings in *Crenshaw County*, unchallenged here, that the Alabama legislature adopted numbered place laws in 1961 in order to make local at-large elections systems "more secure mechanisms for discriminations" against the state's black citizens. In other words, the state adopted numbered place laws and continued to maintain at-large systems across the state for the specific purpose of racial discrimination. The evidence is undisputed that the Baldwin County Board of Education's at-large system, including the numbered-place feature, is a product of these racially discriminatory efforts of the Alabama legislature. Moreover, as demonstrated in Part III of this opinion, the evidence is overwhelming that the enactments continue today to have their intended racist effect. The plaintiffs have therefore established a prima facie case of intentional racial discrimination.

Id. at 1468.

cently announced in *Gingles*, as bases for adopting the plaintiffs' proposed seven single-member district plan. It interpreted the mandate of the 1982 Voting Rights Act to require full and effective relief: "Congress has made clear that a 'court should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice.'"¹²⁰ The court also rejected the school board's contention that the sole majority-black district in the plan it ordered was not sufficiently compact:

The court therefore believes, especially in light of § 2's strong national mandate, that a district is sufficiently geographically compact if it allows for effective representation. For example, a district would not be sufficiently compact if it was so spread out that there was no sense of community, that is, if its members and its representative could not effectively and efficiently stay in touch with each other; or if it was so convoluted that there was no sense of community, that is, if its members and its representative could not easily tell who actually lived within the district. Also of importance, of course, is the compactness of neighboring districts; obviously, if, because of the configuration of a district, its neighboring districts so lacked compactness that they could not be effectively represented, the *Thornburg* standard of compactness would not be met. These are not, however, the only factors a court should consider in assessing a proposed district; because compactness is a functional concept, the number and kinds of factors a court should consider may vary with each case, depending on the local geographical, political, and socioeconomic characteristics of the jurisdiction being sued.

The seven-member redistricting plan proposed by the plaintiffs meets this functional standard.¹²¹

In other *Dillard* jurisdictions, extended trial proceedings and court rulings were necessary before and after all-white local governing bodies finally agreed to consent decrees. In North Johns, a tiny municipality near Birmingham, after the mayor agreed to a consent decree that changed the method of electing council members from at-large voting to single-member districts, the district court found that he intentionally withheld state mandated ethics forms from the black candidates:

The mayor was aware that Jones and Richardson, as black candidates, were seeking to take advantage of the new court-ordered single-member districting plan and that their election would result in the town council

¹¹⁹ *Id.* at 1462–63.

¹²⁰ *Id.* at 1469 (quoting 1982 U.S.C.C.A.N. 208) (emphasis omitted).

¹²¹ *Id.* at 1466.

being majority black. The court is convinced that Mayor Price acted as he did in order to prevent this result, or at least not to aid in achieving it.¹²²

A particularly egregious example was the effort of Etowah County to sidestep the effect of the *Dillard* cases. The Etowah County Commission was one of the *Dillard* jurisdictions that had agreed in a consent decree to change its at-large election system to single-member districts, one of which had a black voter majority.¹²³ But as soon as a black commissioner was elected, the white-majority commission voted to exclude its new member from the traditional practice of giving each commissioner executive power over the road construction and maintenance operations in his district.¹²⁴ Instead of control over a road camp and crew, “Coach” Presley, the first black candidate ever elected to the Etowah County Commission, was assigned the executive functions of maintaining the county courthouse building and grounds; in effect, he was put in charge of the janitorial staff.¹²⁵ Fortunately, in Etowah County, the 1986 consent decree contained this saving provision: “[W]hen the District 5 [the majority-black district] and 6 Commissioners are elected in the special 1986 election, they shall have all the rights, privileges, duties and immunities of the other commissioners, who have heretofore been elected at-large, until their successors take office.”¹²⁶ Based on this judicially enforceable contractual commitment, on remand, the district court ordered the Etowah County Commission to negotiate a fair division of powers that complied with the consent decree.¹²⁷

¹²² *Dillard v. Town of North Johns*, 717 F. Supp. 1471, 1476 (M.D. Ala. 1989).

¹²³ See *Dillard v. Crenshaw County*, CA No. 85-T-1332-N (M.D. Ala. Nov. 12, 1986); see also *Presley v. Etowah County Comm’n*, 869 F. Supp. 1555, 1564 (M.D. Ala. 1994).

¹²⁴ See *Presley*, 869 F. Supp. at 1566.

¹²⁵ See *id.* at 1560–63. When the county commission refused to submit for Section 5 preclearance the resolutions making these changes, black citizens asked a three-judge district court to rule that the resolutions could not be enforced until they had been precleared. In the same civil action, plaintiffs also challenged similar changes on the Russell County Commission that had not been submitted for Section 5 preclearance. See *Presley v. Etowah County Comm’n*, 502 U.S. 491, 498–99 (1992); *Mack v. Russell County Comm’n*, 840 F. Supp. 869 (M.D. Ala. 1993). The district court enjoined enforcement of one resolution, but not another, based on their respective practical impacts on the electoral power of black voters. See *Presley*, 502 U.S. at 497–98. However, the Supreme Court held that none of the commission’s resolutions met the statutory definition of a “voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting.” *Id.* at 494, 504, 509, 510 (quoting 42 U.S.C. § 1973c (2006)).

¹²⁶ *Presley*, 869 F. Supp. at 1559 (quoting *Dillard*, CA No. 85-T-1332-N).

¹²⁷ *Id.* at 1574.

C. INTENTIONAL DISCRIMINATION IN ANNEXATIONS

In *City of Pleasant Grove v. United States*,¹²⁸ the U.S. Supreme Court affirmed the district court's denial of Section 5 preclearance to two annexations to the city of Pleasant Grove on the ground that the city had engaged in a racially selective annexation policy. Pleasant Grove was at that time an all-white city with a long history of discrimination located in an otherwise racially mixed part of Alabama.¹²⁹ The Supreme Court stated that "in housing, zoning, hiring, and school policies [the city's] officials have shown unambiguous opposition to racial integration, both before and after the passage of the federal civil rights laws."¹³⁰ The city sought preclearance for two annexations, one for an area of white residents who wanted to attend the all-white Pleasant Grove school district instead of the desegregated Jefferson County school district, the other for a parcel of land that was uninhabited at the time but where the city planned to build upper income housing that would likely be inhabited by whites only.¹³¹ At the same time, the city refused to annex two predominantly black areas.¹³² The district court held "that the city had failed to carry its burden of proving that the two annexations at issue did not have the purpose of abridging or denying the right to vote on account of race."¹³³ In affirming the district court's decision, the Supreme Court stated:

It is quite plausible to see appellant's annexation [of the two parcels] as motivated, in part, by the impermissible purpose of minimizing future black voting strength. Common sense teaches that appellant cannot indefinitely stave off the influx of black residents and voters—indeed, the process of integration, long overdue, has already begun. One means of thwarting this process is to provide for the growth of a monolithic white voting block, thereby effectively diluting the black vote in advance. This is just as impermissible a purpose as the dilution of present black voting strength. To hold otherwise would make appellant's extraordinary success in resisting integration thus far a shield for further resistance. Nothing could be further from the purposes of the Voting Rights Act.¹³⁴

¹²⁸ 479 U.S. 462 (1987).

¹²⁹ *Id.* at 465.

¹³⁰ *Id.*

¹³¹ *Id.* at 465–66.

¹³² *Id.* at 466–67.

¹³³ *Id.* at 467. The district court also stated that even if the burden had been on the United States, it would have found discriminatory intent on behalf of the city. *Id.* (quoting *Pleasant Grove v. United States*, 623 F. Supp. 782, 788 n.30 (D.D.C. 1985)).

¹³⁴ *Id.* at 471–72 (citations omitted).

The *Pleasant Grove* case is a modern example of what occurred decades ago in *Gomillion v. Lightfoot*¹³⁵—the manipulation of city borders to fence out blacks.

D. HALE COUNTY: AN EXAMPLE OF THE VOTING RIGHTS ACT AT WORK

Hale County, a Black Belt county, serves as an example of a majority-black county where the effort to suppress full black electoral participation has persisted, and only because of the Voting Rights Act—particularly the preclearance and the examiner/observer provisions—have black voters been able to overcome this entrenched and continuing discrimination.

Before the passage of the Voting Rights Act, black Hale County residents who wanted to register and vote faced tremendous obstacles: the poll tax, literacy tests and harassment.¹³⁶ As of May 1964, only 3.9% of the black voting age population was registered to vote.¹³⁷ On August 9, 1965, three days after the Voting Rights Act was passed, the Department of Justice certified Hale County as a jurisdiction where a federal examiner had the authority to register black voters.¹³⁸ Not coincidentally, on August 10, 1965, the Alabama State Legislature passed legislation changing the method of electing Hale County commissioners from single-member districts to at-large voting.¹³⁹

Though Hale County began to elect its commissioners at-large, Hale County did not submit this voting change to at-large elections until 1976.¹⁴⁰ The Department of Justice objected to the change.¹⁴¹ Hale County then sought preclearance from the U.S. District Court for the District of Columbia.¹⁴² In reviewing the change, the court found black candidates lost each of the thirty times they ran for countywide office, including eleven times for county commissioner.¹⁴³ The court found that the elections were char-

¹³⁵ 364 U.S. 339 (1960).

¹³⁶ *Hale County v. United States*, 496 F. Supp. 1206, 1211 (D.D.C. 1980) (three-judge court).

¹³⁷ *Id.*

¹³⁸ *Id.* at 1210. The federal examiner provisions contained in Sections 6–9 and 13 apply to all the jurisdictions subject to the coverage formula in Section 4(a). Examiners have the authority to register voters and to monitor elections by utilizing federal observers. In the early years of the Act, examiners were used for both purposes. Over time, the registration function of the examiner has become used less frequently, to the point where it is not used at all today, whereas the monitoring function has continued. See Department of Justice, About Federal Observers and Election Monitoring, http://www.usdoj.gov/crt/voting/examine/activ_exam.htm (last visited Dec. 30, 2007).

¹³⁹ *Hale County*, 496 F. Supp. at 1210.

¹⁴⁰ *Id.* at 1209.

¹⁴¹ *Id.*

¹⁴² See *id.* at 1206.

¹⁴³ *Id.* at 1212.

acterized by racial bloc voting; that black citizens suffered from educational and economic impediments traceable to a history of discrimination that impacted their right to vote; and that black voters were subjected to intimidation and harassment in trying to exercise their right to vote.¹⁴⁴ These factors, when combined with at-large voting, prevented black candidates from being elected county commissioner.¹⁴⁵ The court held that Hale County failed to show that the change did not have a discriminatory purpose or effect, and it denied preclearance.¹⁴⁶

Since the 1982 reauthorization, much of the focus has been on the elections in the city of Greensboro, the county seat in Hale County, where the Voting Rights Act has played a major role. The city attempted to deanex property “shortly after it became known that subsidized public housing would be built on the property and that there was a strong perception in both the white and black communities that such housing would be occupied largely or exclusively by black persons”¹⁴⁷ The Department of Justice objected to the change.¹⁴⁸

In 1987, the city’s at-large method of electing its five county commissioners was challenged as part of the *Dillard* litigation.¹⁴⁹ Though the city admitted to a Section 2 violation shortly after the litigation was filed, it took ten years for a final remedial plan to be implemented.¹⁵⁰ During the litigation, the Department of Justice objected to two different plans under Section 5 adopted by the city council on the grounds that, given the history of discrimination and the pattern of racially polarized voting, the plans allowed black voters to elect only two of the five council members, even though blacks comprised 62% of the total population and 56% of the voting age population.¹⁵¹ The Department found that both plans fragmented the black population.¹⁵² Ultimately, the court-ordered plan was drawn by a court-appointed Special Master.¹⁵³ Although the Special Master did not

¹⁴⁴ *Id.* at 1212–14.

¹⁴⁵ *Id.* at 1215.

¹⁴⁶ *Id.* at 1215–16.

¹⁴⁷ Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice, to John C. Jay, Jr., Mayor of the City of Greensboro (Oct. 21, 1985).

¹⁴⁸ *See id.* at 2.

¹⁴⁹ *Dillard v. City of Greensboro*, 74 F.3d 230, 231 (11th Cir. 1996).

¹⁵⁰ *See Dillard v. City of Greensboro*, 956 F. Supp. 1576 (M.D. Ala. 1997).

¹⁵¹ *See* Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice, to Nicholas H. Cobbs, Jr., City Attorney, Greensboro, Ala. (Dec. 4, 1992); Letter from James P. Turner, Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice, to Nicholas H. Cobbs, Jr., City Attorney, Greensboro, Ala. (Jan. 3, 1994).

¹⁵² *See* Letter from John R. Dunne, *supra* note 151, at 2; Letter from James P. Turner, *supra* note 151, at 2.

¹⁵³ *City of Greensboro*, 956 F. Supp. at 1577.

consider race when drawing the plan and, instead, followed “traditional re-districting criteria,” the plan contained three districts where two-thirds or more of the population was black.¹⁵⁴

Observers have played a critical role in elections in Hale County. Beginning in 1966, observers have monitored elections in Hale County twenty-two times, including twelve times since 1982.¹⁵⁵ In the June 5, 2006, primary election, the Department of Justice sent observers to “ensure that the right of voters to participate in the primary election is not denied on the basis of their race.”¹⁵⁶ Testifying before the National Commission on the Voting Rights Act, Alabama State Senator Bobby Singleton spoke of the significance of federal observers, and described a particularly intense election in 1992:

We had at that time, still, white minorities . . . in that community who were still in control of the electoral process, holding the doors, closing the doors on African-American voters before the . . . voting hours were over. I . . . had to go to jail because I was able to snatch the door open and allow people who was coming from the local fish plant . . . whom they did not want to come in, that would have made a difference in the . . . votes on that particular day. We’ve experienced that in the city of Greensboro . . . over and over again, and even in the county of Hale.¹⁵⁷

Singleton testified further about how critical observers were in enabling minority voters to elect a majority on most of the elected bodies in Hale County, including the school board, county government, most city councils, as well as to elect a black circuit court judge, circuit clerk and state representative.¹⁵⁸ Hale County exemplifies both the continuing persistence of voting discrimination against blacks in Hale County and the success of the Voting Rights Act in remedying and preventing that discrimination.

E. THE VOTING RIGHTS ACT AND CONGRESSIONAL AND LEGISLATIVE REDISTRICTING IN ALABAMA

The 1982 reauthorization of Section 5 had an immediate impact on the ability of black Alabamans to elect their favored candidates to the Alabama

¹⁵⁴ *Id.* at 1581–82.

¹⁵⁵ See PROTECTING MINORITY VOTERS, *supra* note 37, at Map 10C.

¹⁵⁶ 2006 Department of Justice Press Release, *supra* note 69.

¹⁵⁷ PROTECTING MINORITY VOTERS, *supra* note 37, at 62–63 (quoting State Senator Bobby Singleton).

¹⁵⁸ *Id.* at 63.

State Legislature. Alabama is the state in which the U.S. Supreme Court established “one person, one vote” as a substantive constitutional requirement for all state elective representation systems.¹⁵⁹ Even though the disfranchising 1901 Alabama Constitution called for the legislature to redistrict after every decennial census, this mandate had simply been ignored, and the original 1901 House and Senate boundaries were still in place after publication of the 1960 Census.¹⁶⁰ Federal courts were forced to draw the legislative districts in use during the 1960s and 1970s.¹⁶¹ As a result of court-ordered redistricting, the first two blacks to serve in the Alabama State Legislature since Reconstruction, Fred Gray and Thomas Reed, were elected to the House in 1970.¹⁶² In the first election following the 1980 Census, seventeen blacks were elected to the House and three to the Senate.¹⁶³ This first election in 1982 was carried out using districts adopted by the Alabama State Legislature and slightly modified by a federal court pending Section 5 preclearance of the statutory plans.¹⁶⁴ The Department of Justice, through Assistant Attorney General William Bradford Reynolds, had denied preclearance to the redistricting plan the legislature had enacted in 1981, because it had reduced the number of majority-black districts and the size of black majorities in other districts.¹⁶⁵ On June 1, 1982, the Alabama Legislature, sitting in an emergency special session, adopted a second redistricting bill, Act No. 82-629, in an effort to meet the Attorney General’s objections.¹⁶⁶ This was the plan the federal court modified for use in the 1982 election, on the condition that it would impose its own plan in a special 1983 election if the legislature was unable to satisfy Section 5 of the Voting Rights Act.¹⁶⁷ But on August 2, 1982, Reynolds also objected to Act No. 82-629, even though it arguably cured the retrogression problems, because it appeared to fragment black voting strength in the western Black

¹⁵⁹ *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (quoting Justice Douglas in *Gray v. Sanders*, 372 U.S. 368, 381 (1963)).

¹⁶⁰ See *Burton v. Hobbie*, 561 F. Supp. 1029, 1030 (M.D. Ala. 1983) (three-judge court).

¹⁶¹ See *id.* at 1030–32.

¹⁶² FRED D. GRAY, *BUS RIDE TO JUSTICE* 248 (1995); ROBERT J. NORRELL, *REAPING THE WHIRLWIND: THE CIVIL RIGHTS MOVEMENT IN TUSKEGEE* 190–200 (1986).

¹⁶³ See James U. Blacksher & Larry T. Menefee, *From Reynolds v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 *HAST. L.J.* 1, 39 n.261 (1982).

¹⁶⁴ *Burton v. Hobbie*, 543 F. Supp. 235, 236–37 (M.D. Ala. 1982) (three-judge court), *aff’d*, 459 U.S. 961 (1982).

¹⁶⁵ See Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dept’t of Justice, to Charles A. Graddick, Attorney Gen., State of Ala. (May 6, 1982).

¹⁶⁶ *Burton*, 543 F. Supp. at 236–37.

¹⁶⁷ *Id.*

Belt counties intentionally.¹⁶⁸ There is no doubt that the Attorney General's objection was influenced by the ringing mandate of the 1982 Voting Rights Act Amendments to provide protected minorities with equal access to the electoral process. And there is no doubt this federal mandate of full, equal access, under both Section 2 and Section 5, strengthened the negotiating power of black legislators and political leaders in the legislature's next attempt to obtain Section 5 preclearance before the federal court's 1983 deadline.

The result was Act No. 83-154, a compromise plan to which black legislators agreed—an historic first for Alabama.¹⁶⁹ The legislative leaders, black and white, flew to Washington, D.C. to attend a congratulatory press conference called by Assistant Attorney General Reynolds after the plan received Section 5 preclearance.¹⁷⁰ The federal court gave its blessing to the 1983 plan in an opinion by Judge Frank Johnson, which began:

The day may have now arrived to which the late Judge Richard T. Rives referred when expressing his feelings and the feelings of many of us in *Dent v. Duncan*: "I look forward to the day when the State and its political subdivisions will again take up their mantle of responsibility, treating all of their citizens equally, and thereby relieve the federal Government of the necessity of intervening in their affairs. Until that day arrives, the responsibility for this intervention must rest with those who through their ineptitude and public disservice have forced it." Enactment of Act No. 83-154 marks the first time in Alabama's history that its Legislature has provided an apportionment plan that is fair to all the people of Alabama.¹⁷¹

In the ensuing 1983 special election, nineteen blacks were elected to the one-hundred-five-member House, and five were elected to the thirty-five-member Senate.¹⁷²

In 1992, the U.S. Attorney General also objected to the congressional redistricting plan enacted by the Alabama State Legislature on the ground that the fragmentation of black population concentrations in the state was evidence of "a predisposition on the part of the state political leadership to limit black voting potential to a single district."¹⁷³ However, because of a

¹⁶⁸ See Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Charles A. Graddick, Attorney Gen., State of Ala. (Aug. 2, 1982).

¹⁶⁹ See *Burton v. Hobbie*, 561 F. Supp. 1029, 1030 (M.D. Ala. 1983) (three-judge court).

¹⁷⁰ *Alabama Voting Plan Cleared*, N.Y. TIMES, Mar. 1, 1983, at A19.

¹⁷¹ *Burton*, 561 F. Supp. at 1030 (citations omitted).

¹⁷² See 1984 Ala. Acts 1397–1408 (Roster of the Senate of Alabama and Roster of the House of Representatives of Alabama).

¹⁷³ Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Jimmy Evans, Attorney Gen., Ala. State House (Mar. 27, 1992).

deadline imposed by a three-judge federal district court, there was insufficient time for the legislature to attempt to cure the Section 5 objection, and the court proceeded to order implementation of a congressional plan that also contained only a single majority-black district.¹⁷⁴

The racial gerrymandering Fourteenth Amendment jurisprudence introduced by the U.S. Supreme Court in *Shaw v. Reno*¹⁷⁵ in 1993 came into play in Alabama in the 1990s.¹⁷⁶ Black members of the Alabama House and Senate and the leaders of longstanding, predominately black political organizations in Alabama had parlayed their gains under the 1983 legislative redistricting plans into often-effective coalitions with some white elected officials. They were able to negotiate a post-1990 Census legislative redistricting plan that passed the House, but was blocked in the Senate. Relying on the mandates of both Section 2 and Section 5 of the Voting Rights Act, black plaintiffs filed suit in state court to obtain a racially fair redrawing of the House and Senate districts. Only a month before *Shaw* was handed down, the state court approved a consent decree negotiated by black political leaders and white state officials.¹⁷⁷ The consent decree plan increased the number of majority-black House districts to twenty-seven (of one hundred five) and the number of majority-black Senate districts to eight (of thirty-five).¹⁷⁸ In 1997, however, white plaintiffs filed a federal lawsuit claiming, among other things, that the 1993 state court consent decree plan violated the *Shaw* principles.¹⁷⁹ After lengthy, complicated proceedings in both federal and state courts, a three-judge federal court “ultimately held that seven of the challenged majority-white districts were the product of unconstitutional racial gerrymandering and enjoined their use in any election.”¹⁸⁰ On direct appeal, the U.S. Supreme Court vacated the district court judgment and remanded the case with instructions that the complaint be dismissed for failure to satisfy the standing requirements of

¹⁷⁴ *Wesch v. Hunt*, 785 F. Supp. 1491, 1501 (S.D. Ala. 1992) (three-judge court), *aff’d sub nom.* *Camp v. Wesch*, 504 U.S. 902 (1992) and *Figures v. Hunt*, 507 U.S. 901 (1993).

¹⁷⁵ 509 U.S. 630 (1993).

¹⁷⁶ The subsequent cases in the *Shaw* line include *United States v. Hays*, 515 U.S. 737 (1995); *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Hunt (Shaw II)*, 517 U.S. 899 (1996); *Bush v. Vera*, 517 U.S. 952 (1996); *Abrams v. Johnson*, 521 U.S. 74 (1997); *Hunt v. Cromartie*, 526 U.S. 541 (1999); *Sinkfield v. Kelley*, 531 U.S. 28 (2000); and *Easley v. Cromartie*, 532 U.S. 234 (2001).

¹⁷⁷ See *Sinkfield v. Camp*, CA No. 93-689-PR (Cir. Ct. Montgomery County, May 12, 1993), available at http://www.legislature.state.al.us/reapportionment/1993_consent_decree.html (partial consent decree); see also Jurisdictional Statement for Appellants at 2, *Bennett v. Kelley*, *Sinkfield v. Kelley*, 531 U.S. 28 (2000) (Nos. 00-132, 00-133), 2000 WL 33979525.

¹⁷⁸ *Sinkfield*, CA No. 93-689-PR (Exhibit A).

¹⁷⁹ Jurisdictional Statement for Appellants, *supra* note 177, at 2.

¹⁸⁰ *Sinkfield*, 531 U.S. at 29.

United States v. Hays.¹⁸¹ The Court did not address the merits of the *Shaw* claims, nor did it respond to the contentions of black defendants that, because of the decades-long history of black communities in Alabama organizing to pursue their legitimate political objectives, the plan their representatives successfully negotiated reflected a constitutionally protected exercise of blacks' First Amendment rights. For the time being, the gains Alabama's black citizens had won under the Voting Rights Act were preserved.

Section 5 of the Voting Rights Act played a decisive role in the re-drawing of congressional and state legislative districts in Alabama, following publication of the 2000 Census. For the first time since 1901, without supervision of a federal court, the Alabama State Legislature passed, and the governor signed into law, redistricting statutes for congressional, House, Senate and state board of education seats.¹⁸² All four of these statutes received Section 5 preclearance and survived court challenges by white voters contending that they systematically discriminated against whites by overpopulating their districts and that they violated the *Shaw* racial gerrymandering standards.¹⁸³ Black legislators were able to leverage the no-retrogression command of Section 5 successfully "to pull, haul, and trade to find common political ground" with their white Democratic (and Republican) colleagues."¹⁸⁴ Instead of attempting to maximize the number of seats black voter majorities controlled, black legislators were able to maintain the overall electoral power of blacks, while working with white legislators to balance consciously both racial and partisan interests with fair, neutral districting criteria.¹⁸⁵ Without the protection of Section 5 in Alabama's racially polarized environment, there would be little or no incentive for white legislators to bargain with the black minority in the Alabama State Legislature.

¹⁸¹ *Id.* at 30; see also *United States v. Hays*, 515 U.S. 737 (1995).

¹⁸² See *Montiel v. Davis*, 215 F. Supp. 2d 1279, 1281–82 (S.D. Ala. 2002) (three-judge court).

¹⁸³ See Alabama Legislature, Current Legislative, Congressional and Board of Education Districts, http://www.legislature.state.al.us/reapportionment/districts_2001.html (last visited Dec. 14, 2007); *Gustafson v. Johns*, 434 F. Supp. 2d 1246 (S.D. Ala. 2006) (three-judge court); *Montiel*, 215 F. Supp. 2d at 1289; *Rice v. English*, 835 So. 2d 157 (Ala. 2002).

¹⁸⁴ Brief for Leadership of the Alabama Senate and House of Representatives, as Amici Curiae Supporting Appellees at 9, *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (No. 02-1580), 2003 WL 22490664 (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994)).

¹⁸⁵ *Montiel*, 215 F. Supp.2d at 1279.

F. THE PERSISTENCE OF RACIALLY POLARIZED VOTING

Highly racially polarized voting patterns persist in present-day Alabama. The pattern has been found to exist on a statewide basis by the U.S. Attorney General,¹⁸⁶ expert voting witnesses¹⁸⁷ and federal courts.¹⁸⁸ Without exception, based on numerous analyses by expert witnesses, federal courts¹⁸⁹ and the Department of Justice¹⁹⁰ have found severe racial po-

¹⁸⁶ See, e.g., Letter from John R. Dunne, *supra* note 173, at 2.

¹⁸⁷ See, e.g., Report of Gordon G. Henderson, PhD. as Trial Exhibit 184 Supporting Defendants, Kelley v. Bennett, 96 F. Supp. 2d 1301 (1997) (on file with authors).

¹⁸⁸ See, e.g., White v. Alabama, 867 F. Supp. 1519, 1552 (M.D. Ala. 1994), *vacated on other grounds*, 74 F.3d 1058 (11th Cir. 1996) (citing testimony of Gordon Henderson; Letter from Deval L. Patrick, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Jimmy Evans, Attorney Gen., State of Ala. (Apr. 14, 1994)).

¹⁸⁹ See, e.g., Dillard v. Baldwin County Comm'n, 222 F. Supp. 2d 1283, 1290 (M.D. Ala. 2002), *aff'd*, 376 F.3d 1260 (11th Cir. 2004) ("The plaintiffs have shown that black citizens of Baldwin County still suffer from the racially polarized voting and from historically depressed conditions, economically and socially."); Wilson v. Jones, 45 F. Supp. 2d 945, 951 (S.D. Ala. 1999), *aff'd sub nom.* Wilson v. Minor, 220 F.3d 1297 (11th Cir. 2000) (Dallas County); Dillard v. City of Greensboro, 946 F. Supp. 946, 952 (M.D. Ala. 1996); Dillard v. Town of Louisville, 730 F. Supp. 1546, 1549 (M.D. Ala. 1990); Dillard v. Town of Cuba, 708 F. Supp. 1244, 1246 (M.D. Ala. 1988); Dillard v. Chilton County Bd. of Educ., 699 F. Supp. 870, 874 (M.D. Ala. 1988), *aff'd*, 868 F.2d 1274 (11th Cir. 1989); Dillard v. Crenshaw County, 649 F. Supp. 289, 295 (M.D. Ala. 1986) ("[T]he evidence reflects that racially polarized voting in Calhoun, Lawrence, and Pickens Counties is severe and persistent, and that this bloc voting has severely impaired the ability of blacks in the three counties to elect representatives of their choice."); Clark v. Marengo County, 623 F. Supp. 33, 37 (S.D. Ala. 1985); Brown v. Bd. of Sch. Comm'rs of Mobile County, 542 F. Supp. 1078, 1091 (S.D. Ala. 1982), *aff'd*, 706 F.2d 1103 (11th Cir.), *aff'd*, 464 U.S. 1005 (1983); Bolden v. City of Mobile, 542 F. Supp. 1050, 1076-77 (S.D. Ala. 1982).

¹⁹⁰ See, e.g., Letter from Bill Lann Lee, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to J. Frank Head, Wallace, Ellis, Fowler & Head (Aug. 16, 2000) (City of Alabaster); Letter from Bill Lann Lee, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to E. Paul Jones (Feb. 6, 1998) (Tallapoosa County); Letter from James P. Turner, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Lynda K. Oswald, Assistant Attorney Gen., State of Ala. (Nov. 16, 1993) (Tuscaloosa County); Letter from John R. Dunne, *supra* note 151 (Hale County); Letter from John R. Dunne, *supra* note 91 (city of Selma); Letter from John R. Dunne, *supra* note 92 (Dallas County); Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to David R. Boyd, Balch & Bingham (Dec. 23, 1991) (Jefferson County); Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to David R. Boyd, Balch & Bingham (Nov. 8, 1991) (Houston and Henry Counties); Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Dorman Walker, Balch & Bingham (Dec. 3, 1990) (Perry County); Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Gladys D. Prentice, City Clerk, Leeds, Ala. (May 4, 1987) (City of Leeds); Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Charles E. Bailey, Mayor, Alexander City, Ala. (Dec. 1, 1986) (Alexander City); Letter from William Bradford Reynolds to John C. Jay, Jr., *supra* note 147 (city of Greensboro); Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to David F. Steele, Hare and Hare (Feb. 17, 1984) (Monroe County); Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to E. Paul Jones (May 10, 1983) (Tallapoosa County); Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Robert G. Kendall, Johnston, Johnston & Kendall

larization at the county and municipal levels in Alabama. Federal courts in Alabama have acknowledged the causal connection between racial bloc voting and the history of *de jure* segregation: “Racial bloc voting by whites is attributable in part to past discrimination, and the past history of segregation and discrimination affects the choices of voters at the polls.”¹⁹¹

An expert analysis of the 2004 general election for the seven members of the Chilton County Commission, who, pursuant to a 1987 consent decree, are elected at-large using cumulative voting rules, provides dramatic evidence of how white voters in Alabama remain unwilling to vote for black candidates. Commissioner Bobby Agee, who is black, has served continuously on the commission since 1988 and has earned the respect of his fellow commissioners. But even the power of incumbency and familiarity has earned him no support from the white electorate:

The [expert’s] tables reveal that Mr. Agee, a long time incumbent on the county commission, is the overwhelming choice of the African American voters. His support among African American voters in the county ranges, across the analyses, from an estimated 5.2 votes per voter to 5.6. He is the first choice of African American voters to represent them on the commission in every analysis. In contrast, his support among the non-African American voters is minimal. The estimates of their support for Mr. Agee based on the ecological inference and regression analyses range from 0.1 to 0.2 votes per voter, and he finishes last in this election in the votes cast by non-African Americans in each type of analysis. The correlation coefficient between the racial composition of the precincts and the votes per voter in them for Mr. Agee, as noted above, is a statistically significant .991. This is much higher than those for any of the non-African American candidates in this election.¹⁹²

Because of white bloc voting against black candidates, only two black candidates have been elected to statewide office in the entire history of Alabama. The late Oscar Adams was appointed to a place on the Alabama Supreme Court in 1980; he won re-election in 1982 and 1988.¹⁹³ When Justice Adams retired in 1993, the governor appointed Ralph Cook, who

(July 26, 1982) (Conecuh County); Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice, to Calvin Steindorff, Probate Judge & Chairman, Butler County Comm’n (July 19, 1982) (Butler County).

¹⁹¹ *Brown*, 542 F. Supp. at 1094.

¹⁹² Supplemental Report of Richard L. Engstrom, PhD., as Trial Exhibit 1 Supporting Plaintiff at 7, *Dillard v. Chilton County Comm’n*, CA No. 2:87-1179-T (M.D. Ala. 2005). The scatterplot of the election returns for Agee by precinct in the expert’s report also provided a pictorial display of this stark racially polarized voting in Chilton County. *Id.* at 6.

¹⁹³ *S. Christian Leadership Conference of Ala. v. Sessions*, 56 F.3d 1281, 1288 (11th Cir. 1995).

also is black, to replace him.¹⁹⁴ Justice Cook was re-elected in 1994.¹⁹⁵ Subsequently, a second black justice, John England, was appointed to the Alabama Supreme Court, but both Cook and England were defeated by white challengers when they stood for re-election in 2000.¹⁹⁶ Currently, there are no black statewide elected officials. There are twenty-seven blacks serving in the Alabama House of Representatives¹⁹⁷ and eight blacks in the Alabama Senate.¹⁹⁸ All but one have been elected from majority-black districts. The sole exception is the 47.8% black House District 85, in which the incumbent black member was re-elected in 2002.¹⁹⁹

On November 2, 2004, voters in Alabama defeated proposed amendments to the 1901 Alabama Constitution that would have removed language requiring the racial segregation of schools, that would have struck language inserted in 1956 as part of Alabama's official campaign of massive resistance to federally imposed desegregation and that would have repealed the poll tax provisions.²⁰⁰ Federal and state court decrees over the years have made these segregationist provisions unenforceable,²⁰¹ and the business, civic and education leaders of the state, backed by Alabama's Republican Governor, urged the electorate to remove these relics of official white supremacy, as a sign to the world that Alabamans were ready to put their racist past behind them. Their plan backfired when, in the racially po-

¹⁹⁴ *Id.*

¹⁹⁵ *The Issue of Race Blacks, for the Most Part, Fared Well With the White Electorate*, BIRMINGHAM NEWS, Nov. 14, 1994, at 4.

¹⁹⁶ See Thomas Spencer et al., *Moore Wins, Credits God*, BIRMINGHAM NEWS, Nov. 8, 2000, at 1.

¹⁹⁷ See Alabama House of Representatives, Roster of the Alabama House of Representatives, http://www.legislature.state.al.us/house/representatives/houseroster_alpha.html (last visited Dec. 30, 2007).

¹⁹⁸ See Alabama State Senate, Roster of the Alabama State Senate, http://www.legislature.state.al.us/senate/senators/senateroster_alpha.html (last visited Dec. 30, 2007).

¹⁹⁹ See generally Letter from Bill Pryor, Attorney Gen., State of Ala., John J. Park, Jr., Assistant Attorney Gen., State of Ala., to Chief, Voting Section, Civil Rights Div., Dep't of Justice (Sept. 4, 2001), available at http://www.legislature.state.al.us/reapportionment/districts_2001.html (select "Justice Department Submission Letter for the House District Plan" hyperlink); Letter from Bill Pryor, Attorney Gen., State of Ala., Charles Campbell, Assistant Attorney Gen., State of Ala., to Chief, Voting Section, Civil Rights Div., Dep't of Justice (Aug. 14, 2001), available at http://www.legislature.state.al.us/reapportionment/districts_2001.html (select "Justice Department Submission Letter for the Senate District Plan" hyperlink).

²⁰⁰ See ALA. SEC'Y OF STATE, 2004 GENERAL ELECTION RESULTS (2004), available at <http://www.sos.state.al.us/Downloads/d11.aspx> (select "Elections Division"; then select "2004 General Election Results – County Level") (last visited Dec. 30, 2007) (noting election results for Ala. Act No. 2003-203).

²⁰¹ See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Knight v. Alabama*, 787 F. Supp. 1030, 1104 (N.D. Ala. 1991), *aff'd in relevant part*, 14 F.3d 1534 (11th Cir. 1994); *United States v. Alabama*, 252 F. Supp. 95 (M.D. Ala. 1966); Opinion of the Justices No. 333, 624 So. 2d 107 (1993).

larized referendum election, the majority-white electorate refused to go along.²⁰²

In the campaign leading up to the November 2, 2004 vote on what was called “Amendment Two,” white religious conservatives told voters that striking the 1956 segregationist amendments, which took away the right of all children to a public education, would open the door for courts to order an increase in taxes.²⁰³ The opponents of Amendment Two contended that education was not a right, but a gift: “Every child in the state of Alabama has the gift [of education] given to them at taxpayers’ expense”²⁰⁴ This was the same message that had rallied Alabama’s electorate a year earlier to defeat Governor Riley’s proposed amendments to the Alabama Constitution, which would have relaxed some of the racially-inspired provisions that prevent state and local government from raising property taxes—taxes that are, by far, the lowest of all fifty states.²⁰⁵ In the 2003 referendum election on “Amendment One,” only thirteen predominately-black counties had voted to amend the property tax restrictions.²⁰⁶

Later in 2004, a federal district court made findings of fact that Alabama’s antiquated 1901 Constitution, which disfranchised blacks and retained Reconstruction era tax restrictions, was directly linked with the Voting Rights Act of 1965 and the continuing underfunding of public education in Alabama:

The convergence in one year, 1971, of four federal mandates requiring re-enfranchisement of African-Americans, reapportionment of the Alabama legislature, fair reassessment of all property subject to taxes, and school desegregation, had thus created a “perfect storm” that threatened the historical constitutional scheme whites had designed to shield their property from taxation by officials elected by black voters for the benefit of black students.²⁰⁷

²⁰² See Phillip Rawls, *Black Caucus Threatens to Filibuster Over Amendment Two*, ASSOCIATED PRESS, Dec. 16, 2004; *State Constitution Needs Reform for Language, Schools*, TUSCALOOSA NEWS, Nov. 8, 2004; Jay Reeves, *Parker’s Election, Apparent Defeat of Amendment Two Trouble Some*, TUSCALOOSA NEWS, Nov. 6, 2004; David White, *Governor Supports Amendment 2*, BIRMINGHAM NEWS, Oct. 21, 2004, at 1.

²⁰³ See, e.g., Phillip Rawls, *50 Years After Brown, Alabama Votes on Segregation Language in Constitution*, ASSOCIATED PRESS, Oct. 10, 2004.

²⁰⁴ Taylor Bright, *Language Stems from 1956 Session*, BIRMINGHAM POST-HERALD, Nov. 27, 2004 (quoting John Giles, Executive Director, Alabama Christian Coalition).

²⁰⁵ Jeffrey Gettleman, *A Tax Increase? \$1.2 Billion? Alabamians, It Seems, Say No*, N.Y. TIMES, Sept. 6, 2003, at A1.

²⁰⁶ GLENN FELDMAN, *The Status Quo Society, the Rope of Religion, and the New Racism*, in *POLITICS AND RELIGION IN THE WHITE SOUTH* 287, 335 (2004).

²⁰⁷ *Knight v. Alabama*, 458 F. Supp. 1273, 1294 (N.D. Ala. 2004), *aff’d*, 476 F.3d 1219 (11th Cir. 2007), *cert. denied*, 127 S. Ct. 3014 (2007).

Enforcement of the Voting Rights Act in Alabama thus placed increased demands on the 1901 Constitution to block state and local governments now subject to black voter influence or control from using the democratic process to improve public education and other public services. The federal court found:

There is a direct line of continuity between the property tax provisions of the 1875 Constitution, the 1901 Constitution, and the amendments up to 1978. . . . The historical fears of white property owners, particularly those residing in the Black Belt, that black majorities in their counties would eventually become fully enfranchised and raise their property taxes motivated the property tax provisions in the 1901 Constitution and the amendments to it in 1971 and 1978. . . .

Indeed, Black Belt and urban industrial interests successfully used the argument that it is unfair for white property owners to pay for the education of blacks to produce all the state constitutional barriers to property taxes from 1875 to the present, including the 1971 and 1978 Lid Bill amendments.²⁰⁸

Thus, the defeat in 2003 of some of the racially discriminatory property tax provisions in the Alabama Constitution and the defeat in 2004 of state constitutional amendments that would have removed segregation era provisions demonstrate the stranglehold Alabama's history of discrimination still has on its electorate. The State Superintendent of Education complained that demagogues had convinced voters that state government could not be trusted with their money, and historians at Alabama universities said the vote "had clear racial meaning."²⁰⁹ State legislators did not try to pass another bill attempting to remove the racist constitutional provisions in the 2006 regular session, because 2006 was an election year and "[e]veryone is scared to do anything."²¹⁰

²⁰⁸ *Id.* at 1296–97.

²⁰⁹ FELDMAN, *supra* note 206, at 335. Auburn historian Wayne Flynt said the 1956 amendment the voters refused to strike from the state constitution was "right at the core of the whole racist defense. In many ways it is the centerpiece of the whole racist defense of segregation." Bright, *supra* note 204.

²¹⁰ *Language Change Unlikely*, MONTGOMERY ADVERTISER, Dec. 13, 2005, at B3 (quoting Rep. John Rogers). The article further noted:

Rep. James Buskey, D-Mobile, who pushed for the 2004 constitutional amendment, said he's afraid groups would hyperpoliticize the issue during a year when the Legislature, governor and many other state offices are up for election. "It needs to come up, but based on the climate that's out there now it would not do any good for the state of Alabama to suffer a second defeat on that amendment," Buskey said.

Id.

V. CONCLUSION

The overall lesson to be taken from Alabama's experience with the Voting Rights Act since 1982 is clear: The preclearance provisions of Section 5 have become the most important guarantors of equal political and electoral power for blacks in Alabama, first, in their recurring negotiations with white officials, and second, in their ability to restrain the efforts of white elected officials, reacting to their majority-white constituents, to reverse the progress in voting rights and restore the old, discriminatory practices.