VOTING RIGHTS IN SOUTH CAROLINA: 1982–2006

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I. INTRODUCTION

Prior to passage of the Voting Rights Act, South Carolina had elected no African-American officials in the twentieth century.[1] No African-American has been elected to statewide office since passage of the Voting Rights Act.[2] Governor Mark Sanford told a reporter in 2005 that he did not expect to see such an election "[i]n the foreseeable future."[3]

With a large African-American population, South Carolina has a significant history of attempts to deprive those citizens of opportunities to participate fully in its electoral systems. The exclusion of black voters from political processes was sufficiently widespread and severe to warrant statewide coverage under the preclearance provision in Section 5 of the Act.[4]

This history of deprivation and exclusion includes both resistance to the Voting Rights Act and efforts under it to enforce equal opportunity for the South Carolina's African-American population. Upon passage of the Act, South Carolina immediately and unsuccessfully moved to challenge the constitutionality of Section 5.[5] Many South Carolina jurisdictions engaged in decades-long resistance to the Voting Rights Act and full representation for their African-American citizens.

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[1] Orville Vernon Burton et al., *South Carolina*, *in* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990 199 (Chandler Davidson & Bernard Grofman eds., 1994).

[2] *See A Quick Spin Around the State House: Sanford's Views on Black Leaders in S.C.*, COLUMBIA STATE (S.C.), May 11, 2005, at B3 [hereinafter *A Quick Spin Around the State House*].

[3] *Id*.

[4] *See* 28 C.F.R. 51 app. (2007).

[5] *See* South Carolina v. Katzenbach, 383 U.S. 301 (1966).

South Carolina's population grew from 3,121,820 in 1980 to 4,012,012 in 2000.[6] The African-American proportion of that population has declined modestly from 30.4% to 29.5%.[7] The African-American voting age population in 2000 was 27.1%, compared to 27.3% in 1980 and 26.8% in 1990.[8] The Census Bureau's American Community Survey places the black only proportion at 28.9% in 2004.[9]

There is a small, but rapidly growing, Hispanic population in South Carolina. The 2004 American Community Survey found that the Hispanic population had quadrupled since 1990, from 30,551 to 120,681, or 3% of the state's population.[10] Knowledgeable observers place the number of Hispanic residents at around 400,000.[11]

African-American voters, who were 27.8% of registered voters in 1982,[12] made up 26.9% of that registration in 2006.[13] Hispanic voters (13,469) made up only .6% of the total registration (2,400,358) in 2006.[14] That was a significant increase just from 2002, when there were only 7598 registered Hispanic voters, or .4%.[15] In 2002, there were more Asian citi-

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[6] *See* U.S. CENSUS BUREAU, DETAILED POPULATION CHARACTERISTICS: SOUTH CAROLINA 7 tbl.194 (1983), *available at* http://www2.census.gov/prod2/decennial/documents/1980a_scD-01.pdf; U.S. Census Bureau, Population Change and Distribution: 1990 to 2000 2 tbl.2 (2001), http://www.census.gov/prod/2001pubs/c2kbr01-2.pdf.

[7] *See* U.S. Census Bureau, Table 55: South Carolina – Race and Hispanic Origin: 1790 to 1990 (2002), http://www.census.gov/population/documentation/twps0056/tab55.pdf; U.S. Census Bureau, 2000 Census Summary File 1, at tbl.P3, *available at* http://factfinder.census.gov (last visited Jan. 4, 2008).

[8] *See* U.S. Census Bureau, 2000 Census Redistricting Data (Public Law 94-171), at tbl.PL3, *available at* http://factfinder.census.gov (last visited Jan. 3, 2008); U.S. Census Bureau, 1990 Census of Population and Housing (Public Law 94-171): Age by Race and Hispanic Origin, *available at* http://censtats.census.gov (last visited Feb. 25, 2006); U.S. Census Bureau, 1980 Census of Population: General Population Characteristics PC80-1-B42, at tbl.19: (Persons by Age, Race, Spanish Origin and Sex 1980). The Bureau of the Census estimates that the state's population increased to 4,255,083 in 2005. *See* U.S. Census Bureau, Table 1: Annual Estimates of the Population for the United States and States, and for Puerto Rico: April 1, 2000 to July 1, 2005, http://www.census.gov/popest/states/tables/NST-EST2005-01.xls (last visited Jan. 4, 2008). Figures used for 2000 are based on the Maptitude for Redistricting category NH_DOJ_Blk, which includes persons identifying themselves as black, black and white or white and black. Black only persons were 29.5% of the total.

[9] U.S. Census Bureau, South Carolina – Fact Sheet, http://factfinder.census.gov (search "South Carolina") (2004 data on file with authors).

[10] *See id.*

[11] Jim DuPlessis, *Hispanics' Impact on Economy Unclear*, COLUMBIA STATE (S.C.), Dec. 4, 2005, at F1.

[12] *See* S.C. ELECTION COMM'N, REPORT OF THE SOUTH CAROLINA ELECTION COMMISSION FOR THE PERIOD ENDING JUNE 30, 1983 439 (1983).

[13] *See* S.C. Election Comm'n, Registration Tally (Jan. 1, 2006) (on file with authors).

[14] *See id.*

[15] *See* S.C. Election Comm'n, Registration Tally (July 1, 2002) (on file with authors).

zens (8788) registered to vote than Hispanics.[16] In 2006, Asian registrants lagged Hispanic registrants, 11,070 to 13,469.[17]

Substantial change has occurred in South Carolina since 1965. A once all-white General Assembly in 2006 included eight African-American Senators and twenty-five African-American Representatives.[18] Statewide, ninety-nine of the 334 members of county councils are African-American. Another 164 African-Americans are elected public school trustees out of a total of 567 elected trustees.[19]

That progress has come because of vigorous enforcement of the Voting Rights Act through Section 2 vote dilution litigation and Section 5 objections and litigation. Since 1971, the United States Department of Justice (DOJ) has objected 120 times to discriminatory changes in voting practices or procedures in South Carolina.[20] Sixty-one percent of those objections (seventy-three) have come since the 1982 renewal of the Voting Rights Act.[21]

Those discriminatory practices have covered a wide variety of changes that affected nearly every aspect of black citizens' participation in South Carolina's electoral processes, including discriminatory redistricting plans, racially selective annexations and changes in methods of election, which reduced the ability of black voters to elect candidates of their choice.[22] They have covered all levels of government, from the South Carolina General Assembly to a municipal board of public works.[23] Indeed, no region of South Carolina has been untouched by these proposed discriminatory changes.

That expansion and protection of single-member districts through Voting Rights Act enforcement has been the critical factor in that progress because

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[16] *See id.*

[17] *See* S.C. Election Commission, *supra* note 13.

[18] 2006 SOUTH CAROLINA LEGISLATIVE MANUAL 81–140 (2006) (on file with authors). The race of elected members was determined from voter registration lists, county and school district website photos and personal knowledge.

[19] Another fifty-five trustees are appointed by countywide school Boards of Education. *See* S.C. CODE ANN. § 59-19-30 (2007). Those appointed trustees are in majority black counties Marion and Clarendon and 46% black Dillon County. *See* U.S. Census Bureau, 2000 Census Summary File 1, at tbl.P3, *available at* http://factfinder.census.gov (last visited Jan. 4, 2008).

[20] *See* Department of Justice, Section 5 Objection Determinations: South Carolina, http://www.usdoj.gov/crt/voting/sec_5/sc_obj2.htm (last visited Jan. 4, 2008).

[21] *See id.*

[22] *See id.*

[23] *See id.*

> [I]n order to give minority voters an equal opportunity to elect a minority candidate of choice as well as an equal opportunity to elect a white candidate of choice in a primary election in South Carolina, a majority-minority or very near majority-minority black voting age population in each district remains a minimum requirement.[24]

High levels of racially polarized voting drives the need for majority or near-majority African-American districts. As recently as 2002, the Court in *Colleton County Council v. McConnell* found:

> Voting in South Carolina continues to be racially polarized to a very high degree, in all regions of the state and in both primary elections and general elections. Statewide, black citizens generally are a highly politically cohesive group and whites engage in significant white-bloc voting. Indeed, this fact is not seriously in dispute.[25]

Even in this young century, South Carolina's African-American citizens have relied for protection of their voting rights on objections to a rich variety of discriminatory changes across the state. As elaborated below, just since 2000, public officials in Charleston, Cherokee, Greenville, Lexington, Richland, Spartanburg, Sumter and Union Counties have changed district lines or voting rules in ways that would diminish the ability of African-American voters to elect candidates of their choice.

II. STATE AND LOCAL GOVERNMENT IN SOUTH CAROLINA

The Voting Rights Act was one of two significant developments framing the change in African-American representation in South Carolina. "One person, one vote" litigation in the 1960s triggered the end of South Carolina's traditional domination of local government by county legislative delegations led by baronial senators. In that process, single-member districts eventually came to both the South Carolina House and Senate.[26] As formerly appointed county governing bodies and school boards became elective and Voting Rights Act enforcement led to single-member districts, African-American citizens had new opportunities to elect candidates of their choice to county councils and school boards.[27]

The 1895 Constitution of South Carolina created a framework of legislative dominance of the state at all levels of government. The General Assembly was apportioned along county lines with one Senator and one or

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[24] Colleton County Council v. McConnell, 201 F. Supp. 2d 618, 643 (D.S.C. 2002).
[25] *Id.* at 641.
[26] *See* Burton et al., *supra* note 1, at 204.
[27] *See id.* at 214–15.

more Representatives.[28] That county delegation, and especially the Senator, ruled the county. As V.O. Key had written over a decade earlier, "County legislative delegations constitute the real governing bodies of the respective counties."[29] "The . . . legislative delegation performed the legislative, executive, and taxing functions for the county."[30] Many local officials, including members of county commissions and county boards of education, were appointed by the Governor upon nomination of the delegation.[31] County operations were funded through Supply Bills adopted by the General Assembly as local legislation upon which only the affected delegation voted.[32]

In 1966, the district court in *O'Shields v. McNair*[33] ruled the apportionment scheme embodied in the 1895 Constitution unconstitutional based on "one-person, one-vote" principles.[34] Prior to *O'Shields*, every county was politically controlled by a Senator who resided in the county.[35] After *O'Shields*, some rural counties no longer had resident Senators.[36]

Following a Constitutional amendment in 1973, a statewide Home Rule Act in 1975 transferred significant powers to county governments, pushing forward a piecemeal process of empowering local citizens to "enact ordinances, require licenses and permits of various sorts, and raise or lower property tax rates."[37] But it was not until 1982 that the General Assembly transferred authority to redistrict single-member district county councils to those councils statewide.[38] Attending that shift in power, each county was required to choose a form of government and method of election or accept the form and method of election specified for it by state law.[39] The move to Home Rule in the mid-to-late 1970s accounted for DOJ objections in eleven South Carolina counties.[40] In their study of the

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[28] *See* S.C. CONST. art. III, §§ 4, 6 (amended 1973).

[29] V.O. KEY, JR., SOUTHERN POLITICS IN STATE AND NATION 151 (1949).

[30] Horry County v. United States, 449 F. Supp. 990, 993 (D.D.C. 1978).

[31] *See id.* at 992–93.

[32] *See id.* at 993.

[33] 254 F. Supp. 708 (D.S.C. 1966).

[34] *Id.* at 709.

[35] *See id.*

[36] *See* Jenny Anderson Horne, *Annual Survey of South Carolina Law (January 1–December 31, 1995)*, 48 S.C. L. REV. 175, 179 (1996) (noting that after *O'Shields*, Senators frequently represented more than one county).

[37] WALTER EDGAR, SOUTH CAROLINA: A HISTORY 551 (Univ. of S.C. Press 1998).

[38] Act of Mar. 24, 1982 (1982), *available at* http://www.scstatehouse.net/sess104_1981-1982/bills/407.htm (Act 313).

[39] *See* S.C. CODE ANN. § 4-9-10 (2007).

[40] Those include Aiken, Bamberg (three objections), Charleston, Chester (two objections), Clarendon, Colleton, Edgefield Horry, Sumter, Lancaster and York Counties. *See* Department of Justice, *supra* note 20.

impact of the Voting Rights Act to 1990, Orville Vernon Burton and his colleagues found that "[t]he Home Rule Act accounted for more than 40 percent (fifteen of thirty-five) of the changes from at-large to district election plans that have occurred in South Carolina county councils between 1974 and 1989."[41]

That process of devolution of power from the delegation to local government is far from complete. Magistrates, the lowest level of court in South Carolina, are still appointed by the Governor on nomination of the county's Senators.[42] The General Assembly routinely passes legislation to, for example, regulate local mowing on state highways,[43] excuse students in particular school districts from days lost to snow[44] or set school start and end dates in specific counties.[45]

Although most local appointment powers have been devolved on county councils, legislative delegations continue to control county boards of registration and elections,[46] precinct lines[47] and method of election and district lines for many boards of school trustees.[48] That continued involvement of state legislators in local affairs removes African-American citizens from participation in critical decisions as discriminatory changes are proposed.

III. MINORITY OFFICE HOLDERS IN SOUTH CAROLINA

> In an interview on WIS-TV in Columbia, Sanford was asked about blacks winning statewide office. "Can I interject?" Sanford asked, interrupting the show's host. "I think there never will be," Sanford said.
>
> "You said you don't think there ever will be?" asked Craig Melvin, who hosts "Awareness."

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[41] Burton et al., *supra* note 1, at 205. The Home Rule Act did not address the method of election of either municipal governments or school district trustees.

[42] *See* S.C. CONST. art. V, § 26.

[43] *See, e.g.*, S.C. CODE ANN. §§ 57-23-810 to 57-23-820 (2007).

[44] *See id.* § 59-1-425(C).

[45] *See id.* § 59-1-425(A).

[46] County Boards of Registration are appointed by the Governor with the advice and consent of the Senate. S.C. CODE ANN. § 7-5-10 (2007). Commissioners of election are appointed by the Governor, "upon the recommendation of the senatorial delegation and at least half of the members of the House of Representatives from the respective counties." *Id.* § 7-13-70 (2007). Local laws have created combined registration boards and election commissions. A summary of the provisions of those several laws can be found in S. 1106, legislation introduced in 2008 to codify them. S. 1106, 2008 Leg., 117th Sess. (S.C. 2008), *available at* http://www.scstatehouse.net/sess117_2007-2008/bills/1106.htm.

[47] S.C. CODE ANN. § 7-7-10.

[48] *See* S.C. CODE ANN. § 59-19-40. See, for example, Acts 416, 418, 420, 421, 422, 425 and 435 of 2006 at http://www.scstatehouse.net/sess116_2005-2006/bills/06actsp1.htm.

> "In the foreseeable future," Sanford said. It hasn't happened in the past 100 years, and "that is tragic," said the governor, who is a white Republican.[49]

South Carolina greeted passage of the Voting Rights Act with no African-American elected officials in a state that was approximately 33% African-American.[50] Through vigorous enforcement of the Voting Rights Act, especially through the creation of single-member districts with majority and near-majority African-American districts, the number of African-American elected officials had grown to 540 in 2001.[51]

A. STATEWIDE OFFICES

No African-American has been elected to statewide office in South Carolina since the end of Reconstruction.[52] Since 1982, African-American candidates have run for Governor, Attorney General and Secretary of State as Democrats.[53]

In 1982, South Carolina's African-American citizens were represented largely by white elected officials. The Congressional delegation and the State Senate, elected from numbered posts in multi-member districts, were all white. The South Carolina House, elected from single-member districts in 1982, included twenty African-Americans among its 124 members.[54]

The first African-American State Senator in the twentieth century, I. DeQuincey Newman, was sworn in on October 25, 1983 after winning a special election.[55] Four additional African-Americans joined Newman in the Senate in 1985 after the Senate was reapportioned into forty-six single-member districts.[56]

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[49] *A Quick Spin Around the State House*, *supra* note 2, at B3.

[50] *See* S.C. BUDGET & CONTROL BD., DIV. OF RESEARCH & STATISTICAL SERVS., SOUTH CAROLINA STATISTICAL ABSTRACT, 1985 311 (1985) [hereinafter 1985 STATISTICAL ABSTRACT] (authors' averaging of 1960 and 1970 percent African-American and others).

[51] JOINT CTR. FOR POLITICAL AND ECON. STUDIES, BLACK ELECTED OFFICIALS: A STATISTICAL SUMMARY 18 tbl.2 (2000), *available at* http://www.jointcenter.org/index.php/content/download/1809/12453/file/BEO-00.pdf [hereinafter BLACK ELECTED OFFICIALS].

[52] *See* Burton et al., *supra* note 1, at 199; *A Quick Spin Around the State House*, *supra* note 2, at B3.

[53] *See A Quick Spin Around the State House*, *supra* note 2, at B3.

[54] *See* 1983 SOUTH CAROLINA LEGISLATIVE MANUAL 60–l08 (1983) (on file with authors).

[55] *S.C.'s First Black Senator Since Reconstruction Dies*, UNITED PRESS INT'L, Oct. 21, 1985.

[56] 1985 SOUTH CAROLINA LEGISLATIVE MANUAL 17–34 (1985) (on file with authors).

In 2006, African-Americans occupied one of six Congressional seats, eight of forty-six State Senate seats and twenty-five of one hundred and twenty-four State House seats.[57]

As noted previously, the overwhelming reality for African-American voters is that

> [I]n order to give minority voters an equal opportunity to elect a minority candidate of choice as well as an equal opportunity to elect a white candidate of choice in a primary election in South Carolina, a majority-minority or very near majority-minority black voting age population in each district remains a minimum requirement.[58]

The only congressional seat occupied by an African-American is District Six,[59] which has a 58% African-American voting age population according to 2000 Census population data.[60] Prior to the 1992 creation of the majority African-American Sixth District, no African-American had served in Congress from South Carolina in the twentieth century.[61] The remaining districts range in African-American voting age population from 18% to 30%.[62]

Eight of the forty-six South Carolina Senate districts have an African-American incumbent.[63] Only two of those districts—District 7 and District 29—have less than a majority African-American voting population.[64] In 2006, District 7 had a majority nonwhite voter registration (51%), compared to its 47% African-American voting age population.[65] District 29

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[57] *See supra* note 18 and accompanying text.

[58] Colleton County Council v. McConnell, 201 F. Supp. 2d 618, 643 (D.S.C. 2002).

[59] *See* United States Congressman James E. Clyburn, James E. Clyburn Biography, http://clyburn.house.gov/clyburn-biography.cfm (last visited Jan. 7, 2008).

[60] *See* U.S. Census Bureau, 2000 Census Redistricting Data (Public Law 94-171), at tbl.PL3, *available at* http://factfinder.census.gov (last visited Jan. 3, 2008).

[61] *See* United States Congressman James E. Clyburn, *supra* note 59.

[62] *See* U.S. Census Bureau, 2000 Census Redistricting Data (Public Law 94-171), at tbl.PL3, *available at* http://factfinder.census.gov (last visited Jan. 3, 2008).

[63] *See* South Carolina Legislature Online, Members of the Senate, http://www.scstatehouse.net/html-pages/senatemembers.html (last visited Jan. 6, 2008).

[64] *See* South Carolina Legislature Online, S. 591 Senate Population Report (2003), *available at* http://www.scstatehouse.net/redist/senate/050603S591NonvotingReport.doc; *see also* Letter from Glenn F. McConnell, President Pro Tempore, S.C. State Senate, to Joseph Rich, Chief, Voting Section, Civil Rights Div., Dep't of Justice (June 27, 2003), *available at* http://www.scstatehouse.net/redist/senate/senred.htm (select "Submission Letter" hyperlink).

[65] *See* South Carolina Legislature Online, *supra* note 64; State of South Carolina, Registration by Senate Seat, http://www.state.sc.us/scsec/regist/senate.html (select "Senate Seat Number 7"; then select "Demographic Type: Race").

had in 2006 a 45% African-American voting age population, but a 47% nonwhite registration.[66]

The South Carolina House of Representatives has 124 members.[67] Twenty-five of those Representatives are African-American, one hundred are white (including one born in Latin America) and one is Asian, specifically Indian.[68] The African-American voting age population in each of those districts is at least 49%, and nonwhite voter registration exceeds 50% in each of those districts.[69]

Solicitors, the local prosecutors, are elected from multi-county districts.[70] Our analysis shows only one of those districts, Judicial Circuit 3 in Clarendon, Lee, Sumter and Williamsburg Counties, had an African-American majority population in 2000 (53%). All fourteen of the Solicitors are white.[71]

B. LOCAL GOVERNMENT

The expansion of single-member districts has preceded the expansion of African-American representation at the local level in South Carolina.

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[66] South Carolina Legislature Online, *supra* note 64; State of South Carolina, *supra* note 65 (select "Senate Seat Number 29"; then select "Demographic Type: Race"). The South Carolina State Election Commission's principal reports distinguish between "White" and "Nonwhite" voters. "Nonwhite" voters, to date, are substantially African-American.

[67] *See* South Carolina Legislature Online, Members of the House, http://www.scstatehouse.net/html-pages/housemembers.html (last visited Jan. 6, 2008).

[68] *See id*. Rep. Nikki Randhawa Haley represents 92% white District 87 in Lexington County. *See* South Carolina Legislature Online, Redistricting 2001: House Judiciary Committee, http://www.scstatehouse.net/redist/house/houred.htm (select "Block Equivalency File" hyperlinks) (last visited Jan. 7, 2008) [hereinafter S.C. House Redistricting Data] (House population figures are based on block equivalency files downloaded and analyzed by authors). In her first election, her opponent attempted to make her Sikh faith an issue in the campaign. Tim Flach, *Indian American Group Hails Haley's Win*, COLUMBIA STATE (S.C.), June 24, 2004, at B1; Brad Warthen, Editorial, *Voters Embraced American Dream in Choosing Nikki Haley*, COLUMBIA STATE (S.C.), June 27, 2004, at D2.

[69] *See* S.C. House Redistricting Data, *supra* note 68. 2006 SOUTH CAROLINA LEGISLATIVE MANUAL, *supra* note 18, at 81–140.

[70] *See* S.C. CONST. art. V, § 13 (amended 1985); S.C. CODE ANN. § 1-7-31 (2007).

[71] *See* S.C. CODE ANN. § 14-5-610 (2007) (prescribing Judicial Circuits). The race of Solicitors was determined from voter registration lists and personal knowledge. Ralph J. Wilson, an African-American, was elected to Solicitor in the majority white 15th Judicial Circuit (Georgetown and Horry Counties) in 1990 and 1994, but he was defeated in 1998. S.C. ELECTION COMM'N, ANNUAL REPORT 1990–1991 115 (1990–1991) (on file with authors); SC ELECTION COMM'N, SOUTH CAROLINA ELECTION REPORT 1994–1995 49 (1994–1995) (on file with authors); S.C. ELECTION COMM'N, SOUTH CAROLINA ELECTION REPORT 1997–1998 52 (1997–1998) (on file with authors). African-American Thomas R. Sims was appointed interim Solicitor in the 1st Judicial Circuit (Orangeburg, Calhoun and Colleton Counties). He was defeated in 1992. *See* S.C. ELECTION COMM'N, ANNUAL REPORT 1992–1993 127 (1992–1993) (on file with authors). Tucker Lyon, *1st Judicial Circuit Solicitor*, TIMES & DEMOCRAT (Orangeburg, S.C.), Nov. 1, 1992, at D2.

Only two of South Carolina's forty-six counties elect its council members at-large: the African-American-majority Hampton and Jasper Counties. There are 315 county council members elected from single-member districts. Thirty percent of those members are African-American. Only eight of ninety-four are elected from districts with less than majority African-American voter registration. Nineteen council members are elected from at-large seats. Five of those are African-American, all elected in majority African-American counties.[72]

Table 2 shows that only South Carolina school trustees and sheriffs come close to matching the state's 30% African-American population proportion. Not one of South Carolina's Solicitors, the state's elected prosecuting attorneys, is African-American. For county elected officials other than sheriff, the same patterns hold true. Other than for sheriff, African-Americans can only rarely be elected in majority white counties.[73]

Voting in South Carolina remains highly racially polarized.[74] For legislative bodies especially, election of African-American candidates of choice in districts that do not have African-American majorities or near majorities is a rare event.

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[72] The figures on elected county officials were derived by identifying county council members from published lists on county websites or lists on the Association of Counties website at http://www.sccounties.org/counties/counties.htm. Copies of the documents and study results are on file with the authors. *See, e.g.*, S.C. ELECTION COMM'N, COUNTY COUNCIL TALLY (Oct. 1, 2004). Race of council members was determined from voter registration lists, county websites and personal knowledge.

[73] The elected officials in counties with less than 45% African-American voter registration include four sheriffs (Abbeville, Colleton, Edgefield and McCormick), two Clerks of Court (Colleton and Georgetown), one Treasurer (Georgetown) and one Coroner (McCormick).

[74] *See* Colleton County Council v. McConnell, 201 F. Supp. 2d 618, 643 (D.S.C. 2002).

Table 1.
Percent African-American (A-A) Voter Registration By Race of Council Member (Single-Member Districts)

	Percent A-A Registration					Total
	0–40	40–45	45–50	50–55	55–100	
A-A Count	2	1	6	8	77	94
% within % A-A reg.	1.1%	9.1%	40.0%	61.5%	84.6%	29.8%
White Count	183	10	9	5	14	221
% within % A-A reg.	98.9%	90.9%	60.0%	38.5%	15.4%	70.2%
Total Count	185	11	15	13	91	315

Table 2.
Elected Countywide Officials and School Trustees

Office	Total	African-American	% A-A
Auditor	46	7	15
Clerk of Court	46	6	13
Coroner	46	5	11
Probate Judge	46	2	4
Register of Deeds or Mesne Conveyances	5	0	0
Sheriff	46	12	26
Treasurer	46	5	11
School Trustee	567	164	29

We have not undertaken a study of minority municipal officeholders in South Carolina. The Joint Center for Political and Economic Studies found 227 African-American members of municipal governing bodies and twenty-nine African-American mayors in South Carolina in 2000.[75]

Section 5 has been especially critical in helping to push jurisdictions in South Carolina to adopt single-members districts, to draw those districts fairly so that African-American citizens can choose candidates of their choice and to ensure that those advances were not taken back in subsequent redistricting. Absent that, we would be much closer to the all-white elected officialdom that confronted South Carolina when the Voting Rights Act first passed. Since 1982, significant advances have been made as school boards and county councils increasingly reflect the state's population.

IV. SECTION 5 OF THE VOTING RIGHTS ACT

South Carolina has been a covered jurisdiction under Section 5 of the Voting Rights Act of 1965[76] since its passage because of its history of discriminatory voting practices.[77] The Act has been extended in 1970,[78] 1975[79] and 1982.[80]

Under Section 5, any change with respect to voting in a covered jurisdiction may not be implemented or enforced unless and until the jurisdiction first obtains the requisite determination by the United States District Court for the District of Columbia or makes a submission to the United States Attorney General.[81] The jurisdiction is required to provide proof that the proposed voting change does not deny or abridge the right to vote on account of race, color or membership in a language minority group.[82] If the jurisdiction is unable to demonstrate the absence of such discrimination, the District Court must deny the requested declaratory judgment or, in the case of administrative submissions, the Attorney General must object to the voting change, making the change legally unenforceable.[83]

As the Supreme Court noted in rebuffing South Carolina's challenge to preclearance provision of Section 5:

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[75] BLACK ELECTED OFFICIALS, *supra* note 51, at 19 tbl.2.
[76] 42 U.S.C. § 1973c (2006).
[77] *See* 28 C.F.R. 51 app. (2007).
[78] Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (1970).
[79] Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400 (1975).
[80] Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982).
[81] 42 U.S.C. § 1973c(a).
[82] *Id.*
[83] *See id.*

> Congress had found that case-by-case litigation was inadequate to combat wide-spread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits. After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims.[84]

Reno v. Bossier Parish School Board (Bossier I)[85] and *Reno v. Bossier Parish School Board (Bossier II)*[86] have limited the scope of Section 5 preclearance review to whether proposed changes are retrogressive; that is, whether they diminish the opportunity of minority voters to elect candidates of their choice.[87] Relying on *Beer v. United States*,[88] which held that an election plan has a prohibited "effect" only if it is retrogressive, the United States Supreme Court held that Section 5 does not prohibit preclearance of a redistricting plan enacted with a discriminatory, but nonretrogressive, purpose.[89]

The Department of Justice is responsible for defending declaratory judgment actions in the District Court, and the Department may bring lawsuits to enjoin the enforcement of voting changes that have not received Section 5 preclearance.[90] Private parties may also bring suits to enjoin voting changes, which have not been submitted to the Attorney General and received preclearance.[91]

Voting changes in South Carolina jurisdictions have occasioned numerous objections and required several lawsuits by private citizens and the United States to enforce Section 5.

A. SECTION 5 OBJECTIONS

Since 1971, the Department of Justice has objected to preclearance of discriminatory changes in voting practices or procedures in South Carolina 120 times.[92] Sixty-one percent of those objections (seventy-three) have

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[84] South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966).

[85] 520 U.S. 471 (1997).

[86] 528 U.S. 320 (2000).

[87] *Bossier I*, 520 U.S. at 478; *Bossier II*, 528 U.S. at 324.

[88] 425 U.S. 130 (1976).

[89] *Bossier II*, 528 U.S. at 335–36. Justice Souter, in dissent, pointed out that Bossier Parish officials had exercised their energies for decades in an effort to "limit or evade" their obligation to desegregate the parish schools. *See id.* at 344 (Souter, J., dissenting).

[90] *See* 28 C.F.R. §§ 51.51, 51.62 (2007).

[91] *Id.* § 51.63.

[92] *See* Department of Justice, *supra* note 20.

come since the 1982 renewal of the Voting Rights Act.[93] Since 1982, the discriminatory practices to which the DOJ objected have covered a wide variety of changes that affected nearly every aspect of African-American citizens' participation in South Carolina's electoral processes, including discriminatory redistricting, annexations, voter assistance, changing county boundaries, eliminating offices, reducing the number of seats on a public body, majority vote requirements, changing to at-large elections, using numbered posts or residency requirements, staggering terms, unfair scheduling of elections, changing from nonpartisan to partisan elections and limiting the ability of African-American citizens to run for office.

Since 1982, those Department of Justice objections to discriminatory practices have covered all levels of government: the General Assembly (both Senate and House), counties,[94] county boards of education,[95] school districts,[96] cities and municipalities[97] and a board of public works.[98] These objections also have covered the state geographically.

Many of those jurisdictions engaged in decade-long resistance to the Voting Rights Act and full representation for their African-American citizens.

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[93] *See id.*

[94] Those include Beaufort, Dorchester, Edgefield, Horry, Lee, Marion, Orangeburg, Richland, Sumter and Williamsburg Counties, as well as statewide legislation affecting qualifications for Probate Judges. *See id.*

[95] Those include Anderson, Hampton, Marion and Spartanburg County Boards of Education. *See id.*

[96] Those include Consolidated School District of Aiken County, Charleston County School District, Cherokee County School District 1, Dorchester District 4, Edgefield County School District, Hampton County School Districts 1 and 2, Lancaster County School District, Lee County School District, Newberry County School District, Richland-Lexington School District 5 and Union County School District. *See id.*

[97] Those include Barnwell, Batesburg, Batesburg-Leesville, Bennettsville, Charleston, Chester, Clinton, Columbia, Elloree, Greer, Hemingway, Jefferson, Johnston, Lancaster, North Charleston, Norway, Rock Hill, Spartanburg, Summerville, Sumter and York. *See id.*

[98] Gaffney Board of Public Works. *See id.*

Table 3.
Department of Justice Objections

Issue	No.
Redistricting	27
Annexation	9
Other	8
Staggered Terms	8
Method of Selection	7
Majority Vote Requirement	6
Schedule of Election	6
Change in No. of Seats	4
Eliminates County Bd. of Educ. or Superintendent	3
At-Large with Residency Requirement	1
Required Resignation of Public Employees	1

The principal focus of objections in South Carolina prior to 2000 was on the discriminatory intent of the jurisdictions rather than the retrogressive effect of the proposed changes.

1. Objections in the 2000 Cycle

The opponents of the Voting Rights Act often suggest that the types of discriminatory practices that led to passage of the Act and Section 5, in particular, are part of an ancient history now happily buried. However, the objections that the Department of Justice has entered to attempted changes in South Carolina just since the release of the 2000 Census belies this and underlines the importance of the continued requirement that voting changes go to the Department of Justice for preclearance.

South Carolina jurisdictions have continued to attempt discriminatory changes to which the Attorney General, even with the narrowed review following the *Bossier II* decision in 2000, objected.

a. Charleston County School Board

Following the 2000 General Election, African-Americans comprised a majority (five of nine) on the Charleston County School Board.[99] School trustees in Charleston County are elected at-large from four residency districts.[100] There is no majority vote requirement.[101] The District Court in *United States v. Charleston County*, a challenge to at-large partisan County Council elections, had found that "special circumstances unique to the school board" explained "the contemporary and inordinate African American-candidate success that is out of balance with the characteristically poor results for African American candidates in all other jurisdictional elections."[102]

In finding against the County Council, the court had ruled that partisan elections, with their attendant primary processes, created "a *de facto* majority vote requirement [which] makes it more difficult for the African-American community to employ a traditional strategy of bullet voting in order to improve their chances of electing candidates of their choosing."[103] The *Charleston County* court expressed "particular concern" over a 2002 effort to convert the school trustees to partisan elections as one of "two recent episodes of racial discrimination against African-American citizens attempting to participate in the local political process."[104]

In 2003, the South Carolina General Assembly, led by the Charleston legislative delegation, passed Act 128 of 2003, which would have changed the method of elections for Trustees of the Charleston County School District from nonpartisan to partisan elections[105]—essentially recreating the electoral system for county council that the district court had just found "denies African Americans, on account of their race and color, equal access to the electoral and political process, in contravention of Section 2 of the Voting Rights Act."[106]

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[99] United States v. Charleston County, 316 F. Supp. 2d 268, 279 (D.S.C. 2003), *aff'd*, 365 F.3d 341 (4th Cir. 2004).

[100] *Id.* at 274.

[101] *See id.*

[102] *Id*. at 281.

[103] *Id*. at 294.

[104] *Id.* at 286 n.23.

[105] *See* JOURNAL OF THE SOUTH CAROLINA SENATE, 115th Sess., at 1672 (Apr. 16, 2003) [hereinafter April 16, 2003 SENATE JOURNAL].

[106] *Charleston County*, 316 F. Supp. 2d at 307. The vote in the Senate was again on racial lines. *See* April 16, 2003 SENATE JOURNAL, *supra* note 105, at 1675. In the House of Representatives, one white member voted with his African-American delegation colleagues on the losing end of a 7-6 vote. *See* JOURNAL OF THE SOUTH CAROLINA HOUSE OF REPRESENTATIVES, 115th Sess. (May 22, 2003), *available at* http://www.scstatehouse.net/sess115_2003-2004/hj03/20030522.htm.

On February 26, 2004, the Department of Justice objected to the legislation because "[t]he proposed change would significantly impair the present ability of minority voters to elect candidates of choice to the school board and to participate fully in the political process. In addition, it was enacted despite the existence of a nonretrogressive alternative."[107]

The special circumstances which led to the election of African-American candidates have only been repeated once. The Board of Trustees in 2006 had one remaining African-American member, Hillery Douglas, who was reelected without opposition in 2004.[108]

b. Sumter County Council

The Sumter County Council has a long history of attempts to limit the ability of African-American citizens to fully participate in the political process, which continued through redistricting in 2001. Single-member districts for the Sumter County Council only came after a long process of resistance, beginning in 1967 with the adoption of at-large elections for the newly created council.[109] No effort was made to seek preclearance of that change, and elections were held under the unprecleared system from 1968 through 1974.[110] Following adoption of the 1975 Home Rule Act, Sumter did not adopt a new form of government, but accepted the Act's designation of a Council-Administrator form with at-large elections.[111] The Attorney General objected to adoption of that form on December 3, 1976.[112] Private parties and the United States sought and were granted an injunction in the South Carolina District Court against implementation of the at-large election system.[113]

Following several attempts to convince the Attorney General to reconsider and a referendum adopting at-large elections for Sumter County Council, the county convinced a three-judge federal panel that its requests for reconsideration constituted a request for preclearance under Section 5 and that the Attorney General had failed to timely object to this request.[114]

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[107] Letter from R. Alexander Acosta, Assistant Attorney Gen., Dep't of Justice, to C. Havird Jones, Jr., Senior Assistant Attorney Gen. (Feb. 26, 2004) (on file with authors).

[108] S.C. ELECTION COMM'N, ELECTION REPORT 2004 143–44 (2004) [hereinafter 2004 ELECTION REPORT].

[109] 1967 S.C. Acts 371.

[110] *See* County Council of Sumter County v. United States, 596 F. Supp. 35, 37 (D.D.C. 1984).

[111] Burton et al., *supra* note 1, at 208.

[112] *Id.*

[113] *Id.* at 208–09; *see also* Blanding v. DuBose, 454 U.S. 393, 395–99 (1982) (providing a brief history of the Sumter County litigation).

[114] Blanding v. DuBose, 509 F. Supp. 1334, 1337 (D.S.C. 1981), *rev'd*, 454 U.S. 393 (1982).

On appeal, the Supreme Court rejected that argument and reversed the district court's judgment.[115]

In 1984, the Sumter County Council sought a declaratory judgment from the District Court for the District of Columbia preclearing at-large elections for the Sumter County Council.[116] The district court refused, finding that only one African-American had been elected under the at-large system.[117] "A fairly drawn single-member district plan for the Sumter County Council is more likely to allow black citizens to elect candidates of their choice in three of seven districts (or 42.8 percent of the representation on the Council)."[118]

The court found that Sumter County had failed to prove "that the legislature did not pass Act 371 in 1967 for a racially discriminatory purpose at the insistence of the white majority in Sumter County" or "that the at-large system was not maintained after 1967 for racially discriminatory purposes and with racially discriminatory effect."[119]

Since 1984, elections for Sumter County have been held from single-member districts. In 2000, Sumter County was 47% African-American and 49% non-Hispanic white.[120] Three of the county's seven council members were African-American.[121] District 7, which had been a barely white majority district when drawn in the 1990s and was represented by a white councilmember, had become increasingly African-American as a result of demographic changes.[122] The benchmark plan for the Sumter County Council showed four heavily African-American majority districts, including District 7 which had a nearly 59% African-American voting age population.[123] The district was not malapportioned and could have remained unchanged.[124]

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[115] *Blanding*, 454 U.S. at 394.

[116] *See* County Council of Sumter County v. United States, 596 F. Supp. 35 (D.D.C. 1984).

[117] *See id.* at 37.

[118] *Id.*

[119] *Id.* at 38.

[120] U.S. Census Bureau, 2000 Census Summary File 1, at tbls.P3, P4, *available at* http://factfinder.census.gov (last visited Jan. 7, 2008).

[121] *See* Robbie Evans, *Council Reaches Distasteful Racial 'Compromise,'* DAILY ITEM (Sumter), Oct. 16, 2003, at 6A.

[122] Figures taken from digitized benchmark plan (existing plan from the 1990s drawn to 2000 Census geography) provided by the Digital Cartography & Precinct Demographics section of the Office of Research & Statistics of the South Carolina Budget & Control Board (on file with authors). *See also* S.C. ELECTION COMM'N, ELECTION REPORT 2000 303 (2000).

[123] Letter from Ralph F. Boyd, Jr., Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Charles T. Edens, Chairperson, County Council, Sumter, S.C. (June 27, 2002).

[124] *See id.* at 2.

The county adopted and submitted to the Department of Justice for preclearance a plan that included only three districts in which African-American citizens would be able to elect candidates of choice.[125] District 7 had been drawn to reduce its African-American voting age population from 59% to 49%.[126] The Department of Justice objected to the plan on June 27, 2002, finding that, because of a pattern of racially polarized voting in the district, "under the proposed plan, the black candidate of choice would lose, or at best win by an extremely narrow margin."[127] The plan was retrogressive.[128]

Over the next several months, the Council made numerous attempts to agree on a new plan in a racially charged atmosphere. White members pushed for a variant of a 3-3-1 plan not significantly different from the plan rejected by the Department of Justice.[129]

In an editorial, the *Sumter Daily Item*'s Robbie Evans wrote: "The very fact that voting lines must be determined by race is inherently an insult to every Sumter resident who queues up at a polling place each November. What it states, bluntly, is that 200 years after Abraham Lincoln, we, blacks and whites, still are unable to see past the color of a candidate's skin."[130]

At a public hearing, a white councilmember declared: "This is about black power." Another white councilmember moved to challenge Section 5 "all the way to the Supreme Court" because it was imperative to defend the rights of Asian (.9% of the population) and Hispanic (1.8% of the population) minorities who would get no district.[131]

Nearly a year later, the Council still had not adopted a plan. At a November 11, 2003 meeting, white councilmember Carol Burr demanded the removal of African-American citizens Carl Holmes and Eugene Baten, who were silently holding signs that read, "Don't reduce the Black Vote" and "Respect the Voting Rights Act."[132] Burr stormed from the meeting after the Council Chair, on advice of counsel, allowed the citizens to remain.[133] Another white member left before Baten told the Council, "All that I ask is

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[125] *See id.* at 1.

[126] *Id.*

[127] *Id.* at 2.

[128] *Id.*

[129] *See* Evans, *supra* note 121, at 6A.

[130] *Id.*

[131] Author John C. Ruoff was present at this December 10, 2002 meeting.

[132] Braden Bunch, *Redistricting Compromise Implodes*, DAILY ITEM (Sumter), Nov. 12, 2003, *available at* http://www.theitem.com/apps/pbcs.dll/article?AID=/20031112/NEWS01/111120017.

[133] *Id.*

that the plan you pass is legal."[134] White member Charles Eden said, "I'm tired of hearing what he has to say. I've heard it a hundred times."[135]

Two weeks later, on November 25, 2003, the Sumter County Council finally adopted a new redistricting plan with a 55% African-American voting age population in District 7.[136] Under that plan, to which the Attorney General did not object, Eugene Baten was elected to represent District 7.[137]

c. Union County Board of School Trustees

Union County came to national attention in 1994 when a young white woman, Susan Smith, murdered her two children and attempted to deflect law enforcement attention by playing on racial stereotypes, claiming that her car, with the children inside, had been carjacked by "a black male in his late 20s to early 30s, wearing a plaid shirt, jeans and a toboggan-type hat."[138]

Following the 2000 Census, the county's African-American citizens faced two attacks on their ability to elect candidates of their choice. In 2002, the General Assembly passed Act 462 of 2002, which redistricted the Board of Trustees of the Union County School District.[139] Union County School District is coextensive with the county.[140] The county is rural and located upstate, with a population of only 29,881, of whom 31% are African-American according to the 2000 Census.[141] The district's nine trustees were elected on staggered terms from single-member districts in nonparti-

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[134] *Id.*

[135] *Id.*

[136] Braden Bunch, *County Oks Voting Lines*, DAILY ITEM (Sumter), Nov. 26, 2003, *available at* http://www.theitem.com/apps/pbcs.dll/article?AID=/20031126/NEWS01/111260070.

[137] *See* Bobby Baker, *Democrats Baten, Eldridge Win County Seats*, DAILY ITEM (Sumter), Nov. 4, 2004, *available at* http://www.theitem.com/apps/pbcs.dll/article?AID=/20041104/NEWS01/111040082; *see also* Sumter County Government, County Council Members, http://www.sumtercountysc.org/council.htm (last visited Jan. 7, 2008).

[138] Heather Brooke, *Carjacker in Union Abducts 2 Toddlers*, HERALD-JOURNAL (Spartanburg), Oct. 26, 1994, *available at* http://www.goupstate.com/stagnant/smith/ninedays/1smith.html. The story can be traced in the nearby *Spartanburg Herald-Journal*. *See* GoUpState.com, Nine Days in Union, http://www.goupstate.com/stagnant/smith/ninedays/ninedays.html (last visited Jan. 7, 2008).

[139] Letter from Ralph F. Boyd, Jr., Assistant Attorney Gen., Dep't of Justice, to C. Havird Jones, Jr., Senior Assistant Attorney Gen., S.C. (Sept. 3, 2002).

[140] *See* South Carolina Department of Education, Schools and Districts in South Carolina, http://ed.sc.gov/schools (last visited Jan. 7, 2008).

[141] *See* U.S. Census Bureau, 2000 Census Summary File 1, at tbl.P3, *available at* http://factfinder.census.gov (last visited Jan. 8, 2008).

san elections.[142] Two of those districts had African-American majorities and were represented by African-American candidates of choice in 2002.[143]

As the Department of Justice noted in objecting to the plan:

> Also revealing is the fact that, in contrast to the process which led to the 1989 benchmark plan, the proposed plan here was developed without any formal public hearings in the county, and without any opportunity for black members of the local board of trustees and the local black community to voice what we understand to be considerable concerns regarding the plan, resulting in an atmosphere of secrecy.[144]

Indeed,

> [t]he School Board in Union County found out that this Bill had been introduced and adopted when the chairman of the board saw a little article in the newspaper that said that Representative Fleming was going to meet with the Town Council Members from Jonesville, which is a small town in Union County, to discuss with them the school board redistricting lines.[145]

District 1 had a 60% African-American voting age population and District 7 had a 68% African-American voting age population under the benchmark plan. The African-American proportion of the voting age population, due to voter participation levels in District 7, especially, could not be significantly reduced from the benchmarks without impairing the ability of African-American citizens to elect candidates of their choice.[146] Act 462 created African-American voting age populations of 56% and 61% in Districts 1 and 7, respectively.[147] An alternative plan prepared at the request of the Board of Trustees and offered as an amendment during the Senate debate "avoided significant reductions in black voting strength while adhering substantially to the State's redistricting goals as presented

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[142] Letter from Ralph F. Boyd, Jr., *supra* note 139, at 1.

[143] *Id.*

[144] *Id.* at 2.

[145] JOURNAL OF THE SOUTH CAROLINA SENATE, 114th Sess. (Feb. 7, 2002), *available at* http://www.scstatehouse.net/sess114_2001-2002/sj02/20020207.htm [hereinafter Short Testimony] (testimony of Sen. Linda Short). The transcript of the debate on H. 4351 is available online at http://www.scstatehouse.net/sess114_2001-2002/sj02/20020207.htm, but not the printed version of the journal for that day.

[146] *See* Expert Report of John C. Ruoff, Ph.D., Regarding Racial Dimensions of Elections and Voting in Union County, South Carolina Elections, for Defendant Intervenors Keenan et al. (Jan. 23, 2003), Rodgers v. Union County, No. 7:02-1390-MBS (D.S.C. filed Apr. 26, 2002) (on file with authors). The Ruoff study analyzed county council districts and elections, but school trustee District 7 is similar to county council District 5.

[147] Short Testimony, *supra* note 145.

in [the State's] submission."[148] Despite "repeated requests," the State failed to provide "further information concerning black and white candidates."[149]

Act 164 of 2003 enacted a plan substantially the same as the alternative offered during the Senate debate in 2002,[150] but the Department of Justice did not object to it. The Union County School District Board of Trustees had two African-American members in 2006.[151]

While dealing with the effort to reduce African-American voting strength in majority African-American school districts, the Union African-American community was also confronted with a challenge to one of the two majority African-American county council districts. In 2000, Union County redrew its council districts.[152] That plan maintained two African-American majority districts, District 2 and 5.[153] District 2 had in both the 1990 and 2000 redistricting split the town of Jonesville, a place with 982 people, of whom 322 were African-American.[154] Private white plaintiffs filed a challenge to District 2 on April 6, 2002, alleging that the split of Jonesville was unconstitutional because race predominated in the drawing of the district.[155]

On December 30, 2003, a Consent Order and Agreement was filed which settled the case.[156] That Consent Order and Agreement found "that there is statistically significant racial bloc voting in Union County and specifically in Districts 2 and 5 . . . . [T]his racial bloc voting leads to the white voting majority in Union County being able to defeat the African American candidate of choice."[157]

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[148] Letter from Ralph F. Boyd, Jr., *supra* note 139, at 2. The Board of Trustees requested of Senator Linda Short: "The board would like this plan developed by the Office of Research and Statistics in consultation with Dr. John Ruoff of the NAACP. This plan should include all criteria required by the Justice Department and the Voting Rights Act." Short Testimony, *supra* note 145.

[149] Letter from Ralph F. Boyd, Jr., *supra* note 139, at 2.

[150] A private citizen brought litigation seeking to enjoin elections under the 1990s plan, as that plan was malapportioned. *See* Sanders v. Vanderford, No. 7:02-4076-20 (D.S.C. 2002). That suit was dismissed after the new plan was passed and precleared. *See* Sanders v. Vanderford, No. 7:02-4076-20 (D.S.C. Oct. 6, 2003) (order of dismissal).

[151] *See* Union County School District, School Board Members and Highlights, http://www.union.k12.sc.us/District/School%20Board/Board.html (last visited Mar. 7, 2008). The race of 2006 members was ascertained from voter registration lists and personal knowledge.

[152] Complaint at 5, Rodgers v. Union County, No. 7:02-1390-MBS (D.S.C. Apr. 26, 2002).

[153] *Id.* at 4–5.

[154] *Id.* at 5; U.S. Census Bureau, 2000 Census Summary File 1, at tbl.P3, *available at* http://factfinder.census.gov (last visited Jan. 8, 2008).

[155] Complaint at 6–10, Rodgers v. Union County, No. 7:02-1390-MBS.

[156] *See* Rodgers v. Union County, No. 7:02-1390-MBS (D.S.C. Dec. 30, 2003) (consent order and agreement).

[157] *Id*. at 4.

The plaintiffs, defendants and defendant-intervenors, the Union County Branch of the NAACP and African-American voters agreed to a new map which made very small changes to District 2 by removing 128 people in Jonesville from the district.[158]

d. Cherokee County School District No. 1

In 2002, the South Carolina General Assembly adopted Act 416 of 2002, which, among other provisions, decreased the number of members of the Board of Trustees from nine to seven.[159]

The benchmark plan for Cherokee County School District No. 1 had been developed in 1993 after African-American citizens had sued the school district under Section 5 to enjoin an unprecleared plan.[160] Two of the nine districts had African-American majorities and African-American incumbents.[161]

Under a seven-member plan, African-American citizens in the 21% African-American district would likely have only been able to elect one candidate of their choice.[162] The district maintained in its submission that a "viable cross-over phenomenon" in the 36% African-American voting age population in District 4 created an opportunity for black voters to elect a candidate of their choice.[163] However, the Department of Justice concluded that even in the unlikely event that that phenomenon might benefit the African-American incumbent—as was urged by local officials—it was unclear that another candidate of choice of African-American voters would benefit from it.[164] Any seven-member configuration would have a retrogressive effect.[165]

As noted in the Attorney General's letter, the local NAACP branch had presented a nine-member plan without retrogressive effect to Representative Olin Phillips, chair of the legislative delegation, at a May 2002 meeting.[166] The majority of the school board supported a nine-member plan.[167]

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[158] *See id.* at Pl. Ex. A.

[159] *See* Letter from Ralph F. Boyd, Jr., Assistant Attorney Gen., Dep't of Justice, to C. Havird Jones, Senior Assistant Attorney Gen., S.C., Keith R. Powell, Childs & Halligan, Kenneth L. Childs, Childs & Halligan (June 16, 2003).

[160] *See* S.C. State Conference NAACP v. Cherokee County Sch. Dist. No. 1, No. 7:92-02948-GRA (D.S.C. 1992).

[161] Letter from Ralph F. Boyd, Jr., *supra* note 159, at 2.

[162] *See id.* at 2–3.

[163] *Id.* at 3.

[164] *See id.*

[165] *Id.*

[166] *See id.* at 4.

[167] *See id.*

e. Richland-Lexington School District 5 (Richland and Lexington Counties)

In 2002, the General Assembly adopted the Richland County School Districts Property Tax Relief Act (Act 326), implementing changes to the method of election in Richland-Lexington School District 5.[168] Prior to 2002, trustees were elected to staggered, four-year terms.[169] Five were elected from Lexington County and two from Richland County.[170] Contests were at-large within each county.[171] Act 326 moved one seat from Lexington to Richland County to account for population changes.[172] In addition, it created numbered posts and a new majority vote requirement.[173]

The district's voting age population was 14% African-American according to the 2000 Census.[174] "The minority population is growing rapidly, particularly among school age children and particularly in Richland County."[175] No African-American candidate had been elected to the Richland-Lexington School District 5 Board of Trustees since 1992.[176] According to Department of Justice analyses, the winner in 1992, Sherman Anderson, would have been defeated under a majority vote requirement.[177] Further, with an additional third seat, Anderson, the African-American-preferred incumbent, would have been elected as one of the top two vote-getters in Richland County in 1996 absent the new numbered post system and majority vote requirements.[178]

Race was not part of the discussion when Act 326 was under consideration. African-American citizens were simply ignored. However, with a growing African-American population on the Richland County side of the district, the possibility of African-American voters electing candidates of

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[168] Richland County School Districts Property Tax Relief Act, 2002 S.C. Acts 326. This legislation covers, in addition to school board elections and property tax relief, membership on the local Airport Commission and the technical school commission.

[169] *See* Letter from R. Alexander Acosta, Assistant Attorney Gen., Dep't of Justice, to C. Havird Jones, Jr., Senior Assistant Attorney Gen., S.C. (June 25, 2004).

[170] *Id.* at 2.

[171] *See id.*

[172] *Id.*

[173] *Id.* at 1.

[174] *Id.*

[175] *Id.*

[176] *Id.* at 2.

[177] *See id.*

[178] *Id.* The Attorney General did not object to the move of one member from Lexington to Richland County.

choice increased.[179] In Richland-Lexington 5, three minority candidates ran unsuccessfully for the two seats available in 2002.[180] No minority candidates campaigned for the single seat up in 2004.[181] Absent the Section 5 objection, African-American voters in Richland-Lexington School District 5 would be even further from electing candidates of their choice in the face of racially polarized voting.

f. City of Greer (Greenville and Spartanburg Counties)

Greer, which sits astride the county line between Greenville and Spartanburg Counties, had seen the location of a BMW assembly plant and other development since the 1990 Census.[182] In that period, the city had grown from a population of 10,322, of whom 2728 (26.4%) were African-American and eighty (0.8%) Hispanic, to 16,843, of whom 19.7% are African-American and 8.2% are Hispanic according to the 2000 Census.[183] In short, "Greer continues to be one of South Carolina's fastest growing cities . . . ."[184] Although Greer had two African-American representatives prior to 2000, "it is no longer feasible to devise a redistricting plan, which complies with one-person, one-vote standards, and which contains two districts in which minority voters can elect candidates of choice."[185]

The city preferred a plan that protected white incumbents and split historic communities of interest.[186] While arguing that the *Shaw v. Reno* line of cases precluded drawing the district preferred by African-American citizens, the city drew a minority district that was less compact.[187] That district was not a district in which African-American citizens were likely to elect a candidate of their choice.[188] The Department of Justice found Greer officials "to have been more responsive to the concerns of white individu-

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[179] *See* Chuck Crumbo, *District 5 Board Plan on Hold*, COLUMBIA STATE (S.C.), May 16, 2002, at B3; Bill Robinson, *Minority Presence Strong in Board Races*, COLUMBIA STATE (S.C.), Oct. 17, 2002, at B1.

[180] *See* S.C. ELECTION COMM'N, ELECTION REPORT 2002 324 (2002) [hereinafter 2002 ELECTION REPORT].

[181] *See* 2004 ELECTION REPORT, *supra* note 108, at 304.

[182] *See* Sean Jamieson, *BMW Welcomes Itself to S.C., Opens First North American Plant*, CHARLOTTE OBSERVER, Nov. 15, 1994, at 1D.

[183] *See* U.S. Census Bureau, 1990 Census Summary File 1, at tbls.P001, P006, P008, *available at* http://factfinder.census.gov (last visited Jan. 8, 2008); U.S. Census Bureau, 2000 Census Summary File 1, at tbls.P3, P4, *available at* http://factfinder.census.gov (last visited Jan. 8, 2008).

[184] City of Greer, About Greer, http://www.cityofgreer.org/about/default.aspx?section=About%20Greer (last visited Nov. 2, 2007).

[185] Letter from Ralph F. Boyd, Jr., Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to John B. Duggan, Love, Thorton, Arnold & Thomason (Nov. 2, 2001).

[186] *See id.* at 2–3.

[187] *See id.* at 3.

[188] *Id.* at 2.

als than to concerns expressed by minority citizens."[189] Thus, when a white incumbent was drawn out of his district and a white neighborhood split by the initial plan drawn by the state's redistricting office, the city immediately responded to white citizen concerns by changing the lines.[190] Thus, the Department of Justice found that "the city has failed to meet its burden of establishing an absence of a purpose to retrogress minority voting strength in the adoption of the plan."[191]

Today, after being forced to draw a redistricting plan that did not retrogress, the Greer City Council has one African-American member.[192]

g. City of Charleston (Charleston County)

In the 1990s, the Charleston City Council had six African-American members and six white members along with a white mayor.[193] The city's population of 80,414 in the 1990 Census was 42% African-American.[194] By the 2000 Census, that population had grown to 96,650, of whom 34% were African-American.[195] Much of that growth was the product of annexations that stretched the city both north and south.[196] In 1990, the city occupied about forty-four square miles,[197] compared to about eighty-nine square miles in 1999.[198] Much of that physical growth was on Daniel Island, north of the peninsular city in Berkeley County.[199] However, only 1122 persons lived there in 2000.[200] In the future, that will change, as substantial development is both ongoing and planned on Daniel Island. City

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[189] *Id.*

[190] *See id.* Nearly all redistricting plans for county, municipal and school districts in South Carolina are prepared by the Office of Research and Statistics of the state's Budget and Control Board. That office's Director, Bobby Bowers, has played a critical role over the years in reducing the number of objection letters in South Carolina by having prayer with elected officials over plans which would not pass muster with the Department of Justice.

[191] *Id.*

[192] *See* City of Greer, Mayor and City Council, http://www.cityofgreer.org/Government/CityCouncil.aspx (last visited Jan. 8, 2008).

[193] Jason Hardin, *Redistricting Passes 1st Reading: Charleston City Council's Plan Could Change Racial Balance*, POST & COURIER (Charleston, S.C.), May 9, 2001, *available at* http://archives.postandcourier.com/archive/arch01/0501/arc0509292190.shtml.

[194] CITY OF CHARLESTON, CITY OF CHARLESTON CENTURY V CITY PLAN Ex. A (2000), *available at* http://www.charlestoncity.info/shared/docs/0/century_v_plan4.pdf [hereinafter CENTURY V CITY PLAN].

[195] *See* U.S. Census Bureau, 2000 Census Summary File 1, at tbl.P3, *available at* http://factfinder.census.gov (last visited Jan. 8, 2008).

[196] CENTURY V CITY PLAN, *supra* note 194, at 15.

[197] *Id.* at 18.

[198] *Id.* at Ex. A.

[199] *See id.* at 18, Ex. A.

[200] City of Charleston, Charleston Area Population Figures: Census 2000, http://charlestoncity.info/shared/docs/18/pop_figures.pdf (last visited Jan. 8, 2008).

planning documents in 2000 projected 658% growth on Daniel Island from 1990 to 2015.[201]

The benchmark plan for the City of Charleston still included six majority African-American districts, although only five with voting age population majorities.[202] A proposed redistricting plan would include an unavoidable reduction in majority African-American districts.[203] However, the city redrew its districts in a way that combined Districts 2 and 4 in revised nominally majority African-American District 4.[204] The Department conceded that District 4 might, in the next election, be a district in which African-American voters could elect a candidate of choice.[205] However, the largely white growth on Daniel Island would change that "in a matter of only a few years."[206] The Department of Justice observed that "Section 5 looks not only to the present effects of changes but to their future effects as well."[207]

By drawing the developing areas of Daniel Island into District 1 with downtown Charleston,[208] the city was able to create a District 4 that is likely to remain a district in which African-Americans are likely to elect a candidate of their choice for many years. Charleston City Council in 2006 has five African-American members.[209]

h. City of Clinton (Laurens County)

Clinton, in Laurens County, had a population of 8091 persons according to the 2000 Census, 38% of whom were African-American.[210] Three of

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[201] CENTURY V CITY PLAN, *supra* note 194, at Ex. A.

[202] Letter from R. Alex Acosta, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Francis I. Cantwell, Regan, Cantwell and Stent (Oct. 12, 2001), *available at* http://www.usdoj.gov/crt/voting/sec_5/pdfs/l_101201.pdf.

[203] *Id.* at 1.

[204] *Id.* at 2.

[205] *Id.*

[206] *Id.*

[207] *Id.* (quoting Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 340 (2000)).

[208] There is no elegant way to draw city council districts joining Daniel Island and the Cainhoy Peninsula to the rest of the city. Daniel Island is separated from the remainder of the city by the Cooper River and has no roads directly connecting the two parts of the city. Contiguity between the two districts on Cainhoy Peninsula, Districts 4 and 1, with their Charleston peninsular parts is necessarily by water only. *See* City of Charleston, Council Districts Map, http://www.ci.charleston.sc.us/shared/docs/0/overall_councilsb.pdf (last visited Jan. 9, 2008).

[209] *See* City of Charleston, City Council Members & Districts, http://www.ci.charleston.sc.us/dept/content.aspx?nid=661 (last visited Nov. 2, 2007).

[210] Letter from Ralph F. Boyd, Jr., Assistant Attorney Gen., Dep't of Justice, to C. Samuel Bennett, II, Clinton City Manager (Dec. 9, 2002), *available at* http://www.usdoj.gov/crt/voting/sec_5/pdfs/l_120902.pdf. The city disputed 2000 Census numbers for Lydia Mills, claiming that it was both larger and blacker than the Census figures. The Department of Justice's letter noted that "regardless of which data are used, the result of the proposed designation of

six wards were wards in which African-American citizens had an opportunity to elect candidates of their choice—Wards 1, 2 and 3.[211] In a series of four annexations from 1993 through 2001, the city added population that it designated to Ward 1, the city's only majority African-American ward.[212] The addition of the 25% African-American Lydia Mills to Ward 1 dropped that ward's minority population from 59.3% to 50.3%.[213]

The Attorney General expressed concern that preclearing the Lydia Mills annexation would establish

> a benchmark plan of only two viable districts for minority voters against which any future redistricting plan would be measured. Although the city asserts that the annexations will not affect its goal of maintaining three districts with majority black populations when it does decide to redistrict, the city, under a non-retrogression standard, is free to devise a plan that does nothing more than replicate the plan that would be in effect following the annexations: three districts with a majority black total population, but only two in which black voters can elect a candidate of choice.[214]

The benchmark plan used in redistricting in 2004 had exactly that conformation.[215] In 2006, the Clinton City Council had two African-American members.[216]

i. Town of North (Orangeburg County)

The Town of North, in Orangeburg County, in two annexations in 2002 sought to add two persons to the town, which had a 2000 Census population of 813, of whom 377 (46%) were African-American.[217] Both persons in these annexations were white, perpetuating a practice that "white petitioners [for annexation] have no difficulty in annexing their property to

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the annexations to Ward 1 results in lowering the black voting age population in the ward to less than 50 percent." *Id.* at 2.

[211] *Id.*

[212] *Id.* at 1–2.

[213] *Id.* at 2.

[214] *Id.* at 4.

[215] E-mail from Wayne Gilbert, S.C. Office of Research and Statistics, to John C. Ruoff (Sept. 1, 2004) (on file with authors) (containing the updated benchmark plan including annexations). The annexed area of Lydia Mills is included in Ward 1 of the benchmark plan.

[216] *See* City of Clinton, City Council, http://clintonsouthcarolina.homestead.com/CityCouncil.html (last visited Jan. 9, 2008). Apparently, the Department of Justice did not object to the redistricting submitted on January 28, 2005 (Submission 2005-0273). *See* Department of Justice, Notice of Preclearance Activity, http://www.usdoj.gov/crt//voting/notices/vnote020405.html (last visited Jan. 9, 2008).

[217] *See* U.S. Census Bureau, 2000 Census Summary File 1, at tbl.P3, *available at* http://factfinder.census.gov (last visited Jan. 9, 2008).

the town. In fact, they received help and assistance from town officials."[218] Black citizens seeking annexation, however, received little or no help. Indeed, often city officials simply "fail[ed] to respond to their requests, whether formal or informal."[219] One of those proposed annexations in the early 1990s would have given the town an African-American majority.[220] Apparently, the town simply ignored the request.[221]

North not only ignored African-American petitioners, it failed to respond fully to the Department of Justice's follow-up questions and requests for additional information.[222] Current and former town officials declined to speak to the Department of Justice during its review, and the town made no effort to rebut departmental findings that North had made "racially selective annexations" and failed to provide "equal access to the annexation process" and that "race appears to be an overriding factor in how the town responds to annexation requests."[223]

These objections since 2000 demonstrate the continued need for Section 5 and its vigorous enforcement. Absence of Section 5 review of the General Assembly's efforts to impose a racially discriminatory election system for Charleston County, school trustees would have imposed on Charleston's African-American citizens the obligation to mount costly Section 2 litigation to challenge an electoral system that the district court had just found discriminatory. In the City of Charleston, African-American citizens would have foreseeably and avoidably seen a district in which African-American citizens could elect candidates of their choice quickly change to one in which they could not. In Sumter County, the county council could have deprived African-American citizens of the ability to elect a candidate of their choice in District 7, protecting a white incumbent and continuing a thirty-year pattern of opposing full voting rights for Sumter's African-American citizens.

In Union County, a local state representative could have imposed on the school board a redistricting plan that made it much less likely that African-American citizens would continue to be able to elect two candidates of their choice to the Board of Trustees. In Greer, in order to protect a white incumbent and cater to white citizens' demands, African-American citizens would have been deprived of the ability to elect even one candidate of their

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[218] Letter from R. Alexander Acosta, Assistant Attorney Gen., Dep't of Justice, to H. Bruce Buckheister, Mayor, North, S.C., at 2 (Sept. 16, 2003).

[219] *Id.*

[220] *Id.*

[221] *See id.*

[222] *Id.* at 1.

[223] *Id.* at 2–3.

choice to the city council. In Richland County, imposition of majority vote requirements would have put off the day that a growing African-American population would be able to elect a candidate of its choice to the Richland-Lexington School District 5 Board of Trustees. In North, white city officials would have continued admitting white citizens, while excluding their African-American neighbors from annexing and participating in town elections.

In some of these instances, costly and time-consuming Section 2 suits could have been brought to repair these discriminatory actions. Those costs go to both plaintiffs and defendants. In the Charleston County case, for example, the county's costs alone to defend its discriminatory system were $2 million.[224]

In the meantime, those discriminatory systems would have been implemented. In Richland-Lexington School District 5, where one cannot yet draw a majority African-American district, a Section 2 challenge employing the *Thornburg v. Gingles*[225] factors would have failed, while possible success under the at-large system would have been denied.

The number of discriminatory changes would increase dramatically as numerous legislative, school, municipal and county officials, who have backed off retrogressive proposals only when reminded of DOJ review or having received letters of objection, would implement those discriminatory changes facing only the vague threat of lawsuits whose outcomes would have no impact for years.

> As the Supreme Court noted in *South Carolina v. Katzenbach*:
>
> Voting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 man-hours spent combing through registration records in preparation for trial. Litigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings. Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration.[226]

2. Statewide Redistricting

   a. South Carolina Senate

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[224] United States v. Charleston County, No. 2:0l-0155-23 (D.S.C. Aug. 8, 2005) (order).
[225] 478 U.S. 30 (1986).
[226] South Carolina v. Katzenbach, 383 U.S. 301, 314 (1966).

The South Carolina Senate was all white when the Voting Rights Act was passed and remained so through the 1982 renewal. The first African-American Senator in the twentieth century, I. DeQuincey Newman, was elected in a special election late in 1983.[227]

The history of Section 5 is inextricably linked with redistricting for the South Carolina General Assembly. The first two objections by the Attorney General to changes in South Carolina came in 1972 and 1973 in reaction to redistricting of the all-white South Carolina Senate, as that body rejected single-member districts in favor of white majority multi-member districts, numbered posts and majority vote requirements.[228] In the end, when the Supreme Court ruled the 1973 objection untimely, those discriminatory features stood through the 1970s until 1984.[229]

When the all-white Senate attempted redistricting in 1983, it sought a Section 5 declaratory judgment that Act 257 of 1983 complied with Section 5.[230] That act created forty-six single-member districts for the Senate, splitting counties for the first time.[231] While that declaratory judgment action was pending, the General Assembly sought to proceed as if Act 257 would be cleared by establishing a primary election schedule and opening filing.[232] On March 20, 1984, the Department of Justice objected to that procedure.[233] The D.C. District Court also declared those candidate filings null and void and enjoined the State from taking any further action pursuant to Act 257 until the Act received preclearance.[234]

While that action was pending, private litigants brought an action in the South Carolina District Court asking that court to impose a plan for Senate elections in 1984. The Senate, through Act 513 of 1984, replaced

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[227] *South Carolina Voters Elect a Black to the State Senate*, N.Y. TIMES, Oct. 27, 1983, at A17.

[228] The objections to Act 932 of 1971 were mooted when the South Carolina District Court rejected Fifteenth Amendment arguments, but declared that plan unconstitutional on Fourteenth Amendment malapportionment grounds. *See* Twiggs v. West, No. 71-1106 (D.S.C. Apr. 7, 1972). The July 20, 1973, objection to Act 1205 of 1972 was ruled untimely in *Morris v. Gressette*, 432 U.S. 491 (1977). The South Carolina District Court had ruled Act 1205 constitutional. *See Twiggs*, No. 71-1106 (D.S.C. May 23, 1972), *aff'd*, Powell v. West, 413 U.S. 901 (1973). The Attorney General deferred to that ruling until the District Court for the District of Columbia directed him to review Act 1205 under Section 5 notwithstanding the South Carolina District Court's ruling in *Twiggs v. West*. Harper v. Kleindienst, 362 F. Supp. 742, 746 (D.D.C. 1973), *aff'd*, Harper v. Levi, 520 F.2d 53 (D.C. Cir. 1975).

[229] *See* South Carolina v. United States, 585 F. Supp. 418, 420 & n.2 (D.D.C. 1984).

[230] *Id.* at 420.

[231] *Id.* at 420 n.2.

[232] *Id.* at 420.

[233] *Id.*

[234] *Id.* at 425.

an interim plan issued by the South Carolina District Court in *Graham v. South Carolina*,[235] which had created forty-six single-member districts.[236]

That Act 513 plan included ten majority African-American districts, of which seven had African-American majority voting age populations.[237] Four African-American Senators were immediately elected under the 1984 plan (Districts 7, 19, 39 and 42).[238] A fifth joined them in 1988 (District 30),[239] and a sixth in a special election in 1990 (District 45).[240]

Following the 1990 Census, the General Assembly passed legislation redistricting the South Carolina Senate[241] and the South Carolina House of Representatives.[242] Governor Carroll A. Campbell vetoed both bills observing:

> Upon reviewing the objection letters from the United States Department of Justice concerning certain reapportionment plans in New York, Virginia, Georgia, North Carolina, Texas and Louisiana, I am convinced that the Justice Department would not preclear this plan as provided under Section 5 of the Voting Rights Act.[243]

After both bodies sustained Governor Campbell's vetoes,[244] redistricting returned to the district court for trial and imposition of an interim plan. In 1992, the court in *Burton v. Sheheen* issued a Senate plan that included eleven African-American majority population districts, ten with African-American voting age population majorities.[245] Seven African-American Senators were elected under that plan, although in a special election in

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[235] No. 3:84-1430-15 (D.S.C. June 13, 1984).

[236] Smith v. Beasley, 946 F. Supp. 1174, 1177–78 (D.S.C. 1996) (discussing the history of redistricting of the South Carolina General Assembly).

[237] 1985 STATISTICAL ABSTRACT, *supra* note 50, at 153 (South Carolina Senatorial Districts, Senate Act 513, August 8, 1984).

[238] 1985 SOUTH CAROLINA LEGISLATIVE MANUAL, *supra* note 56, at 17–34.

[239] 1989 SOUTH CAROLINA LEGISLATIVE MANUAL 23–24 (1989) (on file with authors).

[240] 1991 SOUTH CAROLINA LEGISLATIVE MANUAL 41 (1991) (on file with authors).

[241] 1995 S.C. Acts 49.

[242] 1994 S.C. Acts 284.

[243] Veto Letter from Carroll A. Campbell, Jr., Governor, to Nick A. Theodore, President of the Senate (Jan. 29, 1992), *available at* http://www.scstatehouse.net/sess109_1991-1992/hj92/19920204.htm; *see also* Veto Letter from Carroll A. Campbell, Jr., Governor, to Robert J. Sheheen, Speaker of the House of Representatives (Jan. 29, 1992), *available at* http://www.scstatehouse.net/sess109_1991-1992/hj92/19920130.htm.

[244] *See* JOURNAL OF THE SOUTH CAROLINA SENATE, 109th Sess. (Feb. 4, 1992), *available at* http://www.scstatehouse.net/sess109_1991-1992/hj92/19920204.htm; JOURNAL OF THE SOUTH CAROLINA SENATE, 109th Sess. (Jan. 30, 1992), *available at* http://www.scstatehouse.net/sess109_1991-1992/hj92/19920130.htm.

[245] Burton v. Sheheen, 793 F. Supp 1329, 1359–63 (D.S.C. 1992), *vacated sub nom.* Statewide Reapportionment Comm. v. Theodore, 508 U.S. 968 (1993), *and* Campbell v. Theodore, 508 U.S. 968 (1993).

1995, a white candidate replaced African-American Senator Theo Mitchell in Senate District 7 in Greenville County.[246]

The U.S. Supreme Court vacated *Burton* in 1993.[247] The Senate, which did not face elections in 1994, delayed reapportionment on remand until after the House of Representatives submitted a redistricting plan.[248] The Department of Justice denied preclearance to the initial House plan, resulting in a significantly changed plan passed by a coalition of the House Republicans and the Legislative Black Caucus.[249] In describing Senate thinking on redistricting in 1995, Speaker *Pro Tempore* and Judiciary Committee Chair Glenn McConnell testified later: "The Senate decided to take a noncombative posture in dealing with the Department of Justice. We had found it better and cheaper to cooperate and to get clearance . . . we were familiar with what happened to the House and we wanted preclearance."[250]

The South Carolina Senate adopted a new districting plan in 1995 that created additional districts with African-American voting age population majorities in Districts 29 and 37.[251] DeWitt Williams, an African-American House member, joined the Senate in 1996,[252] bringing the total number of African-American Senators to seven.

In 1996 in *Smith v. Beasley*, Districts 29, 34 and 37 of that plan were found unconstitutional because race had predominated over traditional districting principles in the drawing of the districts.[253] In 1997, the Senate adopted a new plan that no longer included African-American majorities in Districts 29 and 37.[254] In objecting to preclearance of the revised District 37, the Department of Justice noted that "there were choices available to the state that would substantially address the *Smith* court's constitutional concerns and not significantly diminish black voting strength in neighboring senate districts."[255]

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[246] Cindi Ross Scoppe, *Senate Democrats Lose 1 Seat, 1 Senator*, COLUMBIA STATE (S.C.), May 31, 1995, at B3.

[247] *See* Statewide Reapportionment Comm. v. Theodore, 508 U.S. 968 (1993); Campbell v. Theodore, 508 U.S. 968 (1993).

[248] *See* Smith v. Beasley, 946 F. Supp. 1174, 1183–84 (D.S.C. 1996).

[249] *See id.* at 1188.

[250] *Id*. at 1201.

[251] *See id.* at 1175–76, 1202.

[252] Cindi Ross Scoppe, *Party's Basking in Wins 'We Stopped the Bleeding,' S.C. Democrats Proclaim*, COLUMBIA STATE (S.C.), Nov. 7, 1996, at B1.

[253] *Smith*, 946 F. Supp. at 1200.

[254] *See* 1997 S.C. Acts 1.

[255] Letter from Isabelle Katz Pinzler, Assistant Attorney Gen., Dep't of Justice, to John W. Drummond, President Pro Tempore S.C. Senate (Apr. 1, 1997).

When the Senate failed to pass a new plan, the *Smith* court adopted the bulk of Act 1, but crafted new districts in District 37 and the adjoining Districts 34, 38 and 44.[256] In its order, the court strongly rejected the Department of Justice's reliance on a benchmark that used the "unconstitutional plan embodied in Act No. 49 (1995) 'modified to address the constitutional infirmities in that plan identified by the court.' "[257] The *Smith* court instead relied on the 1984 Senate plan, the "last plan that was legally adopted by the General Assembly that has not been set aside by the court or superseded by action of the General Assembly that has not been altered by the court."[258]

The Department of Justice also had objected to the Senate plan on Section 2 grounds prior to the Supreme Court's 1997 decision in *Bossier I*, limiting Section 5 preclearance to retrogression review.[259]

Special elections were held for the South Carolina Senate in 1997. Senator DeWitt Williams was defeated in the now 45.8% African-American voting age population district, with 5280 votes to his white opponent's 5793 votes.[260]

After the 2000 Census, redistricting for the Senate also ended up before a three-judge panel when the General Assembly was unable to pass a plan after Governor Jim Hodges vetoed H. 3003.[261]

> The Governor's stated reason for vetoing the legislatively passed redistricting plan centered on the claim that the House and Senate plans should have created more so-called minority "influence districts," defined by the Governor as districts with a black voting age population ("BVAP") of between 25% and 50%, and a claim that the Congressional Plan unnecessarily split several counties within the state.[262]

In reviewing plans proposed by the parties to statewide redistricting in 2002, the court took special note that the Governor and the legislature "have proposed plans that are primarily driven by policy choices designed to effect their particular partisan goals. And, in many cases, the choices appear to be reflective of little more than an individual legislator's desire to strengthen his or her ability to be re-elected to the seat in question."[263]

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[256] Smith v. Beasley, No. 3:95-3235-0, slip op. at 4 (D.S.C. May 28, 1997).

[257] *Id.* at 13–14.

[258] *Id.* at 13 (internal quotations omitted).

[259] *See id.* at 2, 12.

[260] S.C. ELECTION COMM'N, REPORT OF THE SOUTH CAROLINA ELECTION COMMISSION 376 (1997–1998).

[261] *See* Colleton County Council v. McConnell, 201 F. Supp. 2d 618, 624 (D.S.C. 2002).

[262] *Id.*

[263] *Id.* at 628–29.

The court engaged in a searching analysis of racial polarization, black political cohesiveness and white bloc voting, concluding:

> This evidence overwhelmingly demonstrates that the first two *Gingles* factors, necessary for the creation of majority-black legislative and congressional districts in areas where minorities are sufficiently large and geographically compact to constitute a majority in a single-member district, are present statewide. Minority voters are generally politically cohesive to a very high degree and, as a rule, the majority usually votes sufficiently as a bloc to defeat the minority's preferred candidate. Thus, we can and should consider race in each of our redistricting plans to ensure that they do not have the unintended effect of diluting the voting strength of a reasonably compact, majority-minority population.[264]

The remedial plan drawn by the District Court included eleven districts with majority African-American populations and ten with majority African-American voting age populations.[265] Those figures do not include the barely under 50% District 7 in Greenville County, which has consistently elected African-American candidates of choice.[266]

In 2003, the Senate redrew those lines to adjust the court's plan. Act 55 of 2003 included twelve districts with African-American population majorities and ten with majority African-American voting age populations.[267] District 7 was increased to 50% African-American population. In addition, District 29, which the court had reduced to 43% African-American population, was redrawn to bring back in historic constituencies, increasing its African-American proportion to 48% and its African-American voting age population to 45%.[268]

b. House of Representatives

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[264] *Id.* at 642.

[265] *Id.* at 661–62.

[266] *See id.* at 660.

[267] *See* 2003 S.C. Acts 55.

[268] 2003 SOUTH CAROLINA LEGISLATIVE MANUAL 33 (2003). African-American candidate Gerald Malloy was elected to represent Senate District 29 in a special election in November 2002. Block assignments for the districts in each plan (the 1997 Federal Court Plan, the 2002 Federal Court Plan and S. 591 (Act 55 of 2003)) can be found at the Senate's redistricting archive for the 2002 redistricting. *See* South Carolina Senate, South Carolina Redistricting 2001, http://www.scstatehouse.net/redist/senate/senred.htm (select "March 2002 District Court Order; South Carolina Legislative Districts" Congressional and Senate Block Equivalency Files; "S. 591 State Senate Redistricting Plan" Block Equivalency File hyperlinks) (last visited Mar. 7, 2008). After issuing its order in *Colleton County Council*, the district court appended an Order of Clarification, which authorized the use of pre-*Colleton County Council* lines for special elections in November 2002. *See Colleton County Council*, 201 F. Supp. 2d at 669–71.

The House of Representatives was integrated a decade before the Senate. Even so, redistricting in the House was marked by Department of Justice objections to its reapportionment plans in 1974, 1981 and 1994.[269]

In the 1970s, the House of Representatives fought a delaying action. Although three African-Americans were elected to the House in 1970, the reapportionment following the 1970 Census saw the drawing of a plan that employed multimember districts and a full-slate requirement.[270] African-American voters challenged the plan, which was ruled unconstitutional because of the full-slate requirement in *Stevenson v. West*.[271]

The South Carolina General Assembly replaced that plan with another multi-member district plan with numbered posts, thus replacing the full slate law as an impediment to African-American voters choosing candidates of their choice.[272] The Department of Justice objected to that change on February 14, 1974.[273] Elections for 1972 proceeded under the multi-member plan without the full-slate provisions.[274]

In 1973, the Supreme Court summarily reversed the decision of the *Stevenson* court approving multi-member districts.[275] The General Assembly again redistricted in time for the 1974 elections with single-member districts.[276] The number of African-American House members increased from four in 1974 to thirteen in 1975.[277]

In 1981, the General Assembly passed a new districting plan.[278] However, the Department of Justice objected to the fragmentation and dilution of African-American voting strength in Florence County, Richland County, Lee County, Allendale-Bamberg-Barnwell Counties and Jasper-Beaufort Counties, where "alternate proposals were presented which would have avoided the fragmentation and dilution of minority voting strength in each of the referenced areas."[279] The General Assembly addressed those

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[269] *See* Department of Justice, *supra* note 20.

[270] Burton et al., *supra* note 1, at 204–05. Under a full-slate requirement, voters are required to cast a ballot for every office.

[271] *Id.* at 204 (citing Stevenson v. West, No. 72-45, slip op. at 11 (D.S.C. 1972), *rev'd and remanded*, 413 U.S. 902 (1973)).

[272] *Id*.

[273] *Id.*

[274] *Id.*

[275] *Id.*

[276] *Id.*

[277] *Id.*

[278] 1981 S.C. Acts 173, *available at* http://www.scstatehouse.net/sess104_1981-1982/bills/2727.htm.

[279] Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Daniel R. McLeod, Attorney Gen. of S.C., at 2 (Nov. 18, 1981). The Department withdrew

areas in Act 312 of 1982.[280] That plan had twenty-six districts with African-American population majorities.

In the 1990s, Section 5 review played a key role in expanding the number of House districts in which African-American voters were able to elect candidates of their choice. The General Assembly passed reapportionment legislation in 1992 but was unable to override the veto of Governor Carroll A. Campbell, Jr.[281] In vetoing the House's plan, Campbell argued that the plan would not receive Department of Justice preclearance because it "fail[ed] to create additional minority districts"; "reduce[ed] minority populations in existing minority districts"; and "[f]ractur[ed] . . . minority populations to benefit white incumbents at the expense of the creation of electable minority districts."[282] Campbell pointed to seven additional minority districts that could be drawn.[283]

Unable to pass a plan, the parties ended up before the *Burton* court in 1992. That court issued an interim plan that included twenty-eight African-American majority population districts; however, only twenty-three had African-American voting age population majorities.[284] Elections held under the *Burton* plan in 1992 produced eighteen African-American House members. In 1993, the U.S. Supreme Court vacated *Burton*, pointing to the Solicitor General's brief on appeal.[285] The *Smith* court summarized that brief:

> The Solicitor General's brief in *Burton* argued that the district court had not given adequate consideration to the requirements of section 2 of the Voting Rights Act in imposing its redistricting plan. The Solicitor General argued that the district court erred in viewing the litigation as arising under section 5 of the Act, which covers preclearance, instead of section 2 of the Act. According to the Solicitor General, because the *Burton* plaintiffs alleged that the existing election districts violated both section

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its objection to the districts in the Allendale, Bamberg and Barnwell areas on February 25, 1982. *See* Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Robert J. Sheheen, Chairman, Judiciary Comm., S.C. House of Representatives (Feb. 25, 1982).

[280] 1982 S.C. Acts 312, *available at* http://www.scstatehouse.net/sess104_1981-1982/bills/3545.htm.

[281] *See* Veto Letter from Carroll A. Campbell, Jr., Governor, S.C., to Robert J. Sheheen, Speaker of the House of Representatives (Jan. 29, 1992), *available at* http://www.scstatehouse.net/sess109_1991-1992/hj92/19920130.htm.

[282] *Id.*

[283] *Id.*

[284] *See* Burton v. Sheheen, 793 F. Supp. 1329, 1364 (D.S.C. 1992). John Ruoff, testifying on behalf of the Statewide Advisory Reapportionment Committee, had offered a plan to the *Burton* court which included thirty-two effective majority-minority House districts.

[285] *See* Statewide Reapportionment Advisory Comm. v. Theodore, 508 U.S. 968 (1993); Campbell v. Theodore, 508 U.S. 968 (1993).

> 2 and the United States Constitution, the court was required to ensure that any plan it adopted complied in all respects with section 2. The Solicitor General also argued that the court refused to resolve the issue of racially polarized voting and did not respond adequately to the question of whether additional compact and contiguous districts with black majorities could and should have been created in disputed areas to avoid dilution in voting strength in violation of section 2. In addition, the Solicitor General contended there was no basis for the court's finding that any district in which blacks constitute more than 50% of the voting age population may be considered a "black opportunity district." Finally, the Solicitor General also contended that the *Burton* court appeared to have given undue deference to "state policy" in formulating its plans with primary emphasis on preserving county and precinct lines.[286]

The *Burton* court held off issuing a new plan, giving the General Assembly an opportunity to craft its own districts.[287] The House of Representatives substantially recreated the *Burton* plan in Act 284 of 1994.[288] An amendment proposed in the House Judiciary Committee, the Legislative Black Caucus's Plan A, would have increased the number of districts with African-American voting age majorities to thirty-two, but that plan was rejected.[289] Rather than veto the House plan, Governor Campbell let it become law without his signature in order to allow it to get to the Department of Justice for review.[290]

On May 2, 1994, Assistant Attorney General Deval L. Patrick wrote Speaker Robert J. Sheheen to communicate the Attorney General's objection to H. 4333. [291] In that letter, Patrick noted that "legislative elections throughout the state are characterized by a pattern of racially polarized voting."[292] Further, "[a]ll [18 black House members] were elected in districts where blacks constitute a majority of the voting age population (excluding military residents, who generally do not participate in local elections), and 14 of the 18 were elected in districts where blacks constitute over 55 percent of the voting age population."[293] Patrick's letter pointed to nine "specific areas of the state where the state's concern for incumbency protection,

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[286] Smith v. Beasley, 946 F. Supp. 1174, 1181 (D.S.C. 1996).

[287] *Id.*

[288] *See* 1994 S.C. Acts 284.

[289] *Smith*, 946 F. Supp. at 1183.

[290] *Id.* at 1184.

[291] *Id.* at 1185.

[292] *Id.* at 1182 (quoting Letter from Deval L. Patrick, Assistant Attorney Gen., Dep't of Justice, to Robert J. Sheheen, Speaker of the House of Representatives (May 2, 1994)).

[293] Letter from Deval L. Patrick, Assistant Attorney Gen., Dep't of Justice, to Robert J. Sheheen, Speaker of the House of Representatives, at 2 (May 2, 1994) (on file with authors).

and disregard for black electoral opportunity, yielded districting configurations that do not satisfy the Section 5 purpose and effect test."[294]

Early in the morning on May 11, 1994, following a long day of procedural maneuvers, a coalition of Republicans and the Legislative Black Caucus forced a late-night agreement to recall H. 4349 from the Judiciary Committee.[295] On May 12, Amendment 2, co-sponsored by House Minority Leader Howell Clyborne and Legislative Black Caucus redistricting leader Don Beatty formed the base of what became Act 415 of 1994.[296] That plan, mirroring the arguments of the Department of Justice, included nine new African-American majority districts.[297] On May 31, 1994, one day before the *Burton* court's deadline, the Department of Justice advised Speaker Sheheen that the Attorney General did not object to the redistricting plan.[298]

Elections held under Act 415 in 1994 produced twenty-four African-American members of the South Carolina House of Representatives.[299] However, a constitutional challenge to those nine new districts under newly developed *Shaw/Miller* theories had already been brought in *Able v. Wilkins*.[300] The opinion in that case, which had been combined with *Smith v. Beasley*,[301] contained a detailed and scathing review of the Justice Department's role in passage of those plans. The *Smith* court concluded: "The evidence is overwhelming that race was the predominant factor in drawing House districts 12, 54, 82, 91, 103, and 121. Race predominated to such an extent as to obliterate any other factor."[302]

In 1997, the House redistricted to cure the constitutional defects in the 1994 plan.[303] That plan still included thirty-two majority African-American population districts, including all six of the districts found unconstitutional by the court. Twenty-nine of those districts included African-American voting age population majorities when adjusted for military

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[294] *Id.* at 5.

[295] JOURNAL OF THE SOUTH CAROLINA HOUSE OF REPRESENTATIVES, 110th Sess. (May 10, 1994), *available at* http://www.scstatehouse.net/sess110_1993-1994/hj94/19940510.htm.

[296] *See Smith*, 946 F. Supp. at 1188–91.

[297] *Id.* at 1188.

[298] *Id.* at 1192, 1208.

[299] 1995 SOUTH CAROLINA LEGISLATIVE MANUAL 79–131 (1997).

[300] No. 3:96-0003-O (D.S.C. 1996).

[301] No. 3:95-3235-O (D.S.C. 1996).

[302] *Smith*, 946 F. Supp. at 1193.

[303] 1997 S.C. Acts 1. The plaintiffs in *Able* challenged the redraws of Districts 12 and 121. In an April 28, 1997 Order, the court found those districts constitutional. *See* Able v. Wilkins, No. 3:96-0003-O (D.S.C. Apr. 28, 1997) (finding the revised plan for Districts 12 and 121 constitutional).

populations.[304] In special elections held in 1997, only the African-American incumbent in District 12, Anne Parks, lost in a very close contest in a district that had a 51% African-American population and a 48% African-American voting age population.[305] Representative Parks retook the seat in 1998 and represented District 12 as of 2006.[306] All of the districts successfully challenged in *Able* were represented in 2006 by African-American legislators except District 54, which was still served in 2006 by white Representative Douglas Jennings.[307]

Redistricting following the 2000 Census started on a similar path. After the General Assembly was unable to pass legislation because of a gubernatorial veto,[308] a federal court redistricted the state[309] and the General Assembly adjusted the court plan in later legislation that largely provided greater incumbency protection in affected districts.[310] The *Colleton County* court plan included thirty-one districts with a majority African-American population and twenty-eight with a majority African-American voting age population.

When the Justice Department first objected to a redistricting plan in 1971, the South Carolina General Assembly had an all-white Senate elected from multi-member districts and a House of Representatives, which had only just admitted its first three African-Americans elected from multi-member districts.[311] The bulk of the objections entered by the Department of Justice to legislative reapportionment in South Carolina focused on vote dilution rather than retrogression. In 1971, it was nearly impossible to retrogress through reapportionment in South Carolina, although the House of Representatives' change to numbered posts when the full-slate law was

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304 Digitized version of House plan provided by House staff, on file with the authors.

305 Parks' loss, by thirty-three votes, was to Jennings McAbee who had represented the district since 1975 until being defeated by Parks in 1996. S.C. ELECTION COMM'N, ELECTION REPORT 378–81 (1997–1998); *see also* Mona Breckenridge, *2 Black Lawmakers Lose Seats in S.C. Redistricting Elections*, CHARLOTTE OBSERVER, Nov. 6, 1997, at 5C.

306 *See* Dawn Hinshaw, *Voter Turnout Floods Polls; Long Lines Signal Interest in Key Races*, COLUMBIA STATE (S.C.), Nov. 4, 1998, at A33; *see also* South Carolina Legislature, Representative J. Anne Parks, http://www.scstatehouse.net/members/bios/1434090737.html (last visited Jan. 10, 2008).

307 *See* South Carolina Legislature, Representative Douglas Jennings, Jr., http://www.scstatehouse.net/members/bios/0927272616.html (last visited Jan. 10, 2008).

308 *See* Veto Letter from Jim Hodges, Governor, S.C., to David H. Wilkins, Speaker of the House of Representatives (Aug. 30, 2001), *available at* http://www.scstatehouse.net/sess114_2001-2002/hj01/20010904.htm. Hodges argued that the plan passed for the House (H. 3003, R. 165 of 2001) failed to create sufficient "influence" districts.

309 *See* Colleton County Council v. McConnell, 201 F. Supp. 2d 618, 619 (D.S.C. 2002).

310 *See* 2003 S.C. Acts 55.

311 Burton et al., *supra* note 1, at 203–04; South Carolina Legislative Black Caucus, S.C. Legislative Black Caucus – History, http://www.sclbc.org/2.html (last visited Jan. 12, 2008).

found unconstitutional showed the lengths to which the General Assembly would go to impede African-American representation.[312]

3. Jurisdictions with Repeated Objections

In addition to state legislative redistricting, several jurisdictions have attempted discriminatory changes more than once. Notably, objections from the Department of Justice and Section 2 litigation have gone hand in hand in many of these jurisdictions as officials, forced to single-member districts, have attempted to make other changes to undermine or defeat those expansions of African-American representation. In others, a pattern of discriminatory practices has also led to Section 2 litigation.

a. Lancaster County School District

The General Assembly adopted staggered terms for the at-large county board of education and area school boards three times.[313] In 1974, 1983 and 1984, the Department objected to this same device[314] because:

> As we indicated in our previous objections, the use of staggered terms in Lancaster County school board elections, where the at-large system is used and racial bloc voting seems to exist, limits the potential for black voters to participate effectively in the electoral process by reducing the ability of those voters to use single-shot voting.[315]

Finally, with Act 602 of 1984, staggered terms were taken off the books for Lancaster County school elections.[316] Lancaster County now elects school board members from single-member districts.

b. City of Lancaster (Lancaster County)

In 1976, the city of Lancaster adopted, among other changes, majority vote requirements for regular and contested elections.[317] Those changes were submitted for preclearance on October 25, 1982.[318] On December 27, 1982, William Bradford Reynolds, Assistant Attorney General, wrote the City Administrator, objecting to majority vote requirements for contested

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[312] *See* Burton et al., *supra* note 1, at 204.

[313] *See* 1984 S.C. Acts 601; 1976 S.C. Acts 848; 1972 S.C. Acts 1622.

[314] *See* Department of Justice, *supra* note 20.

[315] Letter from William Bradford Reynolds, Assistant Attorney Gen., Dep't of Justice, to C. Havird Jones, Jr., Senior Assistant Attorney Gen., S.C. (Apr. 27, 1984) (on file with authors).

[316] *See* 1984 S.C. Acts 602.

[317] Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Paul S. Paskoff, Lancaster City Adm'r, at 1 (Dec. 27, 1982).

[318] *Id.*

elections on the same grounds that he had objected to majority vote requirements for regular elections on September 18, 1978.[319]

In 1989, following settlement of Section 2 claims in *NAACP v. City of Lancaster*,[320] the city adopted a redistricting plan which changed a system of seven members, including the mayor, elected at-large by plurality votes to a nine-member council, six elected from single-member districts and three, including the mayor, elected at-large by plurality vote in staggered terms.[321] In objecting to the two additional members, the Department of Justice noted that the additional districts appeared to have been added after it became clear that African-American citizens would have an opportunity to elect candidates of their choice in three of the six districts, creating a city council that mirrored the 41% African-American population.[322] Further, the Department of Justice observed that preserving seats for two white incumbents was a major consideration in the addition.[323]

In 2006, three African-Americans served on the seven-member council.[324]

c. Richland County

In 1982, Richland County attempted to reduce its county council from eleven members to seven. The Department of Justice objected to this change because its analysis showed that African-American voters had then "an existing real opportunity for electing candidates of their choice to at least two of the eleven seats on the council. On the other hand, our analysis shows that, with one explainable exception, blacks have never won with a standing higher than fourth among the winning candidates."[325] A reduction in the number of positions on that council would reduce the likelihood of African-American political success to one in eleven. Richland County was 39% African-American in 1980.[326]

In 1986, the Richland County adopted an ordinance requiring an employee to resign his or her employment before running for political of-

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[319] *See id.*

[320] No. 0:CV-89-0001465D (D.S.C. Jan. 9, 1990).

[321] Letter from James P. Turner, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Paul S. Paskoff, Lancaster City Adm'r (June 13, 1989).

[322] *Id.* at 1–2.

[323] *Id.* at 2.

[324] *See* City of Lancaster, SC, City Council, http://www.lancastercitysc.com/Government_CityCouncil.aspx (last visited Nov. 2, 2007).

[325] Letter from William Bradford Reynolds, Assistant Attorney Gen., Dep't of Justice, to J. Lewis Cromer, Richland County Attorney (Jan. 12, 1983) (on file with authors).

[326] *See* 1985 STATISTICAL ABSTRACT, *supra* note 50, at 329.

fice.[327] African-Americans constituted approximately 31% of the employees of Richland County.[328] The Department objected to this change because it would "impact more heavily on the black potential candidates than on the white potential candidates" and "significantly affect black voters in Richland County because it limits the pool of potential candidates likely to be the choice of the black constituency."[329]

In 1988, the Richland County Council adopted single-member districts in a settlement of a Section 2 claim in *NAACP v. Richland County Council*.[330] In 2006, African-Americans occupied four of the eleven districts.[331]

d. Spartanburg County Board of Education

In 1991, the South Carolina Conference of Branches of the NAACP and private African-American plaintiffs brought a Section 2 action challenging at-large school board elections in Spartanburg County for the countywide school board and for School Districts 5 and 7.[332] That litigation was successfully settled with single-member districts for the County Board of Education and School District 5 and a mixed system of single-member and multimember districts in District 7.[333]

In 1994, the Spartanburg County Board of Education began elections in single-member districts, three of which had African-American majorities. Prior to 1994, no African-American members served on the County Board of Education.[334] The Spartanburg County School district had a 1990 Census population of 220,225, of whom 44,451 (20%) were African-American. The Census also listed the voting age population in the jurisdiction as 18% African-American.[335]

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[327] *See* Letter from William Bradford Reynolds, Assistant Attorney Gen., Dep't of Justice, to C. Dennis Aughtry, Richland County Attorney (Sept. 23, 1988) (on file with authors).

[328] *Id.* at 2.

[329] *Id.* at 3.

[330] No. 3-87-2597-17 (D.S.C. 1988).

[331] *See* Richland County, County Council, http://www.richlandonline.com/departments/countycouncil/councilmembers.asp (last visited Jan. 12, 2008).

[332] *See* NAACP v. Spartanburg County Bd. of Educ., No. 7:91-03111-HMH (D.S.C. 1991). The challenge to the Board of Education was amended to include a malapportionment claim.

[333] *See id.*

[334] *See* Letter from Deval L. Patrick, Assistant Attorney Gen., Dep't of Justice, to C. Havird Jones, Jr., Assistant S.C. Attorney Gen. (Dec. 13, 1994) (on file with authors).

[335] Memo from John C. Ruoff, Ph.D., to William McBee Smith, Counsel to Spartanburg Bd. of Educ., and Bruce Roberts, Nyisha Shakur and Michael Talley, Counsel to the NAACP and private plaintiffs (Nov. 30, 1993) (on file with author). The seven school districts which comprised the jurisdiction of the Spartanburg County Board of Education are largely, but not completely, coextensive with Spartanburg County. They include portions of Cherokee and Greenville Counties but do not include a portion of Spartanburg County near Greer which is part of the Greenville County School District.

Immediately, the Spartanburg Legislative Delegation moved to abolish the County Board of Education, passing Act 610 of 1994, devolving its duties on the separate school districts and to replace it with an Education Oversight Committee made up of the chairs of the seven school district Boards of Trustees.[336] This was the second bill passed by the Legislative Delegation in 1994 to limit the power and authority of the newly single-member district Board of Education; Act 606 of 1994 required the Board of Education to exercise its authority to change school district boundaries only with the advice and consent of the legislative delegation.[337]

On December 13, 1994, the Department of Justice objected to implementation of Act 610 of 1994, which effectively negated the plan precleared on August 15, 1994, under which "black voters will have an opportunity to elect two or three seats on the sixteen-member body."[338] The Justice Department concluded:

> The sequence of events surrounding the adoption of Act [610] also gives rise to an obvious inference of discriminatory purpose. Based on the information supplied by you and many others, we have not been persuaded that it is coincidental that the state abolished the county board only after a new method of election was in place that promised equal minority electoral opportunity, and replaced it with an appointed body on which minority voters will have little opportunity to influence appointments.[339]

Undeterred by the objection to dissolving the County Board of Education, the Legislative Delegation proceeded to strip the County Board of Education of its most significant power: fiscal control of the seven school districts.[340] Act 189 of 1995 distributed the assets of the County Board of Education and provided fiscal autonomy, the ability to set their own budget and school tax rate, to the seven school districts.[341]

The Board of Education was stripped of significant powers, but "the county board retain[ed] substantial powers and duties (similar to those proposed for an appointed education oversight committee in 1994), although it [would] have a very limited budget with which to perform those duties."[342]

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[336] *See* 1994 S.C. Acts 610, *repealed by* 1995 S.C. Acts 189.

[337] Act of Mar. 16, 1994, *available at* http://www.scstatehouse.net/sess110_1993-1994/bills/4600.htm (Act 606 of 1994).

[338] Letter from Deval L. Patrick, *supra* note 334, at 1.

[339] *Id.* at 2.

[340] *See* 1995 S.C. Acts 189.

[341] *Id.*

[342] Letter from Deval L. Patrick, Assistant Attorney Gen., Dep't of Justice, to C. Havird Jones, Jr., Assistant S.C. Attorney Gen., at 2 (Nov. 20, 1995).

Thus, the Attorney General did not find that Act 189 was a voting change covered by the Voting Rights Act.[343]

However, as the Department noted in objecting to Section 19.67 of Part 1B of Act 145 of 1995, the 1995–1996 Fiscal Year Appropriations Act had allocated those funds directly to the seven school districts and prohibited any funds going to the County Board of Education.

> It appears, therefore, that the change embodied in Section 19.67 affects voting because it results in the *de facto* elimination of the county board (at least for one year) within the meaning of the exception recognized by the Court in *Presley*. On this basis, we conclude that Section 19.67 is a voting change subject to review under Section 5.[344]

By 1999, however, the Spartanburg County Board of Education was abolished. Act 499 of 1998 established the Education Oversight Committee and devolved the functions of the Spartanburg County Board of Education on it.[345] The Attorney General did not object to this act.

e. City of Barnwell

Barnwell, the county seat of Barnwell County, had a population that was 38% African-American according to the 1980 Census.[346] Despite repeated candidacies, no African-American candidate had been elected in the nine previous elections to the at-large aldermanic body.[347] In 1983, Barnwell moved to make election even more difficult by introducing staggered terms.[348] Staggered terms in an at-large system reduce the number of officials elected, making it less likely that a candidate receiving fewer votes than the top vote getter will be elected.[349] In addition, the Department of Justice discovered an unprecleared majority vote requirement.[350] When Barnwell submitted that change, the Department of Justice affirmed its denial of preclearance of staggered terms and objected to the 1966 change to a majority vote requirement.[351] Barnwell simply ignored the Attorney General's objection and proceeded to hold elections under the unprecleared

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[343] *Id.*

[344] *Id.* at 2.

[345] *See* 1998 S.C. Acts 499.

[346] Letter from William Bradford Reynolds, Assistant Attorney Gen., Dep't of Justice, to Thomas M. Boulware, Brown, Jeffries & Boulware, at 1 (Mar. 26, 1984) (on file with authors).

[347] *Id.*

[348] *Id.*

[349] *See id.*

[350] *Id.*

[351] Letter from William Bradford Reynolds, Assistant Attorney Gen., Dep't of Justice, to C. Havird Jones, Jr., Assistant S.C. Attorney Gen. (Aug. 31, 1984) (on file with authors).

plans. The Department of Justice filed suit in the district court, which enjoined unprecleared elections in 1986.[352]

In 1994, with the city's African-American population having increased from 38% to 43%, according to the 1990 Census,[353] Barnwell adopted a single-member districting plan for the six council districts, three of which had African-American majority voting age populations.[354] For both the mayoral and city council elections, the city attempted to reinstitute the same majority vote requirement to which the Department of Justice had objected a decade before and which the district court had enjoined.[355]

In making this change, "city officials did not seek the views of the minority community (*e.g.*, the city did not appoint minority persons to the study committee for the new method of election, which appears to have recommended the adoption of the majority vote requirement)."[356] The city officials wanted to return things to their view of the status quo "prior to the Federal Court Order"—the unprecleared plan under which it had illegally operated from 1966 to 1986.[357] The Attorney General again objected to the majority vote requirement for mayoral elections.[358]

f. Final Thoughts on Section 5 Administrative Preclearance

Section 5 offers jurisdictions two paths on which to seek preclearance of voting changes: judicially by seeking a declaratory judgment from the District Court for the District of Columbia, or administratively through the Attorney General.[359] Since 1972, only four times have South Carolina jurisdictions sought declaratory judgments under Section 5 from the District Court for the District of Columbia: Horry County (1977),[360] Colleton County (1981),[361] Sumter County[362] and the South Carolina Senate.[363] Only Colleton County, which entered into a consent order creating single-

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[352] *See* United States v. City of Barnwell, CV-84-0002508 (D.S.C. June 14, 1988); *see also '84 Election Voided: City Loses Election Suit*, PEOPLE-SENTINEL (Barnwell, S.C.), Mar. 1, 1986, at 1.

[353] *See* U.S. Census Bureau, 1990 Census Summary File 1, at tbls.P001, P006, *available at* http://factfinder.census.gov (last visited Jan. 12, 2008).

[354] Letter from Loretta King, Assistant Attorney Gen., Dep't of Justice, to Thomas M. Boulware, Brown, Jeffries & Boulware, at 1 (Aug. 15, 1994) (on file with authors).

[355] *Id.* at 2.

[356] *Id.*

[357] *Id.*

[358] *Id.*

[359] *See* 42 U.S.C. 1973c (2006).

[360] *See* Horry County v. United States, 449 F. Supp. 990 (D.D.C. 1978).

[361] *See* Colleton County v. United States, No. 81-2664 (D.D.C. Apr. 28, 1982) (consent order).

[362] *See* County Council of Sumter County v. United States, 596 F. Supp. 35 (D.D.C. 1984).

[363] *See* South Carolina v. United States, 585 F. Supp. 418 (D.D.C. 1984).

member districts, was granted preclearance through a declaratory judgment from the District Court for the District of Columbia.[364]

The vast majority of changes have been reviewed administratively, a process that greatly improves efficiency by saving both the jurisdiction and interested parties the significant expenditure of resources required to bring or defend a challenge to a voting practice. The $2 million spent by Charleston County to defend its discriminatory at-large scheme for elections to county council is only a token of the countless millions which South Carolina jurisdictions would have been required to spend defending the 120 objected to changes reviewed here. In addition, although Section 5 preclearance by the Attorney General does not bar litigation by other parties,[365] that administrative clearance functions to reduce potential litigation on the thousands of changes that are precleared.

Section 5 administrative review of proposed electoral changes by the Attorney General importantly contributes to efficient resolution when changes are proposed while protecting the voting rights of minority citizens.

B. OTHER SECTION 5 ENFORCEMENT LITIGATION

When a covered jurisdiction attempts to implement a change that has not been precleared, either the United States or a private party can file suit in the District Court seeking to enjoin implementation.[366] In South Carolina, the United States and private parties have been forced to go to court to enjoin unprecleared changes in South Carolina elections under Section 5.

Those changes have included the 1966 creation of at-large county council districts in Edgefield, for which no preclearance was sought for nearly two decades, and unprecleared annexations in the Town of Hemingway, which brought in white populations while excluding African-American populations. Principally, however, they involved jurisdictions going forward to hold elections, sometimes under circumstances that particularly disadvantaged African-American voters, while redistricting plans or changes to the method of election had yet to be precleared.

1. Edgefield County Council: *McCain v. Lybrand*

Edgefield County, home to long-time U.S. Senator J. Strom Thurmond, was the focus of protracted litigation in an attempt to open the elec-

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[364] Burton et al., *supra* note 1, at 228.
[365] *See* 28 C.F.R. § 51.41 (2007).
[366] *See* 42 U.S.C. § 1973c.

toral system to the county's African-American citizens.[367] In litigation begun in 1974, private plaintiffs challenged the county's at-large system of electing the county council.[368] They were initially successful in their constitutional claim of vote discrimination as District Court Judge Robert Chapman found "bloc voting by the whites on a scale that this court has never before observed."[369] However, after the Supreme Court's decision in *City of Mobile v. Bolden*,[370] requiring plaintiffs to show a racially discriminatory purpose in adopting or maintaining a discriminatory election system, Judge Chapman vacated his own ruling.[371]

Armand Derfner and Laughlin McDonald, representing the plaintiffs, began examining the origins of the county council's electoral system and amended their complaint to include a Section 5 violation.[372] The 1966 law, which created the Edgefield County Council, thus abolishing the old Supervisor and Commission form of government, had never been precleared by the Department of Justice.[373] A three-judge district court panel ruled that the county's submission and the Attorney General's not interposing an

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[367] *See* Burton et al., *supra* note 1, at 209; *see also* Jackson v. Edgefield County, S.C. Sch. Dist., 650 F. Supp. 1176 (D.S.C. 1986). Edgefield County even offered resistance to the extension of the Voting Rights Act in 1982. Reverend Jesse Jackson and other African-American citizens were denied the right to assemble and hold a prayer vigil in support of the Voting Rights Act extension by the Edgefield County School Board on the grounds that it would embarrass Senator Thurmond, who, at the time, opposed the Act's extension. In *Jackson v. Edgefield County District School Board of Trustees*, No. 81-1316-3 (D.S.C. 1981), plaintiffs sued the Board on June 25, 1981, for injunctive and declaratory relief to redress the deprivation of rights guaranteed to plaintiffs by the First, Thirteenth and Fourteenth Amendments to the United States Constitution. Plaintiffs had requested the use of the public school grounds as part of a nationwide campaign to convince Congress to extend the Voting Rights Act. Plaintiffs contended that the School Board's decision to deny plaintiffs use of grounds and facilities at Strom Thurmond High School deprived them of the rights of speech, assembly, petition, association, equal protection and due process in violation of the First, Thirteenth and Fourteenth Amendments to the United States Constitution. On June 27, 1981, the day before the scheduled demonstration, the District Court granted plaintiffs' motion for a preliminary injunction, as well as the right to assemble and hold a peaceful prayer vigil at Strom Thurmond High School.

[368] Burton et al., *supra* note 1, at 209.

[369] *Id.* (quoting McCain v. Lybrand, No. 74-281, slip op. at 17–18 (D.S.C. Apr. 17, 1980)). The history of litigation in Edgefield County is also detailed in *McCain v. Lybrand*, 465 U.S. 236, 238–43 (1984).

[370] 446 U.S. 55 (1980).

[371] Burton et al., *supra* note 1, at 209.

[372] *Id.*

[373] *McCain*, 465 U.S. at 239, 242 (discussing Act 1104 of 1966). The Attorney General objected on June 11, 1984, to the implementation of Act 1104. Burton et al., *supra* note 1, at 210 (citing Letter from William Bradford Reynolds, Assistant Attorney Gen., Dep't of Justice, to C. Havird Jones, Jr., Assistant S.C. Attorney Gen. (June 11, 1984)).

objection to a 1971 change,[374] which increased the number of council members from three to five, blessed the 1966 change.[375]

The Supreme Court unanimously overturned the ruling of the district court:

> To the extent there was any ambiguity in the scope of the preclearance request, the structure and purpose of the preclearance requirement plainly counsel against resolving such ambiguities in favor of the submitting jurisdiction in the circumstances of this case. The preclearance process is by design a stringent one; it is predicated on the congressional finding that there is a risk that covered jurisdictions may attempt to circumvent the protections afforded by the Act . . . .[376]

On remand, the district court ordered implementation of a single-member district plan for the Edgefield County Council, under which African-Americans won three of five seats.[377]

As Vernon Burton and his colleagues note in *A Quiet Revolution in the South*, the decision in *McCain v. Lybrand* triggered a series of successful suits and negotiated agreements involving town councils, school boards and county councils which lead to single-member districts and the election of African-American candidates, including the Edgefield County School Board, the Johnston Town Council, the Laurens County Council, the Saluda County Council, the Abbeville County Council and the Richland County Council.[378]

2. NAACP v. Hampton County

In 1982, the General Assembly wrestled with the future of the Hampton County Board of Education, which had oversight responsibilities over the two school districts in the majority African-American county.[379] Initially, Act 547 of 1982, adopted in February of 1982 and submitted to the Attorney General for preclearance, changed the countywide board to an elected, rather than appointed, body that was elected at large.[380] The first election was to be held at the General Election in November 1982, with candidate filing scheduled for August 16 through August 31, 1982.[381]

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[374] 1971 S.C. Acts 521.

[375] *Id.* at 209–10 (citing McCain v. Lybrand, No. 74-281 (D.S.C. May 10, 1982)).

[376] *McCain*, 465 U.S. at 257.

[377] Burton et al., *supra* note 1, at 210.

[378] *Id.* at 210–11.

[379] Nat'l Ass'n for the Advancement of Colored People (NAACP) v. Hampton County Election Comm'n, 470 U.S. 166, 170 (1985).

[380] *Id.* at 171.

[381] *Id.*

In April of 1982 before the Attorney General had acted on Act 547, the General Assembly passed Act 549 of 1982, which abolished the county board and made those trustees elective, rather than appointive, subject to a referendum in May 1982.[382] On April 28, the Attorney General notified the state that he would not object to Act 547.[383]

On August 23, the Attorney General initially objected to abolition of the Hampton County Board of Education principally because of a misunderstanding about whether abolishing the County Board would reduce the possibility of merging Hampton School Districts 1 and 2.[384] Anticipating a requested reconsideration by the Attorney General, Hampton County officials proceeded to accept filings in the August filing period.[385]

When the Attorney General had not reconsidered his objection by the date of the General Election, elections were held for the Hampton County Board of Education under Act 547, but not for the district trustees under Act 549.[386] The Attorney General withdrew his objection on November 19, 1982, past the date of the elections proposed in both the precleared Act 547 and the unprecleared Act 549.[387]

Rather than reopening filing for the election—now scheduled for March 15, 1983—county officials simply declared that the filing period was the August 1982 filing period when the Act had not yet been precleared.[388] Potential African-American candidates had not filed to run in an unprecleared election.

The NAACP and other parties filed suit in the district court.[389] A three-judge panel denied a preliminary injunction and then denied both a permanent injunction and declaratory relief, finding that Section 5 did not apply because "the scheduling of the election and the filing period were simply 'ministerial acts necessary to accomplish the statute's purpose.' "[390] "Relying on *Berry v. Doles*, the District Court held as an alternative ground

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[382] *Id.* at 171–72.

[383] *Id.* at 170.

[384] *See id.* at 171–72; *see also* Letter from William Bradford Reynolds, Assistant Attorney Gen., Dep't of Justice, to C. Havird Jones, Jr., Assistant S.C. Attorney Gen. (Aug. 23, 1982) (on file with authors).

[385] *NAACP*, 470 U.S. at 172.

[386] *Id.*

[387] *Id.* (citing Letter from William Bradford Reynolds, Assistant Attorney Gen., Dep't of Justice, to C. Havird Jones, Jr., Assistant S.C. Attorney Gen. (Nov. 19, 1982)). The initial submission was delayed until June 16, 1982.

[388] *Id.* at 172–73.

[389] *Id.* at 173.

[390] *Id.* at 174.

that these changes were implicitly approved when the Attorney General withdrew his objection to Act No. 549."[391]

The Supreme Court disagreed, ruling that:

> Appellees' use of an August filing period in conjunction with a March election, and the setting of the March election date itself, were changes that should have been submitted to the Attorney General under § 5. These changes cannot be said to have been approved along with Act No. 549. . . . [I]t is appropriate in these circumstances for the District Court to enter an order allowing appellees 30 days in which to submit these changes to the Attorney General for approval. If appellees fail to seek this approval, or if approval is not forthcoming, the results of the March 1983 election should be set aside. If, however, the Attorney General determines that the changes had no discriminatory purpose or effect, the District Court should determine, in the exercise of its equitable discretion, whether the results of the election may stand.[392]

Upon submission, the Department of Justice found that the "restriction on candidacies for the March 15, 1983, election adversely affected the opportunity of black voters to elect candidates of their choice."[393] The Attorney General objected to the qualifying period for the special election, voiding the March 1983 elections.[394]

3. NAACP v. Mayor and Council of Hemingway and Franklin v. Lawrimore

Between 1986 and 1991, Hemingway a small, nearly all-white[395] town in Williamsburg County annexed seven pieces of land.[396] Those annexed areas were all white according to the town's preclearance submission.[397] An African-American community immediately adjacent to Hemingway, Donnelly, had requested annexation in the 1970s to obtain water and sewer service, but was denied in a referendum vote.[398] A similarly situated white

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[391] *Id*. at 181.

[392] *Id.* at 182–83.

[393] Letter from William Bradford Reynolds, Assistant Attorney Gen., Dep't of Justice, to C. Havird Jones, S.C. Assistant Attorney Gen., at 3 (June 28, 1985).

[394] *Id*.

[395] The population in Hemmingway was 98% white according to the 1990 Census. *See* U.S. Census Bureau, 1990 Census Summary File 1, at tbls.P001, P006, *available at* http://factfinder.census.gov (last visited Jan. 12, 2008).

[396] Letter from Deval L. Patrick, Assistant Attorney Gen., Dep't of Justice, to Gregory B. Askins, Askins, Chandler & Askins, Jeffrey N. Thordahl, Assistant Legal Counsel to the Governor, at 1 (July 22, 1994) (on file with authors).

[397] *Id.* at 2.

[398] *Id.* at 2–3.

community, Pine Crest, sought annexation in the mid-1980s.[399] The regional planning agency had studied the financial feasibility of annexation for both Donnelly and Pine Crest and found Donnelly feasible but Pine Crest not feasible.[400] The town annexed white Pine Crest but denied African-American Donnelly.[401]

In 1992, Hemingway and the surrounding area sought to secede from majority African-American Williamsburg and annex itself to majority white Florence County.[402] Donnelly was not included in the transfer area, which included about 2500 people, of whom 21% were African-American.[403] Because state law prohibited altering a county boundary if the change split a town between two counties, the Department of Justice considered the annexations and county transfer issues together.[404]

In October of 1993, while awaiting action by the Attorney General, two groups of plaintiffs represented by the same counsel filed lawsuits alleging Section 5 and Section 2 violations. In *South Carolina Conference of Branches of the NAACP v. Mayor & Council of Hemingway*,[405] the parties entered into a consent order that recognized that Hemingway had filed to obtain preclearance for five annexation areas and enjoined the town from allowing persons in those annexed areas to vote in town elections unless they were precleared. *Franklin v. Lawrimore* was dismissed as moot.[406]

On July 22, 1994, the Department of Justice denied preclearance for five of the seven annexations involving population and for the proposed boundary changes.[407]

In 2006, Hemingway remained in Williamsburg County and Donnelly remained outside the town. Rather than admit African-American citizens through annexation, Hemingway chose to exclude its previously-annexed white citizens.

4. United States v. Orangeburg County Council

In 1984, the Orangeburg County Council redistricted itself. The county's population of 82,276 was, according to the Census in 1980, 56%

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[399] *Id.* at 3.
[400] *Id.* at 3.
[401] *Id.*
[402] *Id.*
[403] *Id.*
[404] *See id.*
[405] No. 4:93-2733-21 (D.S.C. filed Oct. 18, 1993) (consent order entered Feb. 24, 1994).
[406] *See* Franklin v. Lawrimore, 121 F.3d 698 (4th Cir. 1997).
[407] Letter from Deval L. Patrick, *supra* note 396, at 3–4.

African-American.[408] According to the Attorney General, the plan adopted by the Council "fail[ed] to reflect . . . the measurable increase in the county's minority voters."[409] Although the Department eventually objected to the redistricting plan in Orangeburg County,[410] Orangeburg attempted to proceed with elections under the unprecleared plan before the objection was entered. The district court enjoined elections under the unprecleared plan.[411]

The Department of Justice again objected to the redistricting plan adopted by Orangeburg County Council during the next decade, finding that the County Council had unnecessarily removed the African-American population from District 5 in order to reduce its African-American proportion to a targeted level. The County Council did not seriously consider a series of alternatives offered by the African-American community.

> In this regard, many of the reasons presented to us for rejecting these alternative plans appear too pretextual. Furthermore, it appears that the protection of incumbents, particularly white incumbents, and the desire to confine the black population percentage in District 5 to a predetermined and unnecessarily low level were dominant factors in the council's redistricting choices.[412]

5. United States v. Lee County and NAACP v. Lee County Council

Lee County, South Carolina, is majority-African-American.[413] In 1990, the Census found that 62% of Lee County's population and 57% of its voting population were African-American.[414] In 1992, the benchmark plan included two districts with African-American populations over 74% and five districts with African-American populations in the 52% to 63% range.[415] However, in 1992, African-American voters had only been able to elect African-American candidates to two seats on the county council

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[408] *See* 1985 STATISTICAL ABSTRACT, *supra* note 50, at 329.

[409] Letter from William Bradford Reynolds, Assistant Attorney Gen., Dep't of Justice, to Robert R. Horger, Orangeburg County Attorney, at 1 (Sept. 3, 1985) (on file with authors).

[410] *Id.*

[411] *See* United States v. Orangeburg County Council, No. 5:84-2824 (D.S.C. 1984).

[412] Letter from John R. Dunne, Assistant Attorney Gen., Dep't of Justice, to Robert R. Horger, Horger, Barnwell & Reid (July 21, 1992) (on file with authors).

[413] *See* U.S. Census Bureau, 2000 Census Summary File 1, at tbl.P3, *available at* http://factfinder.census.gov (last visited Jan. 12, 2008).

[414] *See* U.S. Census Bureau, 1990 Census Summary File 1, at tbls.P001, P006, P014, *available at* http://factfinder.census.gov (last visited Jan. 12, 2008).

[415] Letter from James P. Turner, Assistant Attorney Gen., Dep't of Justice, to Herman H. Felix, Chairperson, Lee County Council, Jacob H. Jennings, Jennings & Jennings, at 1 (Feb. 8, 1993) (on file with authors).

and school board, which used the same districts.[416] These electoral successes were in the 74% or higher districts.[417]

Controlled by four white council members, "[t]he self-described goal of the council was to draw a plan that retained Districts 3 and 5 as districts with sizeable black population majorities while drawing two other districts with no more than a 65 percent black share of the population."[418] In order to limit the African-American population in two districts to no more than 65%, "black population concentrations [were] fragmented."[419]

The Department of Justice concluded that Lee County had given short shrift to an alternative plan offered by the African-American community and had rejected a proposal for a bi-racial committee to look at redistricting.[420] That alternative proposal had shown that it was possible to draw more than two districts with an African-American population greater than 70%, the minimum required to create a district in which African-American citizens could elect candidates of their choice with such repressed African-American voter participation.[421]

Lee County revised its redistricting plan, and the revised plan was precleared in 1993.[422] The county set an expedited special election schedule, even though the new plan included substantial changes from the previous plan.[423] The county also held a primary in 1994, despite the fact that the plan had not been precleared.[424] There was substantial voter confusion in that unprecleared special primary:

> The circumstances presented by the instant submission suggest that the county's selection of the early schedule was motivated, at least in part, by a desire to diminish black voting potential. The implementation of the new redistricting plan effected significant changes in district assignments for many black voters. The increase in the black percentage in District 1 created a new opportunity for black voters to elect candidates of their choice. The county, however, failed to take adequate steps under these circumstances to publicize information regarding the new district boundaries and to notify black voters (and election-day personnel) of

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[416] *Id.* at 1–2.
[417] *Id.*
[418] *Id.* at 2.
[419] *Id.*
[420] *Id.* at 2–3.
[421] *Id.*
[422] Letter from James P. Turner, Assistant Attorney Gen., Dep't of Justice, to Jacob H. Jennings, Jennings & Jennings, Helen T McFadden, Jenkinson, Jenkinson & McFadden, at 2 (June 6, 1994) (on file with authors).
[423] *Id.* at 1–2.
[424] *See id.* at 3.

> their location in the respective districts in advance of the election. The consequence of these actions, which was reasonably foreseeable, was reduced black voter participation in the special primary election.[425]

In a letter dated the day before the special general election was scheduled, but after candidate qualification periods and the special primary election, the Attorney General objected to the special election schedule for the county council and school board.[426] The county requested reconsideration, but its request was denied.[427]

Both the Department of Justice, on June 6, 1994,[428] and the NAACP, on June 3, 1994,[429] filed suit in the district court to enjoin the special general elections and to vacate the special primary. The court issued a temporary restraining order[430] and, later, a three-judge panel granted summary judgment motions by the plaintiffs vacating the April 19, 1994, special primary and enjoining further implementation of the special election procedure.[431]

6. NAACP v. Greenwood County Board of Education 50

In Greenwood County, the Greenwood County Board of Education 50 and the legislative delegation had come to an agreement with the African-American community to adopt single-member districts.[432] The legislation, Act 595 of 1994, became law on May 4, 1994, with trustee elections scheduled for May 10 of that year.[433] On May 5, the NAACP sought to enjoin those elections until they were precleared.[434] An injunction was granted on May 10, 1994.[435]

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[425] *Id.* at 3–4.

[426] *Id.* at 4.

[427] Letter from Deval L. Patrick, Assistant Attorney Gen., Dep't of Justice, to Helen T. McFadden, Jenkinson, Jenkinson & McFadden (June 23, 1994) (on file with authors).

[428] *See* Complaint, United States v. Lee County, No. 3:94-01582-17 (D.S.C. June 6, 1994).

[429] *See* Complaint, NAACP v. Lee County Council, No. 3:94-01575-17 (D.S.C. June 3, 1994).

[430] *See* NAACP v. Lee County Council, No. 3:94-01575-17 (D.S.C. June 6, 1994) (order granting temporary restraining order).

[431] *See* NAACP v. Lee County Council, No. 3:94-01575-17 (D.S.C. Oct. 27, 1994) (order granting summary judgment); United States v. Lee County, No. 3:94-01582-17 (D.S.C. Oct. 27, 1994) (order granting summary judgment).

[432] *See* Act of Apr. 20, 1994 (Act 595 of 1994), *available at* http://www.scstatehouse.net/sess110_1993-1994/bills/4937.htm.

[433] *See* Complaint, NAACP v. Greenwood County Bd. of Educ. 50, No. 8:94-01223-WBT (D.S.C. May 5, 1994).

[434] *See id.*

[435] NAACP v. Greenwood County Bd. of Educ. 50, No. 8:94-01223-WBT (D.S.C. May 9, 1994) (order granting injunction).

V. EXAMINERS, OBSERVERS, VOTER INTIMIDATION AND VOTER FRAUD

Since 1982, the Attorney General has certified the need for election examiners in seven South Carolina counties pursuant to Section 6 of the Voting Rights Act: Bamberg County (October 10 1984), Calhoun County (September 28, 1984), Chester County (June 8, 1990), Colleton County (October 10, 1984), Hampton County (October 10, 1984), Richland County (September 28, 1984) and Williamsburg County (September 28, 1984).[436]

Election observers have been assigned to thirty-seven South Carolina elections twenty-three times since 1982.[437] Most of the communities to which observers have been sent have repeatedly requested assistance under the Act to protect the ability of African-American voters fully to participate in the electoral process. Those include Bamberg County (1984, 1985), Calhoun County (1984, 1988), Chester (twice in 1990, twice in 1991, 1993 and 1996), Dorchester (1990, 1996 and 2001), Marion (1984 and 1996) and Williamsburg (1984, 1988 and twice in 1996).[438]

However, other areas could have used observers. In McCormick County in 1994, following the redrawing of South Carolina House District 12 as a majority African-American district, a heated election between long-time white incumbent Jennings McAbee and African-American candidate Willie N. Norman, Jr. was marked by voter fraud advantaging the white incumbent in the McCormick County portion of the district.[439] McAbee, running as an Independent, defeated Norman 3155 votes to 2878 votes.[440] McAbee's 1109 vote difference in his home county of McCormick assured the victory.[441] A year later, the clerk of the McCormick County Board of Registration was indicted for, to use the words of South Carolina Attorney General Charles Condon, "voting early and often."[442] Georgetta Wiggleton pled guilty to voter fraud and "admitted that the false ballots were a 'significant factor' in the outcome of that race."[443]

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[436] *See* Department of Justice, Federal Observers and Election Monitoring, http://www.usdoj.gov/crt/voting/examine/activ_exam.htm (last visited Nov. 2, 2007).

[437] DEP'T OF JUSTICE, GEOGRAPHIC PUBLIC LISTING: ELECTIONS IN ALL STATES 40–42 (Nov. 10, 2003) (on file with authors); *see also* NAT'L COMM'N ON THE VOTING RIGHTS ACT, PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK, 1982–2005 Map 10G (2006), *available at* http://www.votingrightsact.org/report/finalreport.pdf.

[438] DEPARTMENT OF JUSTICE, *supra* note 437, at 40–42.

[439] Lee Bandy, *McCormick Registrar Indicted*, COLUMBIA STATE (S.C.), Sept. 14, 1995, at B3.

[440] *See id.*

[441] *Id.*

[442] *Id.*

[443] *Across the Area: Ex-clerk Sentenced in Voter Fraud*, AUGUSTA CHRONICLE, July 7, 2000, at C10.

> In a trial of Section 2 claims in Charleston County, the United States put forward voluminous testimony concerning what it characterized as a consistent and more recent pattern of white persons acting to intimidate and harass voters at the polls during the 1980s and even as late as the 2000 general election. . . . [T]he Court agrees that there is significant evidence of intimidation and harassment . . . .[444]

The court found poll managers assigned to African-American precincts "caused confusion, intimidated African-American voters, and had the tendency to be condescending to those voters."[445]

Further, "poll managers interfered with certain African-American voters' right to receive assistance during the voting process."[446] One particularly problematic white "poll manager's ongoing interference with African-American voters in Charleston County polling places prompted a Charleston County Circuit Court to issue a restraining order against the Election Commission requiring its agents to cease interfering with the voting process."[447] And "[i]n the 1990 election, a member of the Charleston County Election Commission and others participated in a Ballot Security Group that sought to prevent African-American voters from seeking assistance in casting their ballots."[448]

"Moreover, in the 1980 election, the *News and Courier* reported that some college students, claiming that they were federal poll watchers, intimidated some voters at the Fraser Elementary School, a predominantly African-American precinct in the City of Charleston's East Side. The students threatened to 'lock up' voters."[449] As the court noted, "[W]hile the Defendants suggest that such instances of harassment of and intimidation against African-American voters were attributable solely to partisan politics and not race, the uncontroverted testimony establishes that such conduct never occurred at predominantly white polling places, including those that tended to support Democratic candidates."[450]

As recently as the 2004 General Election, at Richland County's predominantly-African-American Ward 8, which includes the historically African-American Benedict College, "GOP monitors challenged students who held S.C. voter registration cards, but did not have driver's licenses or

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[444] United States v. Charleston County, 316 F. Supp. 2d 268, 286 n.23 (D.S.C. 2003).
[445] *Id.*
[446] *Id.*
[447] *Id.*
[448] *Id.*
[449] *Id.*
[450] *Id.*

state-issued identification cards."[451] As African-American Columbia City Councilmember E.W. Cromartie noted, "It reinforced the fact you still have to fight to make sure democracy is the way it is supposed to be."[452]

VI. RACIALLY POLARIZED VOTING

If voting in South Carolina was not so markedly racially polarized, neither Section 2 nor Section 5 of the Voting Rights Act would have much impact on the state. African-American voters would routinely be able to elect candidates of their choice in majority white districts and at-large elections. High levels of racially polarized voting across South Carolina provides the predicate condition that makes Section 2 and Section 5 so critical to the growth of African-American representation and its maintenance in the face of continued resistance by public officials.

That voting in South Carolina is racially polarized is practically a given. When the district court in *McCain v. Lybrand* looked at expert reports on polarized voting in Edgefield County, Judge Robert Chapman found "bloc voting by the whites on a scale that this court has never before observed."[453]

In 1990, James W. Loewen analyzed 130 black/white elections from 1972 through 1984 and found that:

> A reasonable summary would be that voting was polarized throughout the period. Eighty percent of the variance in these election returns is associated with the racial composition of the precinct or county. Overall, whites cast about 90 percent of their votes for white candidates, while blacks cast about 85 percent for black candidates. Thus, the primary determinant of election results in these interracial contests was the racial composition of the turnout.[454]

In *Burton*, the statewide redistricting case decided in 1992, the parties stipulated that "since 1984 there is evidence of racially polarized voting."[455] Loewen and Theodore Arrington offered expert testimony that voting in South Carolina was racially polarized and that polarization had increased since 1982.[456]

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[451] John C. Drake, *Benedict Students Face GOP Challengers*, COLUMBIA STATE (S.C.), Nov. 4, 2004, at B5.

[452] *Id.*

[453] Burton et al., *supra* note 1, at 209 (quoting McCain v. Lybrand, No. 74-281, slip op. at 17–18 (D.S.C. Apr. 17, 1980)).

[454] James W. Loewen, *Racial Bloc Voting and Political Mobilization in South Carolina*, 19 REV. OF BLACK POL. ECON. 23, 25 (Summer 1990).

[455] Burton v. Sheheen, 793 F. Supp. 1329, 1357–58 (D.S.C. 1992).

[456] *Id.* at 1357 & n.49.

The district court in *Smith v. Beasley* and *Able v. Wilkins* found:

> In South Carolina, voting has been, and still is, polarized by race. This voting pattern is general throughout the state and is present in all of the challenged House and Senate districts in this litigation. There is only one exception according to Defendants' expert, Dr. Ruoff, who has studied the voting history of South Carolina for a number of years. He testified, "Whites almost always vote for whites and blacks almost always vote for blacks unless the candidate is a black Republican and then never."[457]

In the most recent statewide litigation, the district court found that "[t]he history of racially polarized voting in South Carolina is long and well-documented."[458] John Ruoff, testifying on behalf of African-American voters, presented a study of 401 elections in the previous decade.

> Specifically, [Ruoff] offered undisputed testimony that South Carolinians are still very divided in terms of where they live and that elections throughout South Carolina continue to be marked by very high levels of racial polarization in voting. Black voters are generally politically cohesive and white voters almost always vote in blocs to defeat the minority's candidate of choice. Racial polarization is highest in black-white elections—those involving a black candidate running against a white candidate. . . . The other experts retained by the parties in this case substantially concurred in this portion of Dr. Ruoff's opinion, which was likewise supported by the statistical and other evidence presented to the court by all of the parties.
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> By way of summary, the evidence revealed that in black-white, single seat elections, the median level of black voters voting for black candidates was 98% in general elections and 86% in primary contests. Although white voters will cross over to vote for black candidates at a rate of 21% in general elections, they will cross over to vote for a black candidate in primary elections at a rate of only 8%. In addition, voter mobilization among blacks in general elections is lower than among white residents, but greater in black-majority districts.[459]

Even more recently, the *Charleston County* district court stated that

> Dr. Theodore Arrington, expert for the United States, found that out of 31 contested, County-Council elections studied from 1984 to 2000, voting was racially polarized 29 times (94%). The findings of Defendants' own expert, Dr. Ronald Weber, also confirm that voting in Charleston

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[457] Smith v. Beasley, 946 F. Supp. 1174, 1202–03 (D.S.C. 1996).
[458] Colleton County Council v. McConnell, 201 F. Supp. 2d 618, 640 (D.S.C. 2002).
[459] *Id.* at 641.

> County Council elections is severely and characteristically polarized along racial lines.[460]

Finally, as the *Colleton County Council* court concluded,

> Voting in South Carolina continues to be racially polarized to a very high degree, in all regions of the state and in both primary elections and general elections. Statewide, black citizens generally are a highly politically cohesive group and whites engage in significant white-bloc voting. Indeed, this fact is not seriously in dispute.[461]

VII. SOCIO-ECONOMIC DISPARITIES

Contributing to the problems that African-American voters have in electing candidates of their choice are significant socio-economic disparities between white and African-American citizens.

Relying on 1990 Census data, the *Smith* court found

> a socio-economic gap between the average white citizen and the average black citizen. There is a larger percentage of blacks than whites below the poverty level; the household income of blacks is generally less than that of whites; unemployment is greater among blacks; and the level of formal education among blacks is less. There are more whites than blacks residing in married-couple households, and more blacks live in single-female households. More blacks than whites are without private means of transportation, and more whites than blacks own their own homes. Infant mortality is greater among blacks.[462]

In 1999, median income for African-American households was $25,032, compared to $42,068 for white households.[463] About 26% of African-American South Carolinians and only about 8% of white South Carolinians lived below the poverty line in 1999.[464] In the same year, 39% of African-American households rented, compared to 22% of white households.[465] African-American households were three times as likely as white households to lack a telephone—about 8.2%, compared to 2.5%—a critical

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[460] United States v. Charleston County, 316 F. Supp. 2d 268, 277 (D.S.C. 2003).

[461] *Colleton County Council*, 201 F. Supp. 2d at 641.

[462] *Smith*, 946 F. Supp. at 1203.

[463] U.S. Census Bureau, 2000 Census Summary File 3, at tbls.P152A, P152B, *available at* http://factfinder.census.gov (last visited Jan. 12, 2008). Throughout this discussion, data for whites are for non-Hispanic whites, where the Census made that distinction.

[464] *See* U.S. Census Bureau, 2000 Census Summary File 3, at tbls.P159A, P159B, *available at* http://factfinder.census.gov (last visited Jan. 12, 2008).

[465] FAIR DATA 2000, SELECTED SOCIO-ECONOMIC DATA: SOUTH CAROLINA 12 Chart 11 (2003), *available at* http://www.fairdata2000.com/SF3/contrast_charts/Statewide/Black/South%20Carolina_SF3_Black.pdf.

tool in political communications.[466] Whereas roughly 20% of African-American households lacked a vehicle, only about 5% of white households lacked a vehicle.[467] African-American South Carolinians in 2003 were twice as likely to be unemployed, 11.2%, compared to 5.1% for white residents.[468]

Thirty percent of African-American family households in 1999 were female-headed with children.[469] Only 8% of white households had that structure.[470] From 2000 to 2003, African-American children had significantly higher infant mortality rates than white children—roughly 14.8% to 5.8%.[471]

South Carolina's African-American citizens also lag behind in education. Among the population twenty-five and older, 35% of African-American residents lack a high school diploma, or the equivalent, compared to 19% of white residents.[472] Conversely, nearly a third of white South Carolinians have at least an associate's degree compared to 15% of African-American residents.[473]

By any measure, the racial disparities in socio-economic conditions noted by the *Smith* court continue in the twenty-first century.

VIII. SECTION 2 LITIGATION IN SOUTH CAROLINA SINCE 1982

"Section 2 of the Voting Rights Act of 1965, prohibits voting practices or procedures that discriminate on the basis of race, color, or membership in one of the language minority groups identified in Section 4 (f)(2) of the Act."[474] In 1982, Congress amended the Act to provide that a plaintiff could establish a violation if it could be shown that, "in the context of the

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[466] U.S. Census Bureau, 2000 Census Summary File 3, at tbls.HCT32A, HCT32B, *available at* http://factfinder.census.gov (last visited Jan. 12, 2008).

[467] U.S. Census Bureau, 2000 Census Summary File 3, at tbls.HCT33A, HCT33B, *available at* http://factfinder.census.gov (last visited Jan. 12, 2008).

[468] S.C. BUDGET & CONTROL BD., OFFICE OF STATISTICS & RESEARCH, SOUTH CAROLINA STATISTICAL ABSTRACT tbl.20 (2005), *available at* http://www.ors2.state.sc.us/abstract/chapter8/employment20.asp.

[469] FAIR DATA 2000, *supra* note 465, at 2 Chart 1.

[470] *Id.*

[471] South Carolina Department of Health and Environmental Control, South Carolina Community Assessment Network, Infant Mortality: 2000–2003, http://scangis.dhec.sc.gov/scan/mch/infantmortality (select infant mortality by race of child for years 2000–2003).

[472] *See* U.S. Census Bureau, 2000 Census Summary File 3, at tbls.P148A, P148B, *available at* http://factfinder.census.gov (last visited Jan. 12, 2008).

[473] *See id.*

[474] Department of Justice, Section 2 of the Voting Rights Act, http://www.usdoj.gov/crt/voting/sec_2/about_sec2.html (last visited Jan. 12, 2008).

'totality of the circumstances of the local electoral process,' the standard, practice, or procedure being challenged had the result of denying a racial or language minority an equal opportunity to participate in the political process."[475]

The Courts have considered the following factors in determining, if within the totality of the circumstances in a jurisdiction, the operation of the electoral device being challenged results in a violation of Section 2:

> 1. The . . . history of official [voting-related] discrimination in the state or political subdivision . . . ;
>
> 2. The extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. The extent to which the state or political subdivision has used unusually large election districts, majority-vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. [W]hether the members of the minority group have been denied access to [the candidate slating process];
>
> 5. The extent to which members of the minority group . . . bear the effects of discrimination in such areas as education, employment, and health, which hinder their ability to participate effectively in the political process;
>
> 6. Whether political campaigns have been characterized by overt or subtle racial appeals;
>
> 7. The extent to which members of the minority group have been elected to public office in the jurisdiction.[476]

A plaintiff need not prove any particular number or even a majority of these factors to prevail in a vote dilution claim.

Recent cases, such as *United States v. Charleston County*[477] and *Colleton County Council v. McConnell*,[478] demonstrate the continued need for Section 2 of the Voting Rights Act. South Carolina's long history of racial discrimination and severely polarized voting makes the extension of Section 2 critical. Successful Section 2 litigation from the 1970s to the present day cannot be allowed to be forfeited. Significant changes wrought by minority voters cannot be abandoned.

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[475] *Id.*

[476] S. REP. NO. 97-417, at 28–29 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 206–07.

[477] 365 F.3d 341 (4th Cir. 2004).

[478] 201 F. Supp. 2d 618 (D.S.C. 2002).

The victory of African-American plaintiffs in *McCain v. Lybrand* discussed above and the 1982 changes to the Voting Rights Act triggered significant legal activity to expand the rights of South Carolina's African-American citizens, who challenged discriminatory electoral systems across the state over the next decade. Attorneys from the American Civil Liberties Union and the NAACP brought numerous actions under Section 2, principally challenging at-large electoral systems.

In *Jackson v. Edgefield County, South Carolina School District*,[479] African-American voters of Edgefield County brought suit, alleging that the at-large electoral system used to elect members of the School Board of Trustees resulted in impermissible dilution of voting strength of African-American voters in violation of their constitutional rights and Section 2 of the Voting Rights Act.[480] The district court held that the at-large method of election for membership on the Edgefield County School Board of Trustees resulted in the denial or abridgement of voting rights of African-American citizens in violation of Section 2.[481] As the court concluded:

> [W]e find that there is credible and substantive evidence showing that a pervasive racial discrimination has left the County's black citizens economically, socially, and politically disadvantaged and that a severe degree of racial bloc voting and the minimal degree of electoral success by minority candidates exacerbate the difficulties faced by black candidates seeking election to the position of the School Board Trustees under the existing at-large electoral structure and practice.[482]

Thereafter, a number of jurisdictions, when challenged pursuant to Section 2, agreed to adopt single-member district plans, which allowed minorities an opportunity to elect candidates of their choice.[483] In those jurisdictions, the method of discrimination in voting has taken many forms—manipulation of boundaries to maintain white control, intimidation and harassment of minority and poor voters at the polls and the presence of pervasive racial polarization among voters.

County councils in Abbeville, Barnwell, Darlington, Fairfield, Georgetown, Laurens, Richland and Saluda counties entered into consent decrees.[484] Only in Kershaw and Charleston Counties did the cases reach

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[479] 650 F. Supp. 1176 (D.S.C. 1986).

[480] *Id.* at 1178.

[481] *Id.* at 1204.

[482] *Id.*

[483] *See, e.g.*, Nat'l Ass'n for the Advancement of Colored People (NAACP) v. Kershaw County, 838 F. Supp. 237, 239 (D.S.C. 1993).

[484] Burton et al., *supra* note 1, at 228.

trial. In Kershaw County, the district court found for the plaintiffs.[485] A single-member system with the chair elected at-large followed.[486] The court's findings in *Charleston County* are discussed at length above.

School districts and Boards of Education in Abbeville[487], Chesterfield[488], Laurens[489], Spartanburg[490], Florence[491] and York[492] settled challenges to their at-large systems following *Jackson*.

Municipalities across South Carolina, including Aiken, Edgefield, Manning, Johnston, Winnsboro, Lancaster, Laurens, Cayce, Mullins, Bennettsville, Orangeburg, Holly Hill, Elloree, Spartanburg, Saluda, Union and Kingstree agreed to single-member or mixed systems that afforded African-American citizens the opportunity to elect candidates of their choice after litigation was filed.[493]

In Laurens, the Commissioners of Public Works, agreed to single-member districts.[494]

After *Charleston County*, only two at-large county councils remain—in majority African-American Hampton and Jasper Counties.[495] All others are single-member districts or single-member districts with the Chair or Supervisor elected at-large. According to the South Carolina School Boards Association, "[t]hirty-nine districts choose board members from single-member districts, 30 retain at-large representation and 16 districts use a combination."[496]

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[485] *Kershaw County*, 838 F. Supp. at 239.

[486] *See id.* at 240.

[487] *See* NAACP v. Bd. of Trustees of Abbeville County Sch. Dist. No. 60, No. 8:93-1047-03 (D.S.C. 1994).

[488] *See* NAACP v. District Bd. of Educ. of Chesterfield County, No. 4:92-2863-21 (D.S.C. 1992).

[489] *See* Smith v. Laurens County, S.C. Sch. Dist. 55, No. 6:87-512-1 (D.S.C. 1987).

[490] *See* NAACP v. Spartanburg County Bd. of Educ., No. 7:91-03111-HMH (D.S.C. 1991).

[491] *See* NAACP v. Truitt, No. 4:95-01054-WBT (D.S.C. 1995).

[492] *See* Love v. Sch. Dist. #1, No. 0:00-00442-DWS (D.S.C. 2000).

[493] The only case in this period involving a Section 2 challenge to the method of election in which a court found that the plaintiffs failed to establish that African-American citizens had less opportunity than others in the electorate to participate in the political process and to elect candidates of their choice was *National Association for the Advancement of Colored People, Inc. v. City of Columbia*, 850 F. Supp. 404 (1993), *aff'd*, 33 F.3d 52 (4th Cir. 1994). The case was a challenge to a mixed-system in the state's capitol.

[494] *See* NAACP v. Bd. of Comm'rs of Pub. Works, No. 6:89-02867-JFA (D.S.C. 1989).

[495] *See* South Carolina Association of Counties, Hampton, http://www.sccounties.org/counties/hampton.htm (last visited Jan. 12, 2008); South Carolina Association of Counties, Jasper, http://www.sccounties.org/counties/Jasper.htm (last visited Jan. 12, 2008).

[496] S.C. SCH. BDS. ASS'N, BOARD MEMBER SELECTION 1 (2005), *available at* http://scsba.org/acrobat/050901_bdmemberselection2005.pdf.

IX. OTHER *SHAW/MILLER* CASES

The 1990s saw significant changes in voting rights jurisprudence. In a series of cases (*Shaw/Miller*), the Supreme Court granted white citizens the right to challenge districts that had been crafted to enable African-American citizens to elect candidates of choice, holding that race had predominated over traditional districting principles in drawing those districts and that, even where compliance with the Voting Rights Act required race-conscious drawing, those districts had not been narrowly tailored to meet those compelling state needs.[497]

South Carolina has seen five challenges to districting plans brought under *Shaw/Miller* theories. The *Smith v. Beasley* (South Carolina Senate) and *Able v. Wilkins* (South Carolina House of Representatives) challenges to legislative redistricting, and the *Rodgers v. Union County* challenge to a county council district, are discussed above.

A. UNITED STATES CONGRESSIONAL DISTRICT SIX

Following the *Smith v. Beasley* and *Able v. Wilkins* findings with respect to House and Senate districts, private plaintiffs brought a *Shaw/Miller* challenge in late 1996 to the Sixth Congressional District in *Leonard v. Beasley*.[498] That district, which encompassed large portions of the Pee Dee region, the majority African-American I-95 Corridor, and African-American areas of Charleston and Columbia, was first drawn as a majority African-American district by the *Burton* court in 1992.[499] That district had a 61% African-American population and a 58% African-American voting age population.[500] When redrawing district lines in 1994, the General Assembly essentially replicated the *Burton* court district.[501]

Leonard v. Beasley settled in 1997. The defendants agreed for settlement purposes that the plaintiffs "had a strong factual and legal claim . . . that the creation of the Sixth Congressional District subordinated traditional

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[497] *See* Shaw v. Hunt, 517 U.S. 899 (1996); Miller v. Johnson, 515 U.S. 900 (1995); Shaw v. Reno, 509 U.S. 630 (1993).

[498] Leonard v. Beasley, No.3:96-03640 (D.S.C. Dec. 6, 1996).

[499] *See* Burton v. Sheheen, 793 F. Supp. 1329, 1359–63 (D.S.C. 1992).

[500] *See* U.S. Census Bureau, 2000 Census Summary File 1, at tbl.P3, *available at* http://factfinder.census.gov (last visited Jan. 12, 2008); U.S. Census Bureau, 2000 Census Redistricting Data (Public Law 94-171), at tbl.PL3, *available at* http://factfinder.census.gov (last visited Jan. 12, 2008).

[501] *See* 1994 S.C. Acts 321. The changes were to accommodate individual politicians who wanted into or out of the Sixth District. Cindi Ross Scoppe, *Charleston Lawmaker's Home Moved into District He Hopes to Represent*, COLUMBIA STATE (S.C.), Mar. 9, 1994, at 6B.

districting principles to racial considerations."[502] Conversely, the plaintiffs agreed that "the State has a compelling state interest in adopting [a] congressional plan that does not have the purpose, effect or result of providing minority citizens with less opportunity than other members of the electorate to elect representatives of their choice."[503] The parties also agreed that a narrowly tailored, majority African-American voting age population district could be drawn in South Carolina.[504] The parties agreed that the General Assembly would attempt to redistrict congressional districts and, failing that, the plaintiffs could reinstitute the action.[505]

The Sixth Congressional District remained unchanged and unchallenged until after the 2000 Census, when the *Colleton County* court found "that [Section] 2 and [Section] 5 of the Voting Rights Act require the maintenance of the Sixth District as a majority-minority district."[506] The court, after "correction of some of the questionable aspects of the existing plan" crafted a "constitutionally proper draw that has a 53.75% BVAP in the district."[507]

B. HORRY COUNTY COUNCIL

In 1991, Horry County Council redistricted its eleven single-member districts, which also apply to the Horry County School Board of Trustees.[508] In that process, it created a new majority African-American district (District 9) and strengthened an existing district (District 7).[509] District 7, under the new plan, had a 60% African-American population, and District 9 a 65% African-American population.[510]

On January 31, 1997, white plaintiffs from Horry County filed suit on *Shaw*/*Miller* grounds challenging Districts 7 and 9.[511] On May 8, 1997, the parties entered a consent order in which the defendant County Council conceded liability in "that it used impermissible factors in redistricting Horry County."[512] On May 23, 1997, the NAACP and private African-American

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[502] Settlement Agreement at 3–6, Leonard v. Beasley, No.3:96-03640 (D.S.C. Aug. 6, 1997) (on file with authors).

[503] *Id.*

[504] *Id.*

[505] *Id.*

[506] Colleton County v. McConnell, 201 F. Supp. 2d 618, 665 (D.S.C. 2002).

[507] *Id.* at 665–66.

[508] *See* Prince v. Horry County, No. 4-97-0273-12, slip op. at 3 (D.S.C. Oct. 31, 1997).

[509] *See id.*

[510] *Id.*

[511] *Id.* at 1.

[512] Prince v. Horry County, No. 4-97-0273-12 (D.S.C. Oct. 30, 1997) (order denying motion for intervention).

citizens sought to intervene in that proceeding.[513] The district court denied that motion on October 30, 1997, while declaring the districts unconstitutional.[514] The white-majority defendant County Council offered no defense of the plans, blaming the districts on "a desire to appease the NAACP and to meet the Department of Justice's preclearance requirements."[515]

When Districts 7 and 9 were redrawn, District 9 was drawn to include a 50% African-American population and 44% African-American voting age population, while District 7 was drawn to include a 47% African-American population and 43% African-American voting age population.[516] Although nominally having a majority African-American population, District 9 was an area of significant white growth.[517] By 1998, its voter registration was only 35% African-American in the proposed district.[518] The benchmark plan for District 7 had "a 54 percent black population majority, and a 50 percent voting age population."[519]

The county demographers had drawn a compact district with an African-American majority population and a 49% African-American voter registration, which the council had rejected.[520] "Because these alternate redistricting configurations illustrate the ability to create a reasonably compact district that reduces black voting strength to a lesser extent than the proposed plan," the Department of Justice objected to the initial proposal to redraw Horry County Council lines.[521] A redrawn plan was approved in July of 1998.[522]

In 2006, one African-American, James R. Frazier, served on the Horry County Council, representing District 7— the district to whose initial redrawing the Attorney General had objected.[523] District 7 had only 42% African-American voter registration in 2004.[524] African-American Council-

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[513] *Id.* at 1.

[514] *See id.* at 5; *Prince*, No. 4-97-0273-12, slip op. at 4.

[515] *Prince*, No. 4-97-0273-12, slip op. at 3–4.

[516] Letter from Bill Lann Lee, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to John C. Henry, The Thompson Law Firm (May 20, 1998), *available at* http://www.usdoj.gov/crt/voting/sec_5/ltr/l_052098.pdf.

[517] *Id.* at 3.

[518] *Id.* The tremendous white growth in the District 9 area may well have led to natural retrogression—the loss of an African-American majority district—because of population changes in 2000, in any case.

[519] *Id.* at 2.

[520] *Id.* at 4.

[521] *Id.*

[522] Craig S. Lovelace, *New Districts OK'd*, SUN NEWS (Myrtle Beach), July 2, 1998, at 1A.

[523] *See* Horry County, County Council, http://www.horrycounty.org/council/members/html/frazier.html (last visited Jan. 12, 2008).

[524] *See* S.C. Election Comm'n, County Council Tally (Oct. 1, 2004) (on file with authors).

member Frazier has had no white opposition since 1998.[525] Three of the twelve members of the Board of Education, which uses the same lines, were African-American in 2006.[526]

Although successful *Shaw/Miller* constitutional challenges have been brought to a number of districting plans in South Carolina, subsequent history has seen that adjustments were made and constitutional districts in which African-American citizens are able to elect candidates of their choice were drawn.

X. CONCLUSION

For decades, the Joint Center for Political and Economic Studies has been tracking African-American elected officials. Their 2000 report showed that the number of African-American elected officials in South Carolina increased from thirty-eight in 1970 to 540 in 2001.[527] Most of that progress has been the product of vigorous enforcement of the Voting Rights Act in the face of significant resistance.

Although some would argue that those advances now make the Act unnecessary, precious little of that progress was granted willingly. Across South Carolina, African-American citizens have had to fight for the opportunity to elect candidates of their choice. And public officials have shown only too ready a willingness to undermine those advances. This report has reviewed efforts in this young century in Charleston, Cherokee, Greenville, Lexington, Richland, Spartanburg, Sumter and Union Counties to change district lines or voting rules to diminish the ability of African-American voters to elect candidates of their choice.

As South Carolina jurisdictions have adopted single-member districts, many of the other election practices that reduced the ability of African-American voters to elect candidates of choice, such as staggered terms and majority vote requirements, have ceased to have those discriminatory effects. Indeed, increasingly, the points of contention have been over district lines that split African-American communities or pack African-American

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[525] *See* South Carolina Election Commission, 2006 South Carolina Election Returns, 2006 General Election—County Offices, Horry County Council District 007, http://www.scvotes.org/statistics/election_returns_from_primaries_and_general_elections_countywide (last visited Mar. 7, 2008) (select "2006 General"; then select "Horry County"; then select "Horry County Council District 007"); 2002 ELECTION REPORT, *supra* note 180, at 243; S.C. ELECTION COMM'N, ELECTION REPORT 1998 223 (1998).

[526] *See* Horry County Schools, Board of Education, http://www3.hcs.k12.sc.us/AboutUs/SchoolBoard/index.html (last visited Nov. 2, 2007).

[527] BLACK ELECTED OFFICIALS, *supra* note 51, at 18 tbl.2.

voters into districts so that their ability to elect candidates of choice in other districts is reduced.

Annexations continue to create concern in African-American communities. In the City of Aiken, governed by a mixed system of single-member and at-large elections for city council, two solidly majority-African-American districts became bare majority African-American districts with redistricting after the 2000 Census because of significant annexations of the white communities south of the city. A 2003 referendum to change the 4-2-1 system to a 5-1-1 was rejected by the white majority electorate, despite the endorsement of the Mayor.[528]

In reviewing plans proposed by the parties to statewide redistricting in 2002, the court took special note that the governor and the legislature "have proposed plans that are primarily driven by policy choices designed to effect their particular partisan goals. And, in many cases, the choices appear to be reflective of little more than an individual legislator's desire to strengthen his or her ability to be re-elected to the seat in question."[529]

Throughout the Section 5 objections, we see that discriminatory actions were taken to protect white incumbents. Leaving South Carolina's African-American citizens at the mercy of incumbency protection for majority white legislative bodies will only lead to a reduction in the ability of South Carolina's African-America citizens to effectively participate in political processes and elect candidates of their choice. Section 5 preclearance review is critical to protecting those gains.

South Carolina has made remarkable progress in the forty years since passage of the Voting Rights Act and in the twenty-five years since the Act was last renewed. But, in a state marked by high levels of racial polarization and continuing socio-economic disparities between her white and African-American citizens, that progress has come almost exclusively in bodies elected from single-member districts. Those districting schemes have been largely the product of vigorous enforcement of the Voting Rights Act through both Section 2 and Section 5 in the face of official resistance stretching, in many jurisdictions, over decades. Section 5's protections against backsliding are critical to maintaining the expansion of African-American representation, which has seen this state go from zero to 540 elected African-American officials in the life of the Act.

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[528] Philip Lord, *Residents Vote to Keep Current Election System*, AIKEN STANDARD, Apr. 2, 2003; Fred B. Cavanaugh, Jr., Mayor of Aiken, *Citizens to Decide Aiken's District-Voting Plan*, AIKEN STANDARD, Mar. 14, 2003.

[529] Colleton County Council v. McConnell, 201 F. Supp. 2d 618, 628–29 (D.S.C. 2002).