GEORGIA'S EXPERIENCE WITH THE VOTING RIGHTS ACT: PAST, PRESENT, AND FUTURE

*David F. Walbert**

I. INTRODUCTION

The Voting Rights Act of 1965 was passed with the broad purpose of remedying voting discrimination that had been practiced principally in the southern states. The Act contained a variety of procedural mechanisms that were devised to give the federal government and private litigants the means to ensure that African-Americans could register to vote, and vote, without discrimination. At the time, the key provision of the Act was perceived to be the ban on state literacy tests and "understanding or interpretation" tests that served as an alternative way of qualifying voters who were illiterate. Literacy tests were first used in the United States in Massachusetts and other northeastern states decades earlier. In some counties in the South, these tests were used to discriminate against African-Americans. Threats, intimidation, and violence also kept blacks from the polls in some places.

The Voting Rights Act profoundly changed southern politics. Prior to the 1960s, blacks were minimally involved in politics in the South. While there were exceptions in some areas, and blacks freely voted in the 1950s in some places, for the most part politics was considered "white man's business." That changed as a result of the civil rights movement in the 1960s and, in particular, the adoption of the Voting Rights Act. Black voter registration increased markedly. Today, the rate of black voter registration is on par with that for whites. In fact, if one accounts for socio-economic differences, the rate of white voter registration is no higher than that for blacks. The key provision that drove this political revolution was the ban on literacy and "understanding or interpretation" tests.

Since 1965, African-American candidates for public office in Georgia

* Atlanta attorney whose litigation experience includes participation in dozens of the most prominent race/representation cases of the last twenty years. He has served as counsel in *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983), in *Rogers v. Lodge*, 458 U.S. 613 (1982), and, most recently, in *Johnson v. Miller*, 115 S. Ct. 2475 (1995), all of which addressed the role of race in redistricting and election procedures. Mr. Walbert also has served as a member of the faculty at Emory University School of Law.

and elsewhere in the South have met with increasing success. There were almost no black officeholders in 1965. Today, while the numbers fall short of proportional representation, the increases have been dramatic. Three factors have driven this political revolution. First is the change in attitudes and politics that has transpired since the elimination of formal segregation. Second is the increase in black voter registration. Third is the elimination of election practices that allowed local white voting majorities to defeat black candidates who were preferred by black voters.

The most important change in electoral practices that led to the election of black state representatives, councilpersons, county commissioners, and the like, was the elimination of at-large voting or multi-member district voting.[1] Those voting methods, which gave white majorities the power to "trump" black candidates in many situations, minimized black electoral opportunities. In some instances, those systems were adopted or maintained for the very purpose of discriminating.[2]

As a practical matter, at-large voting has been eliminated throughout the South—either voluntarily or by litigation—in virtually every city, county, and legislative district with a significant minority population.[3] Courts began to find the practice of at-large voting to be unconstitutional.[4] Then, in a 1980 decision that was widely condemned as reactionary, the United States Supreme Court charted a major shift in the law and held that at-large elections would be invalidated only where the very purpose underlying the discriminatory election device was found to be discriminatory.[5] Two years later, Congress amended section 2 of the Voting Rights Act[6] to reinstate the pre-*Bolden* view that at-large elections were illegal under federal law where they caused discrimination, or resulted in discrimination, regardless of their purpose.[7]

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[1] *See* Thornburgh v. Gingles, 478 U.S. 30 (1986); Rogers v. Lodge, 458 U.S. 613 (1982).

[2] *See, e.g.*, Rogers v. Lodge, 458 U.S. 613 (1982); Paige v. Gray, 437 F. Supp. 137 (M.D. Ga. 1975).

[3] *But see* Holder v. Hall, 114 S. Ct. 2581 (1994) (upholding use of at-large elections where the governing county commission consisted of only one person).

[4] *See, e.g.*, White v. Regester, 412 U.S. 755 (1973); Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd*, East Carroll Parish Sch. Bd. v. Marshall, 424 U.S. 636 (1976).

[5] City of Mobile v. Bolden, 446 U.S. 55 (1980).

[6] 42 U.S.C. § 1973(a) (1986).

[7] *See* Thornburgh v. Gingles, 478 U.S. 30 (1986). Justices Thomas and Scalia have espoused the view that the amendment to § 2 was designed only to address the actual process of registering and voting, and that it was not intended to reach practices such as at-large elections. *See, e.g.*, Holder v.

With the general elimination of at-large and multi-member elections, voting rights advocates shifted their attention to new areas. Desirous of increasing minority voting strength, new arguments, new interpretations of the Voting Rights Act, and new claims were advanced.[8] These new claims did not have the firm footing in the legislative consensus that underlay the Voting Rights Act.

Georgia, like most other southern states, has defended these claims in a variety of district courts and before the Department of Justice when it has exercised its administrative powers under section 5. The purpose of this article is to describe broadly the kinds of claims and arguments that have been raised by voting rights advocates, and to outline the positions that Georgia—and most other states—have advocated in response. These issues have arisen most recently in three separate areas. The first and most protracted of these involve Georgia's judiciary. The second involves the 1992 reapportionment and the kinds of district lines the Georgia General Assembly adopted to satisfy the Department of Justice. The third is the attack by the Department of Justice and private plaintiffs on Georgia's majority vote laws. This article will review events in each of these areas to date, paying particular attention to the arguments that Georgia has advanced on its own behalf.

II. Georgia's Judiciary

Over the past ten years, one of the key battle grounds in voting rights litigation involved challenges by private plaintiffs and the Department of Justice to the method of electing state judiciaries. Claims have been made under both section 2 and section 5 of the Voting Rights Act. Using its section 5 administrative power, the Department of Justice has tried to change the way state judiciaries are elected. These applications of the Voting Rights Act have raised questions in many minds as to whether the Act is being properly applied to new facts and new areas, or whether the theory of the Act has been distorted in an effort to remedy a problem that

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Hall, 114 S. Ct. 2581, 2591 (1994) (Thomas, J., concurring and joined by Scalia, J.). The author was a witness before both the Senate and House Judiciary Committees that considered and adopted the amendment to the Voting Rights Act, and is thoroughly familiar with the legislative process and history concerning that amendment. Their view is, without doubt, mistaken.

[8] *See, e.g.*, Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 Va. L. Rev. 1413 (1991).

is not a voting problem at its core. In fact, some of the most significant attempts to use the Voting Rights Act in this area have met with complete failure.[9] In Georgia, the issue remains unresolved as of this writing. In a recent Georgia case, the District Court for the District of Columbia rejected an attempt by the Department of Justice to construe section 5 in a broad new way.[10] The court rejected the Department of Justice's expansive theories, adopting a more traditional interpretation of section 5 that appears to be in line with Supreme Court decisions. This case will be discussed below.

A. *The Brooks I Case and Section 5*

The superior courts of Georgia have been Georgia's trial courts of general jurisdiction since the state was founded. Superior courts have plenary civil jurisdiction, and have exclusive jurisdiction over equity cases, felony cases, domestic and custody cases, and several other classes of civil cases. They also exercise a wide variety of appellate and certiorari jurisdiction over inferior tribunals, administrative bodies, and local government bodies.[11] The Georgia Supreme Court and the Georgia Court of Appeals were not created until 1845 and 1906, respectively. Before then, superior courts were the highest judicial authority in the state.

For over twenty years after the enactment of section 5, it was the understanding of officials of the State of Georgia that the addition of a new superior court judgeship did not entail a "covered change" that implicated section 5 of the Voting Rights Act. Judgeships were added routinely over the years, and new judgeships were filled and reelected without anyone suggesting that section 5 was implicated. However, in 1988, after it was

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[9] *See, e.g.*, Nipper v. Smith, 39 F.3d 1494 (11th Cir. 1994) (en banc), *cert. denied*, 115 S. Ct. 1795 (1995) (rejecting plaintiffs' § 2 challenge to Florida's method of electing trial court judges by all voters circuit-wide); League of United Latin Am. Citizens v. Clements, 999 F.2d 831 (5th Cir. 1993) (en banc), *cert. denied*, 114 S. Ct. 878 (1994) (rejecting plaintiffs' § 2 challenge to Texas's method of electing trial court judges by all voters circuit-wide); New York v. United States, 874 F. Supp. 394 (D.D.C. 1994) (granting declaratory judgment to the State of New York in a § 5 preclearance action involving newly enacted judgeships and rejecting Department of Justice efforts to broaden the scope of § 5).

[10] Georgia v. Reno, 881 F. Supp. 7 (D.D.C. 1995).

[11] In cases where appellate and certiorari jurisdiction arises, the superior courts function as they do in other cases in that a single judge hears the case. *See* GA. CODE ANN. § 15-6-8 (1994). Superior court judges do not convene in panels when performing their responsibilities, unlike the Georgia Court of Appeals, the Georgia Supreme Court, and other appellate courts in the country.

first suggested that the addition of new judgeships might constitute a change covered by section 5, Georgia's Attorney General submitted the post-November 1, 1964 superior court judgeships to the Department of Justice for preclearance.

While Georgia's administrative submission was pending, several black voters filed a case in the Southern District of Georgia, asserting that section 5 preclearance was required for the state's new judgeships.[12] The state declined to pursue its administrative submission pending the decision of the district court as to whether section 5 preclearance was required. Prior to a decision, the Department precleared twenty-nine superior court judgeships for the northern part of the state, an area with few African-Americans.[13] The Department requested additional information for the forty-eight remaining new superior court judgeships which were located in portions of the state with significant black populations.

On December 1, 1989, the district court in *Brooks I* held that the addition of new superior court judgeships in Georgia was a "covered change" that required section 5 approval. The court's vote was two-one. The majority, while not finding any evidence of discrimination, nevertheless held that the mere addition of a judgeship was, by itself, a "change" that required section 5 review as a matter of procedure.[14] The district court allowed the state to complete submission of the additional information that the Department of Justice required. Subsequently, the Department precleared the three remaining superior court circuits that were at issue, but objected to all new superior court judgeships in regions of the state where there was a significant black population.[15]

In explaining its objection, the Department did not suggest that black candidates had been discriminated against in judicial elections, nor did the Department suggest that there was any "underrepresentation" of blacks on the bench vis-à-vis the number of eligible lawyers. Rather, the Department objected to Georgia's majority vote law. For example, the Depart-

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[12] Brooks v. State Bd. of Elections, 775 F. Supp. 1470 (S.D. Ga. 1989) [hereinafter *Brooks I*].

[13] Letter from the Department of Justice on § 5 (Aug. 26, 1988) (on file with author) [hereinafter Letter of Aug. 26]. The Department concurrently precleared various new circuits that had been created in this area of the State.

[14] *See Brooks I*, 775 F. Supp. 1470.

[15] Letter from the Department of Justice on § 5 (June 16, 1989) (on file with author) [hereinafter Letter of June 16].

ment's letter questioned whether the majority vote law was enacted in 1964 for a racially discriminatory purpose.[16] The Department ignored the fact that these laws were part of the State's mandatory statewide election system *prior* to the effective date of section 5.[17]

Based upon the Department's objection, the court in *Brooks I* enjoined the state from filling any newly created judgeships that were as yet unfilled. The court also enjoined further elections for those judgeships for which there was an objection outstanding, but which had previously been filled. Because the terms of those incumbent judges expired on December 31, 1990, the court provided that the incumbents be allowed to continue in office pending the filing of a section 5 preclearance action in the District Court for the District of Columbia.[18] Such an action was, in fact, filed in Washington in August 1990,[19] and was tried on the merits in the fall of 1994.

Both parties appealed the decision of the District Court for the Southern District of Georgia. The state defendants contended that as a matter of procedure there had not been a "covered change" which required section 5 review. The plaintiffs contended that the court's relief was inadequate. The United States Supreme Court summarily affirmed in both appeals.[20]

The *Brooks I* court revisited the issue of relief on February 28, 1994, ruling that unapproved seats could not continue past March 1, 1995. These judgeships would cease to exist, and the incumbent judges would cease to hold those offices unless a favorable declaratory judgment was issued from the District Court for the District of Columbia before that date. In fact, the District Court for the District of Columbia ruled in favor of the state on February 3, 1995, so the issue of relief was implicitly resolved. The Southern District of Georgia recognized this and issued an order on February 21, 1995, which technically extended the "hold over"

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[16] *Id.*

[17] In its submission to the Department, the state did not provide evidence as to why the majority vote law had been adopted because, under prevailing § 5 law, the state's pre-November 1, 1964 laws were not under review in that proceeding.

[18] *Brooks I*, 775 F. Supp. 1470 (S.D. Ga. 1989). The district court also provided that any vacancies in the objected-to judgeships could be filled by the regular appointment process.

[19] Georgia v. Reno, 881 F. Supp. 7 (D.D.C. 1995).

[20] 498 U.S. 916 (1990).

provision of its last order, while acknowledging that there was no longer any basis for prohibitive injunctive relief.

B. Georgia's Superior Court Judgeships

As of November 1, 1964, the Georgia General Assembly had authorized sixty-one superior court judgeships throughout the state. From 1965 through the 1988 session of the General Assembly, an additional seventy-seven superior court judgeships were created and filled. From 1989 through 1994, an additional twenty-one superior court judgeships were authorized by the General Assembly. Thus, as of 1994, Georgia had 159 superior court judgeships authorized by individual acts of the General Assembly. However, fourteen of the judgeships enacted by the General Assembly in 1989 or later were not filled due to the *Brooks I* injunction. Of the other 145, each was active and filled as of 1994. Forty-eight of those 145 were at issue in the *Georgia v. Reno* case because they were enacted after November 1, 1964, and were refused administrative preclearance by the Department of Justice.

Each of the superior court seats added since November 1, 1964 was added to a specific superior court judicial circuit, as had been the case with every new judgeship created during the prior two centuries of the state's history. There are presently forty-six superior court circuits in the State of Georgia. Today, some circuits in urban areas consist of only one county, while other circuits comprise several counties. Never has any county been split into two or more circuits.

Most of Georgia's forty-six circuits existed as of November 1, 1964 and are, therefore, not subject to section 5 review. Several circuits have been created since November 1, 1964. However, in each of those instances, the circuit boundary has been precleared by the Department of Justice.[21]

Judicial elections in Georgia have a long history. The very first election of any judges in the United States took place in Georgia nearly two hundred years ago under the Georgia Constitution of 1812.[22] While several methods of selecting judges prevailed during the nineteenth century, Geor-

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[21] Letter of Aug. 26, *supra* note 13.; Letter From the Department of Justice on § 5 (April 25, 1990) (on file with author) [hereinafter Letter of April 25].

[22] GA. CONST. of 1812, art. III, § 4 (1812). *See generally* Glenn R. Winters, *Selection of Judges — An Historical Introduction*, 44 TEX. L. REV. 1081, 1082 (1966).

gia's superior court judges have been elected continuously by the voters for nearly a century.

Candidates for superior court judgeships are nominated at primary elections by those voters who reside in each of the respective circuits, just as they have been for the past century. Candidates so nominated are then elected at the November general election.[23] Since the adoption of Georgia's 1983 Constitution, judges have continued to be nominated at the time of the state's primary elections, but their elections are nonpartisan.[24] They continue to be elected by all of the voters in each of the respective circuits. Superior court candidates must obtain a majority of the votes in order to win nomination or election.[25] If no candidate obtains a majority of the votes cast, a run-off election is held between the top two candidates to determine the majority winner. This requirement applies to all state and county offices in Georgia.

Georgia's majority vote requirement, a mandatory law of statewide application that applies to all superior court judgeships whenever enacted, represents no change in the state's law since November 1, 1964. The same law was in effect on that date. As such, this practice is not reached by section 5.[26]

Partly as an adjunct to majority voting, all superior court judges—and all other state and county officials throughout Georgia—must be elected pursuant to separate designated places (sometimes called "posts") on the ballot. This practice was codified in the 1964 election code. It was also effective prior to the November 1, 1964 date with regard to all superior court judgeships, as well as other offices.[27]

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[23] Until the mid-1960s, Georgia was essentially a one-party Democratic state, and nomination in the Democratic primary was tantamount to victory. During the first half of this century, state law prescribed that superior court judges would be elected at the general election by the vote of all the voters throughout the state. This provision rarely, if ever, had any actual impact because, in the absence of Republican nominees, the general elections were not contested. The practice was changed by a 1966 constitutional amendment which prescribed that judges would be elected at the November election by the voters of their respective circuits. *See* 1966 Ga. Laws 819-20. This modification of Georgia's election law is not at issue. It was precleared by the Justice Department, and is now codified at GA. CODE ANN. § 15-6-4.1 (1994).

[24] *See* GA. CONST. art. VI, § 7, ¶ 1.

[25] GA. CODE ANN. § 21-2-501 (1993 & 1994 Supp.).

[26] *See* Voting Rights Act of 1965, 42 U.S.C. § 1973c (1986).

[27] *See* GA. CODE ANN. § 21-2-135 (1993).

C. *The Racial Make-up of Georgia's Bench*

To determine whether there is racial discrimination in the selection and retention of Georgia judges, evidence concerning the appointment and election of African-American lawyers and judges must be examined. First, the racial composition of the Bar must be analyzed.

1. *The number of African-Americans eligible to serve as superior court judges*

To serve as a superior court judge in the State of Georgia, one must be a lawyer who has been licensed for at least seven years.[28] A superior court judge must reside in the circuit in which he is a judge. These requirements reflect the state's interest in a judiciary that is competent, capable, and reasonably familiar with the community which it is elected to serve. States have a fundamental interest in making such decisions concerning the composition, qualifications, and selection criteria of its judicial branch of government.[29]

The Department of Justice has not suggested that there is anything racially discriminatory about these minimum requirements, but it is at this threshold point that the Department's charges of discrimination run into trouble. The fact that Georgia has fewer black superior court judges, percentage-wise, than there are blacks in the general population reflects the fact that the percentage of blacks in the Bar who are eligible to serve as superior court judges is much lower than the percentage of blacks in the population at large. The percentage of blacks in the Bar has ranged from one percent in the early 1970s to the present 4.1% for lawyers with the requisite seven years of experience.[30] The rate of admission of African-Americans to the State Bar of Georgia has grown from approximately two percent per year in the early 1970s to an average of about five percent over the last ten years.[31]

In most of the superior court circuits at issue, the number of African-

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[28] GA. CONST. art. VI, § 7, ¶ 2(a).

[29] *See* Gregory v. Ashcroft, 501 U.S. 452 (1991).

[30] Report of Dr. Joseph L. Katz, p. 7 & Tab 2 (September 29, 1994) (on file with author) [hereinafter Katz].

[31] *Id.* A claim that Georgia's Bar admissions were racially discriminatory was rejected in Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975).

American attorneys is negligible. Many of the forty-six circuits in the state are rural. In these predominantly rural circuits, there are relatively few lawyers compared to the number of attorneys found in major metropolitan areas such as the Atlanta Circuit or the Stone Mountain Circuit (Fulton County and DeKalb County, respectively). Of the thirty judicial circuits in which the Department of Justice challenged a new judgeship, eight do not have a single eligible black attorney. Six of the remaining circuits have only one black attorney. Six others have only two black attorneys who satisfy the minimum legal requirements.

2. *The selection of superior court judges in Georgia*

To fully appreciate how Georgia's superior court and other high-level judicial officers are selected, one has to consider not only the election procedures themselves but the appointment process as well. When superior court judgeships become vacant and when new judgeships are created, those vacancies are filled by gubernatorial appointment. Since Jimmy Carter was Governor of Georgia, a Judicial Nominating Commission (JNC) has screened applicants and made recommendations to the Governor. Since the beginning of the JNC, the Governor's appointments have come exclusively from the names recommended by the Commission.

As a practical matter, the great majority of judges have come to the bench by appointment. From 1968 to mid-1994, 133 of the 233 superior court judges were appointed to office. Of the 145 superior court judges serving in mid-1994, 100 judges—sixty-nine percent—were appointed.

3. *Georgia's experience with the appointment of African-Americans to the bench*

Throughout the history of the JNC, African-American applicants seeking judgeships have fared well. The rate of appointment of African-Americans has exceeded that of white applicants. Since the first superior court appointment through the JNC process in 1972 until mid-1994, 875 lawyers (or judges of other courts) sought superior court judgeships. Of these 875 persons, 106, or twelve percent, were black. This figure exceeds the percentage of African-American lawyers who were members of the Bar

during this time.[32]

If African-American lawyers had been appointed to the 126 superior court openings filled by appointment from 1972 to May 15, 1994 in proportion to their *current* members in the Bar statewide, there would have been five appointments. If minority lawyers had been appointed in proportion to their rate of application to the JNC, there would have been eight black appointments.[33] But, in fact, twelve African-American lawyers were appointed to superior court judgeships by the four governors who served during the relevant time, a figure which amounts to ten percent of all such judgeships appointed. These facts demonstrate that the primary route to the superior court bench in Georgia, gubernatorial appointment, is untainted by discrimination.

4. Georgia's judicial election history and the experience of African-American candidates

The importance of appointment as a route to the judiciary in Georgia is underscored by the history of the state's judicial elections. Simply put, incumbent judges are rarely beaten. It happens, to be sure, but it is an uncommon event. From 1968 through May 15, 1994, there were 621 instances where an incumbent superior court judge stood for election. In 530 of those elections, the incumbent was unopposed. In only ninety instances did they draw opposition, and in only twenty-six instances—four percent of the time—were those incumbents defeated.[34]

Black candidates fared well and comparable to whites when running for election as incumbents. The most dramatic evidence of this is in statewide races. There have been four elections where African-American judges have run statewide for re-election and been opposed by white challengers. These were the election campaigns of Justices Robert Benham and Leah Sears-Collins on the Georgia Supreme Court in 1990 and 1992, respectively, and the election campaigns of then-Judge Robert Benham and Judge Clarence Cooper on the Court of Appeals in 1984 and 1990, re-

[32] Katz, *supra* note 30, at Tabs 2 & 3.

[33] Report of Dr. Michael A. Maggiotto, Tab 2 (September 29, 1994) (on file with author) [hereinafter Maggiotto].

[34] These statistics were established by admission and are reflected in the record in Georgia v. Reno, 881 F. Supp. 7 (D.D.C. 1995).

spectively. In each of these instances, the black incumbent won.[86]

This phenomena in the statewide races is mirrored by the experience of African-American trial court judges in Georgia superior and state courts. There have been twenty-eight instances where African-American judges stood for re-election as superior court or state court incumbents.[86] In only one instance was a black incumbent defeated by a white challenger. That case occurred thirteen years ago in 1982, when a white female state court judge ran against a newly appointed black male superior court judge in the Chattahoochee Circuit. In every other election where African-American trial court judges ran as incumbents, they prevailed: a success rate of twenty-seven out of twenty-eight.[87] During the past decade, African-American judges have enjoyed a 100% success rate as incumbents running in state court, superior court, and appellate court elections (twenty-five of twenty-five).[88]

Open elections comprise a small portion of all of the judicial elections in Georgia, and their significance will probably diminish further in future years. Prior to the 1984 elections, Georgia law required that there be an open election in any case where a judge retired, died, or withdrew from a future term of office subsequent to election but before actually commencing the new term.[89] Open elections in those instances were eliminated by the 1983 Constitution, which provides for gubernatorial appointment in those cases, as it does for all other vacancies.[90] Now, an open election can occur only where the incumbent chooses not to run for re-election, but serves his or her entire term. The successor is elected at the regularly scheduled election. These situations are uncommon. Of the 671 times that a superior court seat has been up for election from 1968 through May 15, 1994, only fifty-one, or eight percent, were open elections.[91] Forty-four of these open elections were contested.[92]

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[86] In 1992, the same year that Justice Sears-Collins and Judge Cooper ran for election, a white incumbent on the court of appeals was defeated in his statewide race by a white challenger. (The incumbent was Judge Sognier, the challenger Alan Blackburn.)

[87] Katz, *supra* note 30, at 16-19.

[88] *Id.* at 13.

[89] Maggiotto, *supra* note 33, at Tab. 3.

[90] *See* Duncan v. Poythress, 657 F.2d 691, 693 (5th Cir. 1981), *cert. dismissed*, 459 U.S. 1012 (1982).

[91] GA. CONST. art. VI, § 7, ¶ 3.

[92] Katz, *supra* note 30, at 15.

[93] *Id.*

In this small number of elections, African-American candidates again fared well. Of nine instances where black and white judicial candidates opposed one another for an open seat on either the superior court or the state court, a black candidate was successful five times. In one of those races, the white candidate received a majority of the votes cast by African-Americans.[40]

III. Does the Addition of Superior Court Judgeships in Georgia Violate Section 5?

The Justice Department's use of section 5 to object to Georgia's new judgeships, and to object to the addition of new judgeships in several other states, has little precedent in case law. It seems equally unfounded in the philosophy of section 5. In essence, the Department is trying to reach back in time to invalidate statutes that should be beyond the scope of section 5 review because they were in effect on November 1, 1964.

Section 5 was not designed to permit review of state electoral practices in effect prior to the adoption of the Act. It was enacted primarily to complement the suspension of literacy tests in the 1965 Voting Rights Act. Because Congress believed that the elimination of these tests would lead to registration of new minority voters, section 5 was included to ensure that no *new* laws would be implemented that would undercut the voter registration gains achieved by the literacy test ban.[44] This underlying purpose of section 5 was discussed long ago:[45]

> By prohibiting the enforcement of a voting-procedure change until it has been demonstrated to the United States Department of Justice or to a three-judge federal court that the change does not have a discriminatory effect, Congress desired to prevent states from "undo[ing] or "defeat[ing] the rights recently won" by Negroes. Section 5 was intended "to ensure that [the gains thus far achieved in minority political participation] shall not be destroyed through new [discriminatory] procedures and techniques."[46]

Because of the narrow purpose of section 5, the Supreme Court has

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[40] *Id.*

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

[45] *See* Beer v. United States, 425 U.S. 130 (1976).

[46] *Id.* at 140-41 (citations omitted).

rejected the idea that it provides *carte blanche* authority for either the Department of Justice or a preclearance court to determine whether any electoral practice of a covered jurisdiction is free from possible discrimination. The broader view of the statute was advocated by Justice Thurgood Marshall, but rejected by all the other Justices.[47] Broad challenges of this kind must be brought by a civil action filed in the defendant's jurisdiction, with the plaintiff, (whether the United States or private persons) bearing the usual burden of proving illegal discrimination.

Decisions of the Supreme Court since *Beer v. United States* have re-emphasized that the core purpose of section 5 is to reach *changes* in the law and to prohibit changes that are retrogressive. For example, *City of Lockhart v. United States*[48] involved a change from a "general law" city government to a "home rule" city council and mayor in Lockhart, Texas. Under the new home rule system, the mayor and two councilpersons were elected in even-numbered years using separately numbered posts. Two other council members were similarly elected in odd-numbered years. A three-judge district court panel held that the new method of election was racially discriminatory and denied approval.

On appeal to the Supreme Court, the Civil Rights Division abandoned its position when the Solicitor General reviewed the case. The United States agreed with the City of Lockhart: whether the new numbered post, at-large election system discriminated against minorities was not the critical inquiry under section 5.[49] The real question was whether black voters suffered some form of political retrogression under the new method of election. If they did not, the method had to be approved. The Supreme Court acknowledged that eliminating numbered post elections might benefit minority voters. But, the Court noted that any potential benefit was irrelevant because numbered posts had been used under the prior method of electing the city government, and were in use on the effective date of the Voting Rights Act.[50] The limited reach of section 5 was succinctly stated in the following language from *Lockhart*: "Since the new plan did

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[47] *See* City of Lockhart v. United States, 460 U.S. 125, 143 (1983) (Marshall, J., dissenting).

[48] 460 U.S. 125 (1983).

[49] The Attorney General had also objected to the use of at-large elections, but the district court rejected that contention because "the *continued* existence of at-large elections [did not have] a retrogressive effect." *Id.* at 134 n.11 (emphasis added). The Attorney General also abandoned this challenge to at-large elections before the Supreme Court.

[50] *Id.* at 135.

not increase the degree of discrimination against blacks, it was entitled to § 5 preclearance. . . . Although there may have been no improvement in [minority] voting strength, there has been no retrogression, either."[81]

Since *Lockhart*, the Supreme Court has issued several other voting rights decisions. They, too, provide little support for the Department of Justice's recent section 5 enforcement actions. Most recent is the Court's decision in *Holder v. Hall*.[82] That case involved a challenge by black voters who claimed that a single member county commission form of government was racially discriminatory. The case was based on section 2, there being no *change* that authorized section 5 involvement. In construing section 2, however, Justice Kennedy discussed the respective roles of the two sections in his opinion announcing the judgment of the Court:

> To be sure, if the structure and purpose of § 2 mirrored that of § 5, then the case for interpreting §§ 2 and 5 to have the same application in all cases would be convincing. But the two sections differ in structure, purpose, and application. Section 5 applies only in certain jurisdictions specified by Congress and "only to proposed changes in voting procedures." . . . In those covered jurisdictions, a proposed change in a voting practice must be approved in advance by the Attorney General or the federal courts. *The purpose of this requirement "has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." Under §5, then, the proposed voting practice is measured against the existing voting practice to determine whether retrogression would result from the proposed change.* The baseline for comparison is present by definition; it is the existing status. While there may be difficulty in determining whether a proposed change would cause retrogression, there is little difficulty in discerning the two voting practices to compare to determine whether retrogression would occur.[83]

Justice Kennedy went on to discuss the scope of section 2. While other Justices agreed and disagreed with his view of section 2 in *Holder*, not a word was written by any other Justice disagreeing with Justice Kennedy's

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[81] *Id.* at 134-35.
[82] 114 S. Ct. 2581 (1994).
[83] *Id.* at 2587 (emphasis added) (footnote and citations omitted).

assessment of section 5 law.[84] Under these precedents, it is difficult to see how the addition of new judgeships, elected like their predecessors, could be said to violate section 5.

If the Department's construction of section 5 were accepted by the courts, the consequences would be remarkable. As a matter of procedural coverage, section 5 applies to any "change" concerning the electoral process. It reaches each new "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964."[85] This includes candidate qualifications,[86] voter registration requirements, voter qualifications, the location of polling places, polling hours, absentee ballot procedures, and other matters related to the election process.[87]

The Department of Justice has selectively criticized state practices relating to majority voting and circuit-wide judicial elections. Under its construction of section 5, the Department would be equally empowered to insist that the states change any other practice that is used in the election of new judgeships, even though that practice was a part of the state's mandatory, statewide laws on November 1, 1964. Under the government's theory, for example, it could require Georgia, as a condition to increasing its judiciary, to strike from its constitution the qualification that superior court judges be members of the Bar for seven years as a "candidate qualification" that has a discriminatory impact. Likewise, Georgia could be forced, as a prerequisite to adding a new superior court judgeship, to expand its voter registration procedures, to require postcard registration, to extend the hours that its polling places are open or shorten them if the Attorney General believed that would be advantageous to black voters, to expand or reduce the number of polling places, or simply to move them to other locations if the Attorney General concluded that such moves might advance the interest of black voters. Modifications could be made to hundreds of practices that are prescribed by the state's election laws.[88] These "voting practices" are as much a part of judicial elections as are the prac-

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[84] *See also* Shaw v. Reno, 113 S. Ct. 2816 (1993). (*Shaw* was a reapportionment case that discussed § 5 much like Justice Kennedy did in *Holder*.)

[85] 42 U.S.C. § 1973c (1995).

[86] *See* Dougherty County Bd. of Educ. v. White, 439 U.S. 32 (1978).

[87] *See* 28 C.F.R. §§ 51.12-.13 (1987).

[88] *See* GA. CODE ANN. § 21 (1994).

tices that parties have previously attacked.

Congress certainly never contemplated that the Attorney General or a federal preclearance court would have such extraordinary powers, yet the Department of Justice claims that it did. Another dubious implication of the Attorney General's position is that, with every new office or election change submitted to the Department or a preclearance court, Georgia would carry the burden of affirmatively disproving that *any of its election laws* have a discriminatory impact. Section 5 approval would be denied where the state failed to carry its burden of disproving purposeful discrimination. Moreover, successful proof in one case would be irrelevant to the next. According to the Department of Justice's view, every new change and every new office puts Georgia's entire election code back into play, even those provisions that predate November 1, 1964 or were affirmatively precleared where enacted after that date.

The Attorney General's selective approach to the criticism of a state's election laws would inevitably result in a new and unacceptable level of arbitrariness to section 5 enforcement. This result is made manifest in the judicial cases: although the Department of Justice sought to change Georgia's election laws, it precleared all of Alabama's new trial court judgeships under virtually the same facts.[88]

IV. Can the Addition of a New Judgeship be Challenged Because of Some Claimed "Purpose to Discriminate?"

A. *Does the "Purpose" Element Of Section 5 Add Anything to the Scope of Review in the Judicial Cases?*

The function of section 5 is to prevent retrogression. Thus, in *Georgia v. Reno*, the state contends that, where there has been no retrogression, there should be no further inquiry under the *Beer-Lockhart-Holder* rulings.[89] While Georgia recognized that the purpose behind the enactment of a statute can be pertinent to section 5 review, the state asserted that purpose was irrelevant where there was no retrogression and the benchmark analysis of section 5 was thus satisfied. Purpose has played a role in section 5 review where the change at issue was admittedly retrogressive;

[88] Letter from the Department of Justice to David Boyd (April 27, 1987) (on file with author).
[89] Brief for Plaintiff, Georgia v. Reno, 881 F. Supp. 7 (D.D.C. 1995).

the court then proceeded to determine whether the change should still be approved under section 5. This scenario has arisen in annexation and consolidation cases.[81]

Purpose played an independent role in one other district court decision which concerned reapportionment.[82] There, Georgia's 1982 congressional reapportionment was held to violate section 5 because one section of one of the state's district lines was tainted by improper racial motivations.[83] This situation also differs from that in *Georgia v. Reno*. In a reapportionment case, the district lines are completely redrawn. Retrogression is not irrelevant, but is much harder to apply because the old reapportionment is gone, replaced by an entirely new map.[84] Obviously, the issue of purpose plays a greater role in that context.

B. *Even if the New Judgeship Enactments at Issue Were Subject to a "Purpose" Review, the Scope of that Review Should Be Different than What the DOJ Contends*

The Department of Justice contends that Georgia's post-1964 judgeships can be vetoed as purposefully discriminatory because the state allegedly discriminated when: (1) the General Assembly enacted allegedly discriminatory laws before November 1, 1964; (2) the General Assembly later failed to repeal those laws; or (3) the General Assembly failed to enact other laws which would have changed the way in which superior court judges are elected in Georgia.[85] These theories of "purposeful discrimination" bear no relation to what the Supreme Court holds to be the proper inquiry in a case where the issue of purposeful discrimination is properly presented. A statute is not "purposefully discriminatory" unless

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[81] *See, e.g.*, City of Pleasant Grove v. United States, 479 U.S. 462 (1987); City of Richmond v. United States, 422 U.S. 358, 378 (1975).

[82] Busbee v. Smith, 549 F. Supp. 494 (D.D.C. 1982) (three judge court), *aff'd*, 459 U.S. 1166 (1983).

[83] *Busbee* was affirmed by the United States Supreme Court but, unfortunately, summarily and without an opinion to shed light on the proper scope of § 5 review in such a case. 459 U.S. 1166 (1983).

[84] In Georgia's 1992 reapportionment, for example, which was the subject of Johnson v. Miller, 864 F. Supp. 1354 (S.D. Ga. 1994), *aff'd*, 115 S. Ct. 2475 (1995), Georgia's congressional representatives were increased from 10 to 11.

[85] Proposed Findings of Fact and Conclusions of Law submitted by the United States, Georgia v. Reno, 881 F. Supp. 7 (D.D.C. 1995).

the underlying, motivating purpose behind the specific law was a discriminatory one.[66]

Therefore, it is not sufficient that a statute's discriminatory consequences were foreseen at the time of enactment. Discriminatory purpose occurs only if a statute was enacted *because of* a discriminatory purpose, and if the statute would not have been enacted *but for* such a purpose.[67] Even where discrimination was a motive, *illegal* discrimination does not arise if the state would have adopted the statute regardless of any such tainted motive.[68]

> "Discriminatory purpose" . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse affects upon an identifiable group.[69]

The "but for" element of purpose cases was discussed in detail in *Mount Healthy School District v. Doyle*.[70] There, although the district court found that a public school teacher had been dismissed "in substantial part" for speech protected by the First Amendment, the Supreme Court held this fact was not enough for the plaintiff to prevail. The Court held that "the fact that the protected conduct played a 'substantial part' in the actual decision not to renew [the teacher's contract] would [not] necessarily amount to a constitutional violation justifying remedial action."[71] There would have been no liability on the part of the government if it had acted the same absent discrimination. In *Hunter v. Underwood*, the Court held that the *Mount Healthy* analysis applies in determining whether statutes that pertain to the electoral process are invalid because of a discriminatory purpose.[72]

The position of the Department of Justice in Georgia's judgeship cases

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[66] *See* Hunter v. Underwood, 471 U.S. 222 (1985); City of Mobile v. Bolden, 446 U.S. 55 (1980); Personnel Adm'r v. Feeney, 442 U.S. 256 (1979); Jefferson v. Hackney, 406 U.S. 535 (1972).

[67] *Feeney*, 442 U.S. at 279.

[68] *See generally* Hunter v. Underwood, 471 U.S. 222 (1985); Mount Healthy Sch. Dist. v. Doyle, 429 U.S. 274 (1977).

[69] *Feeney*, 442 U.S. at 279.

[70] 429 U.S. 274 (1977).

[71] *Id.* at 285.

[72] 471 U.S. at 232.

disregards the law of discriminatory purpose. Instead of addressing the reasons that the enactments at issue were passed by the General Assembly and signed into law, the Department would ask entirely separate questions. The Department of Justice would like to divert the court's attention to these "why" questions:

> • Why was Georgia's majority vote law enacted in 1964?
> • Why hasn't the majority vote law been repealed?
> • Why hasn't Georgia repealed its circuit-wide voting laws that pre-existed 1964?
> • Why won't Georgia do what the Department of Justice wants and what some minority state legislators want: replace the current election system with "cumulative voting" (a system of election whereby incumbent judges would run against each other with the top vote winner prevailing; "cumulative voting" is referred to by many as "herd politics")?
> • Why won't the state change its century-old method of circuit-wide election to race-based subdistrict elections?
> • Why hasn't the State reconfigured its judicial circuit boundaries, all of which precede November 1, 1964 or have been specifically precleared by the Department of Justice, to create two or three race-based circuits that include the several "black-belt" rural counties that are still majority black?

To the extent that the issue of purpose is relevant, the only question that should be resolved is: why were judgeships added by these enactments of the General Assembly? There is no dispute, of course, that all of Georgia's judgeships—and those in other states where the Department has made challenges—were enacted to deal with increasing caseloads.

V. Does Section 2 of the Voting Rights Act have any Application to the Issues in the Section 5 Review Proceeding?

As an additional basis for objecting to Georgia's new judgeships, the Department of Justice contends that the method of electing the positions violates section 2 of the Voting Rights Act. The State argued in *Georgia v. Reno* that this claim is a *sub silentio* effort to repeal both *Beer* and *Lockhart*.

Section 2 has a very prominent history in voting rights litigation. In 1980, the United States Supreme Court held that the Fifteenth Amendment was limited in its scope to proscribing actual legal barriers to voter registration and voting itself.[73] In addition, the Court construed section 2 of the Voting Rights Act, as it then existed, to merely restate the Fifteenth Amendment. There was widespread criticism of the *Bolden* opinion, and after hearings before the respective House and Senate committees, Congress enacted an amendment to section 2 that significantly broadened the statute as it had been construed in *Bolden*. First, the amendment eliminated the "discriminatory motivation" requirement and adopted a "results in" standard. Secondly, the amendment prohibited voting practices that afforded minority voters "less opportunity than other[s] . . . to participate in the political process and to elect representatives of their choice."[74] As amended, the scope of section 2 was expanded far beyond barriers to registration and voting to include other election practices that might have discriminatory impact.[75]

When section 2 was amended in 1982, section 5 was also extended by Congress. Section 5 was temporary legislation that would have expired but for Congress's extension of the law at that time. In extending section 5, however, Congress made no substantive amendments. The statutory language was simply continued, with only the expiration date of the statute being changed.

The Department of Justice's suggestion that section 5 was expanded during the course of Congress's 1982 actions is a bold one. First, section 5 was not changed substantively in any way at that time. If Congress had intended to revise section 5 to permit review of electoral practices regardless of when enacted, and regardless of retrogression, the wording of section 5 surely would have been changed in 1982. That is particularly true in light of the unequivocal construction given to section 5 in 1976 in *Beer v. United States*.[76]

Common sense and normal rules of statutory construction dictate that Congress does not change a statute's meaning when it does not amend the

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[73] *See* City of Mobile v. Bolden, 446 U.S. 55 (1980).

[74] 42 U.S.C. § 1973b (1982).

[75] The purpose and legislative history behind § 2 were discussed in great detail in Thornburgh v. Gingles, 478 U.S. 30 (1986).

[76] 425 U.S. 130 (1976).

statute. This point, in a similar factual setting, was made by the United States Supreme Court in *Pierce v. Underwood*.[77] *Pierce* involved the Equal Access to Justice Act (EAJA),[78] which allows fee awards against the United States in certain cases. Like section 5, that provision of law was originally enacted as temporary legislation. The Act was extended in 1985 but, before its extension, several lower federal courts had construed EAJA to permit an award of fees only in those cases where the government's conduct had not been "reasonable." When the EAJA was extended in 1985, the provision at issue was not changed, but a committee report that accompanied the extension legislation stated that the government must show that its conduct was "more than merely reasonable" in order to avoid attorney's fees.[79] The plaintiffs in *Pierce* relied on this report in their unsuccessful argument that this higher standard should apply.

Similarly, the Department's contention in *Georgia v. Reno* that there was some substantive change in the law is also based on legislative history. However, the section 5 legislative history is even more attenuated than that at issue in *Pierce*. One footnote buried in the lengthy Senate Committee Report simply states, "[I]n light of the amendment to section 2, it is intended that a section 5 objection also follow if a new voting procedure itself so discriminates as to violate section 2."[80] But, just as was the case in *Pierce*, this passing comment in the legislative history is irrelevant in construing section 5 because the language of section 5 itself contained no change, much less the kind of change that would support a radical repeal of the *Beer* retrogression principle. The Supreme Court resolved the analogous situation in *Pierce v. Underwood* by holding that the extended, but unamended, terms of the statute necessarily remained unchanged, and the later legislative history had no weight:

> (Quite obviously, reenacting precisely the same language would be a strange way to make a change.) This is not, it should be noted, a situation which Congress reenacted a statute that had in fact been given a consistent judicial interpretation along the lines that the quoted Committee Report suggested. Such a reenactment, of course,

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[77] 487 U.S. 552 (1988).

[78] 28 U.S.C. § 2412 (1992).

[79] The committee report also stated that some courts had so held previously. In fact, one circuit had done so. The report also stated that it had been the intent of Congress in 1980 to use a "more than mere reasonableness" test. *Pierce*, 487 U.S. at 566.

[80] S. Rep. No. 417, 97th Cong., 2d Sess. 12, n.31 (1982).

> generally includes the settled judicial interpretation. . . . Even in the ordinary situation, the 1985 House Report would not suffice to fix the meaning of language which that reporting Committee did not even draft. Much less are we willing to accord it such force in the present case, since only the clearest indication of congressional command would persuade us to adopt a test so out of accord with prior usage[.][81]

The extent of the statutory amendment suggested by the Department of Justice is much greater than the minor change advocated in *Pierce*, making the idea of a *sub silentio* amendment by Congress even more untenable. Rather than acting as a freezing remedy, the statute would empower the Department of Justice with authority to review the propriety of every electoral practice of every covered jurisdiction, no matter when enacted. Such an interpretation bears no relationship to the purpose of section 5.[82]

There are other considerations that weigh against the position of the Department of Justice. Among these is the rule that a statute will not be construed to undercut state authority unless the congressional enactment clearly and expressly states that purpose. Before Congress will be deemed to have altered the "usual constitutional balance between the States and Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute."[83] "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of a clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."[84] Even as construed in *Beer*, section 5 is indisputably a serious intrusion

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[81] *Pierce*, 487 U.S. at 567-68 (citations omitted). Here, of course, the 1982 amendments reinforced the validity of the *Beer* retrogression standard because of this presumption that congressional reenactment of § 5, without any change, constitutes congressional approval of prior judicial interpretations.

The Court also rejected the 1965 committee report because such a later report is irrelevant in interpreting an earlier statute. "[I]t is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means. *Id.* at 566-67. The 1982 Senate Report is similarly irrelevant here because (1) it is a meaningless interpretation of the language of § 5 as originally enacted in 1965, and (2) there was no § 5 language that the report could be explaining.

[82] *See* Beer v. United States, 425 U.S. 130 (1976); South Carolina v. Katzenbach, 383 U.S. 301 (1966).

[83] Will v. Michigan Dep't of State Police, 491 U.S. 58, 65 (1989).

[84] *Id.*

into the normal federal-state balance of authority.[85] To go beyond the retrogression limits of the freezing remedy permitted by *Beer* would be a huge extension of section 5, an extension for which there is a glaring absence of the necessary "clear statement" from Congress.

The snippet of legislative history that the Department relies upon underscores why the Supreme Court has been more reluctant to rely on *any* legislative history in recent years. The drafting of the history has degenerated to the point where committee reports barely reflect the consensus of the committee members, much less Congress as a whole. Major portions of reports are routinely written by private lobbyists with little, if any, review by the committees or Congress. That is exactly what happened in this instance. Senator Edward Kennedy was allowed to write the Senate Report on the bill. He, in turn, delegated that task to two civil rights lobbyists. These men wrote a laundry list of their own arguments into the report, and included as examples all of their pending cases so they could later cite the legislative history to the judges in those cases in support of their contentions that, in the view of Congress, the electoral practices they challenged should be deemed illegal.[86]

Thus, the State of Georgia feels that it is clear that section 2 has nothing at all to do with the proper application of section 5. Similarly, any issue of "purpose or intent" under section 5 provides no colorable basis for blocking Georgia's new judgeships. The Department's attempt to use sec-

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[85] *See, e.g.*, United States v. Board of Comm'rs, 435 U.S. 110, 141 (1978) (Stevens, J., dissenting).

[86] This tale has been described in detail by Professor Morgan Kousser, an expert hired by the Department of Justice in the *Georgia v. Reno* case. Professor Kousser has written that the real dispute in the 1982 voting bill was the extent to which § 2 should be amended to remove the requirement of proving intentional discrimination, and that the dispute was resolved by the compromise "results in discrimination" language added to § 2. That compromise precipitated the bizarre drafting of the Senate Report:

> In return for the [political] credit [for the compromise], Dole allowed Kennedy to write the Senate Report on the bill, a task which he delegated to two of the chief civil rights lobbyists on the act. These men not only wrote a strong [§ 2] effect standard into the report, but edged towards proportionality. They also made sure that examples were drawn from all the legal cases that were either known to be pending or expected to be filed shortly. When a judge asked subsequently whether Congress meant the law to apply to a case such as that in Hopewell, Virginia, therefore, civil rights lawyers could simply refer him to the Senate Report which used exactly that example.

Morgan Kousser, *Expert Witnesses, Rational Choice and a Search for Intent*, 5 CONST. COMMENTARY 349, 362 (1988).

tion 5 to compel Georgia to rewrite its judicial election laws to fit the whims of departmental bureaucrats smacks of an abuse of the important responsibilities and power vested in those positions.

VI. The District Court's Ruling in the *Georgia v. Reno* Case

While this article was being written, the District Court for the District of Columbia rendered its final judgment in *Georgia v. Reno*. In a two to one decision,[87] the District Court agreed with Georgia's legal contentions in all significant respects. The court also accepted Georgia's factual contentions to the extent that there was any need to reach factual issues.

While the issues in the *Georgia v. Reno* case will ultimately be settled by the United States Supreme Court,[88] the holding of the district court likely presages the holding of the Supreme Court. First, the district court rejected the attempt of the United States to incorporate plenary section 2 review into section 5 proceedings. The court noted the traditional confines of section 5, namely, that it was aimed at retrogressive voting changes. Referring to the Department's complaints about circuit-wide, majority vote elections, the court stated: "[N]either of those characteristics can be deemed retrogressive. The majority vote requirement . . . was already in place on the Act's effective date, while the circuit-wide scope of the primaries, although adopted after that date, was cleared by the Attorney General."[89]

Next, the court addressed the United States' argument that Congress intended to incorporate section 2 into section 5. On this issue, the court held:

> There is little reason to believe Congress has changed its mind since *Beer* and *Lockhart*. The defendants' sole authority for their novel argument consists of a single sentence in a Senate Judiciary

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[87] The majority was comprised of Judge Karen Henderson of the D.C. Circuit Court of Appeals and Judge Stanley Harris of the district court. The dissenter was Judge Norma Johnson. Although Judge Johnson "reserved" the right to file a dissenting opinion at the time the court's decision was rendered, she never did so.

[88] The United States filed a notice of appeal on March 6, 1995, but later abandoned the appeal. Private parties seeking to intervene also filed a notice of appeal on March 6, 1995. There is a right of direct appeal to the Supreme Court from the judgment of the three-judge court.

[89] Georgia v. Reno, 881 F. Supp. 7, 11-12 (D.D.C. 1995) (citations and footnote omitted).

> Committee report footnote and their own regulation. In our opinion, neither shows a change in Congressional intent.
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> . . . Had Congress intended to overturn [the *Beer*] holding it could have amended section 5 as it did section 2, with an explanation similar to the lengthy one on the section 2 amendment. . . . It did not. Given the Congressional inaction, the earlier legislative history supporting the retrogression amendment, set out in *Beer*, and the extensive case law applying the requirement, both before and after the 1982 amendments, we decline to adopt the defendants' position based on the snippet of legislative history they have offered.
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> As for the DOJ regulation, it is entitled to no deference from this court where, as here, Congress had made clear its contrary intent.[90]

Finally, on the issue of intent, the district court held that the evidence unequivocally established that the legislation at issue was enacted simply in order to create new judgeships. It was not tainted by any racial motivation. As to the attempt of the United States to broaden the purpose inquiry beyond that, the court held:

> The defendants assert discriminatory intent can be inferred from the various statutes' reference to the existing electoral process. We view this argument, however, simply as an attempt to circumvent the section 5 retrogression rule and thus to challenge the majority vote requirement, which was in force on November 1, 1964, the Act's effective date. Further, the evidence affirmatively shows that the majority vote requirement was not even discussed when the new judgeships were subsequently created. Thus, we do not see how the statutory recitation of the cited boilerplate language, which does not even describe the specific electoral method to be used, can be construed as evidence of discriminatory intent in creating the new judgeships.[91]

Thus, nearly seven years after the *Brooks I* case was filed in the Southern District of Georgia, final decisions on some of the most significant voting issues appear near at hand. As a practical matter, the section 5 issues have been extremely vexing to the State of Georgia. The failure to get section 5 approval was the sole basis of the *Brooks I* injunction. It was

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[90] *Id.* at 13-14 (citations and footnotes omitted).

[91] *Id.* at 14 (citations omitted).

that injunction, in turn, and the threat that forty-eight incumbent superior court judges would be eliminated from the bench, to say nothing of the State's inability to create gravely needed new judgeships, that brought the state close to settling the judgeship issues on a number of occasions. Assuming that *Georgia v. Reno* is affirmed in the United States Supreme Court,[87] the only remaining issues to be tried are the section 2 issues in the *Brooks I* case. Having tried all of the section 2 issues in the *Georgia v. Reno* case,[88] the state feels it has a strong defense to those claims.

VII. Georgia's 1992 Congressional Enactment and the Ensuing Litigation

After a series of administrative objections under section 5, Georgia enacted a congressional reapportionment plan that led to the election of three African-American congressional representatives in 1992. The representatives were elected from congressional districts with minority populations of 56.63%, 62.27%, and 64.07% in the Second, Fifth, and Eleventh

[87] Somewhat surprisingly, the Department of Justice abandoned its appeal to the Supreme Court in this case. One might surmise that the Solicitor General believed the likelihood of prevailing was too slim to continue the appeal. However, there have been both "off the record" comments and some public comments by Justice Department personnel that indicate that the Civil Rights Division may not acquiesce to the decision in *Georgia v. Reno* in future cases. Private parties who attempted to intervene in the *Georgia v. Reno* case continue to pursue their appeal to the Supreme Court. And while the likelihood of their prevailing appears very slim, particularly in light of their procedural posture, a final decision will not be rendered until fall, 1995, at the earliest. In addition, subsequent to the district court's ruling in *Georgia v. Reno*, a different panel of the District of Columbia District Court gave a broader description of how one could pursue a "purpose" case under § 5 than was explained by the panels in the Georgia and New York cases. *See* Arizona v. Reno, No. 94-2054 (D.D.C. June 16, 1995). This order was issued simply to deny a motion for summary judgment and to define the scope of discovery. Nevertheless, Arizona has taken an appeal from that order to the United States Supreme Court, although the jurisdictional basis for appealing such a nonfinal order is dubious.

[88] Georgia argued in *Georgia v. Reno* that the § 2 evidence was irrelevant there and the district court ultimately agreed with that contention. However, the case was actually tried on a much broader scope of relevant evidence based on all of the legal theories advanced by the Department of Justice. This occurred because the district court had earlier denied Georgia's motion for summary judgment which would have limited the issues (Order of September 20, 1991), although that order was without prejudice to the state to renew its motion after the completion of additional discovery. When discovery was completed in 1994, it might well have been desirous, as a practical matter and a financial one, to file another motion for summary judgment. But the risk of delay in doing so, rather than trying the case in full, was too great a practical consideration, and the state elected to proceed to trial on all issues.

Districts, respectively.[84]

In the process of adopting reapportionment plans, initially and in response to departmental objections, Georgia made great efforts to obtain substantially black districts. The resulting congressional reapportionment lines are more irregular than the lines that have been used by the state in the past. But, of course, it was only in the last several reapportionments that Georgia deviated from county boundaries at all. Prior to the Supreme Court's one-person, one-vote decisions in the 1960s, Georgia was a pure county unit state. All members of the Georgia General Assembly, both in the House and Senate, were elected from intact counties or groups of counties.[85] Under Georgia's county unit system, the county unit vote dominated over the popular vote in the primary elections. Thus, the nominee for governor could succeed in a primary election even though he came in second in the popular vote, so long as he won the county unit vote.[86] Accordingly, the historical configurations of Georgia's congressional plans are partly misleading.

Nonetheless, it is true that Georgia's 1992 reapportionment, parts of which were dictated by the desire to obtain section 5 preclearance from the Department of Justice, contains some unprecedented district lines. A significant reason for this was the affirmative effort to create majority-minority districts.

On January 13, 1994, Georgia was hailed into court in a *Shaw v. Reno* challenge.[87] The district court in *Johnson v. Miller* allowed intervention by both the United States and by a group of African-American voters represented principally by the American Civil Liberties Union.[88]

Georgia's defense of its reapportionment plan differed in significant ways from that of the two groups of intervenors. Most importantly, Geor-

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[84] Sanford Bishop and Cynthia McKinney (both former members of the Georgia General Assembly) were elected to the Second and Eleventh Districts, respectively. John Lewis continued to represent the Fifth Congressional District which contained a significant black majority before reapportionment.

[85] Georgia has 159 counties.

[86] *See* Gray v. Sanders, 372 U.S. 368, 370-74 (1963).

[87] *See* Johnson v. Miller, 864 F. Supp. 1354 (S.D. Ga. 1994), *aff'd*, 115 S. Ct. 2475 (1995).

[88] At various times during the course of the trial, the judges of the three judge district court panel expressed their misgivings about the intervention. The court opined that the intervenors added nothing while protracting the proceedings with pointless cross-examination. The Department of Justice had also been extremely recalcitrant during discovery.

gia did not argue that either the Voting Rights Act or the Constitution required that the reapportionment plan ultimately adopted *had* to be enacted. The intervenors, by comparison, essentially argued that past voting discrimination, past segregation, and the Voting Rights Act all combined to compel Georgia to affirmatively draw the kind of plan which it ultimately did.

This difference notwithstanding, the Georgia defendants[98] maintained that the state's reapportionment plan satisfied the requirements of *Shaw v. Reno*. The following section sets forth the essential arguments made by the defendants.

A. *The Constitutional Considerations Set Forth in Shaw v. Reno Apply in Only a Narrow Class of Cases*

In *Shaw v. Reno*,[100] the Supreme Court held by a five-four majority that a Fourteenth Amendment claim was cognizable where a district was alleged to be so racially gerrymandered that it was "bizarre" in its configuration, and the district as drawn "rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race."[101] Based on this holding, the *Johnson* plaintiffs contended that the Eleventh District should be condemned as an illegal "racial gerrymander." In so arguing, however, plaintiffs assumed that all majority-minority districts require a "compelling" justification where they were purposely created as such and the district lines were intentionally located to elevate the minority to majority status.

Georgia argued that this view of the law was incorrect. Only months before the *Shaw v. Reno* decision, the Supreme Court issued another decision which indicated that race-based districting itself is not improper. In *Voinovich v. Quilter*,[102] the Court unanimously upheld Ohio's intentional,

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[98] There actually was some difference in the positions taken by the defendants in *Johnson v. Miller*. The defendants included the Governor, the Lieutenant Governor, the Secretary of State, and the Speaker of the House. The Speaker of the House was separately represented, and he took a position on the *Shaw v. Reno* issues that was closer to that of the plaintiffs. The other state defendants, who were represented both by the Attorney General and the author as special counsel, sought to defend the state's plan.

[100] 113 S. Ct. 2816 (1993).

[101] *Id.* at 2830.

[102] 113 S. Ct. 1149 (1993).

race-based drawing of state legislative districts designed to create majority-minority districts. The State of Georgia sought to reconcile *Shaw* and *Voinovich* by giving meaning to the entirety of the Court's opinion in *Shaw*. Specifically, *Shaw* states that a "racial gerrymander" issue is not raised *unless* the reapportionment plan under attack "rationally cannot be understood as *anything other* than an effort to segregate citizens in separate voting districts on the basis of race."[103] Similarly, *Shaw* goes on at length to distinguish *United Jewish Organizations v. Carey*,[104] in which the Court upheld the intentional drawing of lines on the basis of race in order to empower black voters, in spite of the resulting bifurcation of a white Hasidic community in New York. That case was different, according to *Shaw*, because the New York plan was not "on its face . . . so highly irregular" that it was explainable *only* on the basis of race.[105]

These admonitions in *Shaw* indicate that the "bizarreness" principle applies only in cases where the districting lines themselves are so unusual that they could have no basis other than race. The *Shaw* Court expressly said as much in noting that its opinion does not mean that " 'the intentional creation of majority-minority districts, without more', always gives rise to an equal protection claim."[106] While the holding in *Shaw* is thus limited to a narrow class of "exceptional cases," the *Johnson* plaintiffs read it to apply to virtually every district because race is almost always a consideration in redistricting decisions. That reading has been proven incorrect.

This issue was further clarified by a subsequent reapportionment decision of the United States Supreme Court handed down on June 30, 1994. In *Johnson v. DeGrandy*,[107] the Supreme Court unanimously upheld state house and senate districts that were admittedly drawn on the basis of race for the very purpose of creating majority-minority districts (there, both Hispanic and black) in rough proportion to the number of minorities in the voting age population.[108] Indeed, *DeGrandy* further held that Flor-

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[103] *Shaw*, 113 S. Ct. at 2830.

[104] 430 U.S. 144 (1977).

[105] *Shaw*, 113 S. Ct. at 2829.

[106] *Id.* at 2828. Justice Kennedy has indicated that this remains an open issue for him. *See* Johnson v. DeGrandy, 114 S. Ct. 2647, 2664-67 (1994) (Kennedy, J., concurring in part and concurring in the judgment).

[107] 114 S. Ct. 2647 (1994).

[108] *Id.* It is true that in *Johnson v. DeGrandy* the district court held that there was a history of

ida's creation of effective "proportionality" constituted a defense, under the facts of that case, to the black and Hispanic plaintiffs' claims of violations under section 2 of the Voting Rights Act. Taken together, *Voinovich v. Quilter* and *Johnson v. DeGrandy* indicate that the principle articulated in *Shaw* does not have the broad sweep that the *Johnson* plaintiffs asserted.

Georgia did not agree that it had a "suspect" reapportionment plan the state must defend under the compelling interest test. Rather, Georgia argued that *Shaw* plaintiffs must first prove that the districting is so "bizarre" that the lines are based on *nothing* other than race. The *Johnson v. Miller* plaintiffs could not meet his burden. While it is true that increasing the number of African-American voters in order to allow these voters an enhanced opportunity to elect candidates of their choice was a significant motivation in drawing Georgia's Eleventh District, the district lines at issue are nothing like the irregular lines questioned in *Shaw* and condemned in *Hays v. Louisiana*.[108]

B. The Extent of Regularity and Irregularity in Georgia's Eleventh Congressional District

Georgia's Eleventh Congressional District is not a picture-perfect geometrical form. Neither is it an irrational mish-mash based on race and nothing else. Even in areas where the district line appears most irregular, it follows existing boundaries of municipalities, other political boundaries, or natural boundaries. For example, in DeKalb County, what appears to be an irregular portion of the district line actually tracks the city limits of Atlanta. Thus, the irregularities of the Atlanta city limit line—a line which no one suggests has anything to do with race—explain the irregularity of the line of the Eleventh District in that area. One must question whether the line is unconstitutional under *Shaw* merely because the general location of the line was made with some racial purpose in mind—namely, the objective of attaining a generally high percentage of African-American residents.

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voting discrimination and that race and ethnicity were such a compelling part of the whole political process in the areas of the state that the essential facts necessary to prove vote dilution were present. *Id.* at 2653.

[108] 839 F. Supp. 1188 (W.D. La. 1993) (three-judge court), *vacated as moot*, 114 S. Ct. 2731 (1994), *prob. juris. noted*, 115 S. Ct. 687 (1994).

The lines of Georgia's Eleventh Congressional District are based largely on the kind of traditional boundaries that the Supreme Court endorsed in *Shaw*. Of the entire district boundary, seventy-one percent of the line runs along traditional political boundaries: the state line, county lines, and municipal lines. Similarly, of the entire area within the Eleventh Congressional District, eighty-seven percent is comprised of whole, intact counties.

Under these two measures, which go to the heart of *Shaw*'s concern that district boundaries be drawn along traditional lines, Georgia's Eleventh Congressional District compares favorably to the State's other ten districts.

Table 1

Georgia's Congressional District Lines:
Contiguity with Traditional Political
Jurisdictional Boundaries

[Boundaries in Miles]

Cong. Dist.	Total Bdry.	Part on State Bdry.	Part on County Bdry.	Part on City Bdry.	Total % Contig. with State County or City Bdry.
1	754	292	643	15	86.2%
2	1,243	255	667	87	57.4%
3	773	39	493	45	65.3%
4	178	0	67	38	57.0%
5	140	0	94	53	79.0%
6	226	0	70	53	44.7%
7	404	120	351	22	90.3%
8	1,155	54	702	53	64.6%
9	488	238	442	16	90.6%
10	614	115	452	56	76.6%
11	1,184	206	785	78	71.1%

Table 2
The Area of Georgia Congressional Districts
and Portions in Entire Counties.

[Area in square miles]

Cong. Dist.	Total Area	Area Within Intact Cnties	Area Within Split Cnties	Percent Within Intact Counties
1	10,425	9,608	817	92.2%
2	10,125	8,479	1,646	83.7%
3	3,829	2,426	1,402	63.4%
4	443	131	312	29.5%
5	406	0	406	0.0%
6	586	0	586	0.0%
7	3,703	3,602	101	97.3%
8	10,610	8,461	2,149	79.7%
9	5,804	5,491	313	94.6%
10	5,114	4,351	763	85.1%
11	6,780	5,868	912	86.6%

Moreover, one must question the meaning of "traditional" concerns in light of the *Shaw* thesis. Surely, the Constitution does not prescribe that the legitimate concerns of a state in reapportionment amount to be nothing more than geometric nicety. The very purpose of reapportionment is to divide up political power and to allow the citizenry to express their interests and views in the legislature. Therefore, one must also question whether racial and ethnic fairness, as a reapportionment objective, is any less wholesome and proper than the "traditional values" expressly endorsed by *Shaw*. Whatever may be said of race-conscious government action in areas such as jury selection, contracting, hiring, school admissions, and the like, voting and reapportionment would appear to be different. Reapportionment serves to empower groups of people within society. Indeed, before "one person, one vote" principles were established, such empowerment was the sole purpose of reapportionment.

C. *A Court Should Invalidate a State's Redistricting Scheme for Irregularity in Only the Most Extreme Circumstances*

The Georgia defendants argued that *Shaw* is best read as allowing reapportionments, like Georgia's Eleventh District, where the district is comprised for the most part of the "traditional" building blocks—here, county units. If, however, *Shaw* means more, and bestows on federal courts more expansive authority to review state-enacted reapportionments, the defendants urged that such authority should still be narrowly construed. To do more would arrogate to the courts the role of "super-legislature" that the Constitution disapproves.[110] It is in this area where courts should be most cautious to tread.

The *Johnson* defendants contended that this view underlay the Supreme Court's decision in *Holder v. Hall*.[111] At issue in *Holder* was whether Georgia's few remaining single commissioner governments were subject to a section 2 challenge on the grounds of vote dilution and, if so, under what standards. A majority of the Court held that this form of government could not be challenged under section 2. In his plurality opinion, Justice Kennedy reasoned that the section 2 claim was not cognizable because there was no meaningful, justiciable standard by which vote dilution could be measured in such a case. If the absence of a justiciable standard blocks minority voters from bringing discrimination claims, the absence of such a standard must likewise block the discrimination claims of white voters. As Justice Kennedy wrote in *Holder*:

> [W]here there is no objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice, it follows that the voting practice cannot be challenged as dilutive under § 2.
>
> As the facts of this case well illustrate, the search for a benchmark is quite problematic when a § 2 dilution challenge is brought to the size of a government body. There is no principled reason why one

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[110] *See, e.g.*, City of Mobile v. Bolden, 446 U.S. 55, 76 (1980); Griswold v. Connecticut, 381 U.S. 479, 482 (1965); Burns Baking Co. v. Bryan, 264 U.S. 504, 534 (1924) (Brandeis & Holmes, JJ., dissenting, and voicing the original opposition to courts acting as "super-legislatures.").

[111] 114 S. Ct. 2581 (1994).

> size should be picked over another as the benchmark for comparison.[113]

Holder underscores a fundamental issue. While *Shaw* opens the door to constitutional challenges to districts based solely on their shape, such challenges should be rare and should prevail only in the most extreme circumstances.[114] Otherwise, the courts will unavoidably assume the responsibility for political judgments that are rightly made elsewhere. In assessing this problem, one is reminded of Justice Frankfurter's cautionary warning concerning reapportionment. Justice Frankfurter, of course, coined the phrase "political thicket," and warned courts against entering that thicket.[115] In *Johnson*, Georgia argued that any review of the constitutionality of district lines based solely on their shape or their general intent or motivation would be inherently devoid of standards. This "political thicket" is a far denser one than Justice Frankfurter envisioned in *Colegrove* and feared in his dissent in *Baker v. Carr*.[116] Because of the lack of coherent standards and the inherently vague nature of judging the shape of a district, Georgia argued that a reapportionment plan should be condemned only in the clearest of cases.

The host of questions that arise post-*Shaw* give one an appreciation of just how dense the political thicket may become. If the Eleventh Congressional District lines are unconstitutional, what is constitutional? If district lines cannot be drawn with race as a significant consideration, as they were in the Eleventh District, what is an appropriate standard? The *Johnson* plaintiffs seem to contend that the Eleventh District has too many minority voters. If so, what determines the "correct" number for each district? Does a particular percentage cut-off of minority population make a district legal or illegal? *Busbee* held that fifty-seven percent by population was too few.[117] Can fifty-seven percent, as a percentage of registered voters, be too many? Are there specific rules which mandate when

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[113] *Id.* at 2586 (citations omitted).

[114] The plaintiffs might be required to prove, for example, that the districts are so irregular that they cause true and palpable mischief among voters, and other serious disruptions of the normal political process.

[115] Colegrove v. Green, 328 U.S. 549, 556 (1946). Justice Frankfurter was chiefly concerned about the establishment of a constitutional standard of population equality among districts.

[116] 369 U.S. 186, 266-330 (1962) (Frankfurter, J., dissenting).

[117] Busbee v. Smith, 549 F. Supp. 494 (D.C.C. 1982), *aff'd*, 459 U.S. 1166 (1983).

county and city boundaries must be followed and when they may be ignored? Are departures from boundaries forbidden for racial reasons, as opposed to other political reasons? Must a district be a certain length? Must it encompass so much area or include only a certain fraction of the entire state? The questions are endless.

D. The Supreme Court's Decision and its Aftermath

While the arguments advanced by the Georgia defendants were convincing to four Justices of the Supreme Court—Justices Stevens, Souter, Breyer and Ginsburg—little of what we argued was accepted by the majority. In the five-four ruling issued on June 29, 1995, the majority took a substantial step beyond the principles set down in *Shaw*.[117] Justice Kennedy's opinion expressly eliminated the requirement set forth in *Shaw* that a district must be "highly irregular" or "bizarre" before it is subject to a Fourteenth Amendment challenge. Now, whether irregular or not, a district is unconstitutional under the Fourteenth Amendment if race was the "predominant motive" for its establishment and configuration. "Predominant" is not defined and will likely be judged differently by different legislators and different courts. This introduces a serious subjective factor into an analysis of the constitutionality of any reapportionment plan.

The majority opinion in *Miller* harshly condemns the Department of Justice. The Department's purported interpretation of section 5, its attempt to apply section 5 to the specific facts in Georgia, and its generally heavy-handed abuse of section 5 were thrashed by Justice Kennedy. He condemned, among other things, the Department's disingenuous use of the purpose prong of section 5. The Court noted how the Department, in pursuit of its goal of maximizing the number of black voters in a district, used its objection power to invalidate any plan that did anything other than maximize. Because the Department was not legally allowed to dictate maximization, it accomplished this goal by ruling that the State had failed to carry its burden of proving that any less-than-maximized plan was not motivated by the desire to discriminate.

That catechism has long been used by the Department of Justice in an effort to evade the retrogression restrictions of *Beer*. The Department's

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[117] Miller v. Johnson, 115 S. Ct. 2475 (1995).

critics believe that such excessive and bad faith actions by the Department of Justice have led to the extreme hostility it has met in recent cases. This hostility is typified by the Court's denunciation in *Miller*.

Immediately after the Supreme Court's decision in *Miller*, I met with the Governor and the legislative leadership to decide how the state should proceed. It was unanimously agreed that a special session of the General Assembly be called, and this special session was set to open on August 14, 1995. The call was not limited to remedying the Eleventh Congressional District: *Johnson v. Miller* claims would likely be raised and successfully litigated in connection with districts other than the Eleventh, including, possibly, the Second Congressional District, and several State House and Senate districts.

With the law of reapportionment becoming increasingly complicated, it is difficult to predict just what the redistricting plans will look like for Georgia's 1996 elections. On September 8, 1995, the Speaker of the Georgia House of Representatives, Tom Murphy, acknowledged that the General Assembly was unable to agree upon a redistricting plan. The members voted to adjourn the special session *sine die*. The task of redistricting Georgia now falls to three federal judges who will draw a map. These are the same judges that voted 2-1 to strike the Eleventh Congressional District.[118]

The Supreme Court of the United States has already accepted for argument and plenary review two more reapportionment cases.[119] One of these appeals concerns the *Shaw v. Reno* case (now *Shaw v. Hunt*), and in light of *Miller v. Johnson*, it seems very likely that the district court's decision to uphold North Carolina's district due to a compelling state interest will be reversed. The Texas case, *Vera v. Richards*, involves the first urban

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[118] Mark Sherman & Mike Christensen, *Georgia Legislature '95 Special Session: Democratic Leaders take the Heat*, ATLANTA CONST., Sept. 13, 1995, at C2. A particularly ugly thought for a state's lawyer in reapportionment cases is the prospect of several independent cases going on simultaneously in different federal courts, and possibly even in superior courts. The Supreme Court has already ruled that a reapportionment plan adopted by a state superior court is entitled to the same deference as a state legislative plan. Growe v. Emison, 113 S. Ct. 1075 (1993). The possibility of inconsistent remedial orders is more than hypothetical. Changing any one portion of a redistricting plan may well cause a ripple effect in other areas of the state.

[119] Vera v. Richards, 861 F. Supp. 1304 (S.D. Tex. 1994) (three-judge court), *prob. juris. noted*, Bush v. Vera, 115 S. Ct. 2639 (1995); Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C. 1994), *prob. juris. noted*, 115 S. Ct. 2639 (1995).

congressional district to be reviewed by the Supreme Court under *Shaw*. Texas's districts are arguably compact, but the lines are hardly regular.

It will likely be years, if ever, before states have clear guidelines as to what constitutes permissible redistricting. It is clear that the discretion afforded state legislatures in reapportionment during the past two centuries has been seriously eroded, albeit under the regime of a Supreme Court that claims to be nonintervention ist. One might guess that "politics" will be removed from reapportionment to a substantial extent, under federal mandate, and states will be required to use only intact counties or similar building blocks to create congressional districts if they wish to avoid *Shaw-Miller* challenges. That may be a political scientist's dream, but it should give one pause to think that the United States Constitution has been interpreted to the point that states are actually mandated in this way.

VIII. Does the Voting Rights Act Prohibit the State of Georgia from Requiring that Candidates for Public Office Attain a Majority of the Votes Cast in Order to Secure Nomination or Election?

The third major set of voting cases in Georgia concerns challenges to its majority vote law. These challenges are pending in two principal cases: *Brooks v. Miller*[120] and *United States v. Georgia*.[121] These cases are unusual. Almost without exception, voting rights actions by minority groups over the past two decades have challenged districting schemes for state and local elections, with most of those cases challenging the use of multi-member legislative districts or at-large elections for local governmental bodies. While results of those cases have been mixed, plaintiffs have generally enjoyed substantial success.[122]

Challenges to majority vote requirements, by comparison, have met with substantial hostility. Unlike previous redistricting litigation, plaintiffs in these cases were not seeking equal access to the political process. Instead, they asked courts to grant them a new political right: the right of a political minority to prevail in an election. Such claims were quite novel,

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[120] Civil Action File No. 1:90-CV-1001-RCF (N.D. Ga.).

[121] Civil Action File No. 1:90-CV-1749-RCF (N.D. Ga.).

[122] *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30 (1986); Rogers v. Lodge, 458 U.S. 613 (1982).

and have been largely rejected by the courts.[123]

In *Brooks II* and in the United States' companion case the plaintiffs contend that black minority voters cannot win a majority of votes in run-off elections because of alleged "racial bloc voting." Racial bloc voting refers to the correlation between the race of voters and the candidates for whom they vote. According to the plaintiffs, black candidates would be defeated in a run-off election by their white opponents, who would be preferred by a majority of the voters.

For this reason, plaintiffs contend that the court should require that candidates who are preferred by a minority of the voters be declared the winner of their races when they garner a plurality. Georgia noted in its defense that the relief sought by the plaintiffs is virtually tantamount to assigning each minority voter two or three votes to permit them to overcome the choice of the majority.

The idea that a minority-supported candidate should be declared the winner of an election precisely because he or she is not supported by a majority of the voters is a strange notion. Professor Robert McKay succinctly noted the fallacy in the plaintiffs' argument in his comment on the *Butts v. City of New York* decision:

> The gist of [plaintiffs'] argument was that, as minorities increase in number and political awareness, there is an increased opportunity for minority candidates to become plurality victors (although probably not to the forty percent level), but little chance of their winning two-person contests against non-minority candidates. Does this argument, however, not prove too much? If a minority candidate could not succeed in a two-person contest, one is entitled to doubt the desirability of electing that person on the basis of a plurality victory, in the face of a concession that he or she would be opposed by a majority of all the voters.[124]

The political theory on which plaintiffs rely is not the only difficulty

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[123] *See, e.g.*, McGhee v. Granville County, 860 F.2d 110, 117-21 (4th Cir. 1988); Butts v. City of New York, 779 F.2d 141 (2d Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986); Whitfield v. Democratic Party, 686 F. Supp. 1365 (E.D. Ark. 1988), *aff'd in part, rev'd in part*, 890 F.2d 1423 (8th Cir. 1989) (en banc), *cert. denied*, 489 U.S. 1126 (1991).

[124] Robert B. McKay, *Butts v. City of New York: Race, Politics and the Run-Off Primary*, 53 BROOK. L. REV. 499, 505 (1987) (footnote omitted).

with their claim. Plaintiffs concede that eliminating majority voting in Georgia would result in the type of elitist, "back-room" politics that most people find undesirable. For example, at his deposition, plaintiff Tyrone Brooks testified how he envisioned politics would work under plurality voting. To take advantage of plurality voting, Mr. Brooks stated that it would be important to run only one black candidate in districts where blacks constitute a majority.[126] Otherwise, the "black vote" could be split and a white candidate would win, given the plaintiffs' assumption of racially polarized voting. Mr. Brooks, who admittedly has extensive political knowledge throughout the state, believes that black "leaders" could avoid vote splitting by preselecting a candidate for office. That selection would occur, of course, without the candidate standing before the voters. He or she would simply emerge from a closed-door meeting of self-appointed persons who took it upon themselves to select the "black candidate" and, presumably, the winner of the office at issue. Mr. Brooks testified on this point as follows:

> A. If you allow a multitude of, say, black people from a particular area to run and you have one white candidate running, obviously, you know, yes, but *you see the burden would be on the leadership in our community to limit the pool of candidates for any particular office.*
> I mean, you know, you just have to use some common sense to say—everybody has a right to run. You can't stop people from running, but we would urge in majority black areas such as Atlanta, we would urge we keep our numbers low so we can maintain the political balance that we have now and not be diluted.
> Q. Okay.
> A. It takes some common sense and leadership.
> Q. In a situation where you have two prominent people, Andy Young and Reginald Eaves, you're saying trying to encourage one of them not to run so you don't get the Sidney Marcus plurality leader? Is that an example of what you are talking about?
> A. We would have to do that in order to effectively not see any dilution. If we allow all the popular well-known people to run for any given office in a majority black area and you have one white candidate running, it's not obviously serving the best interest of peo-

[126] This might ultimately include municipalities, too, such as the City of Atlanta. If majority voting for some offices were illegal, it is likely that it would also be illegal for other offices in the same locales.

> ple you're trying to represent.
> What you do is you say, okay, you know, if you run more than one in this race, you stand a chance of losing ground. I think the message will hit home pretty directly that we just can't afford to have too many people who are well-known, name recognition, running for various offices because we're going to lose.[128]

Mr. Brooks testified that the same phenomenon would occur, in his opinion, in the white community if majority voting was eliminated in Georgia. Under his thesis of race-driven politics, whites would similarly coalesce informally around a single candidate prior to elections in order to ensure that the "white vote" was not split, and to afford that candidate the greatest chance of carrying a plurality in the initial election:

> Q. Would you expect, in retaliation or in response to that situation [the elimination of majority voting], to have the white community then say, okay, we'll have our majority vote requirement but we will do it by just running one candidate in the first election?
> A. I think that is going to happen eventually. I see it happening now in areas where we are the majority population.
> I think it's going to happen but, you know, I say, and I have said it for a long time, and Jesse [Jackson] says it, it's going to require some discipline. It's going to require some leadership on the part of black leaders and all kinds of leaders in our community at every level.
> Q. Listen to me. I am talking about the other side of the coin.
> A. I hear you.
> Q. I am talking about what white folk would do. Do you see similar, in your experience, do you anticipate similar discipline among the white leadership in areas where blacks are in the minority so that whites would have a consensus candidate and blacks would have a consensus candidate and you end up with one on one running in the race, so whether it's minority or majority doesn't have any affect?
> A. I'm not sure you are going to have one on one every time. This is a Republican form of government. Everybody can run. You can't tell people, I don't want you to run and expect them to sit back, but

[128] Deposition of Tyrone Brooks 118-20 (emphasis added) (on file with author). The Andy Young/Reginald Eaves reference is to the 1981 mayoral race in which Sidney Marcus, a white candidate, won the plurality of the votes, but lost in a run-off to Andrew Young. Young and Eaves (who came in third) are black.

> I do believe it is going to require some self-discipline, and I think our community—when I say "our," I mean black, I think we are going to use good, common sense and sound judgment in supporting those candidates that are worthy of our support and those that will be the strongest in a plurality type race.
>
> Q. All I was getting at, though, is would you expect the same level of pre-election consensus by the white community in trying to arrive at a strong white candidate in those circumstances?
>
> A. Certainly, because I have seen it over the years on both sides of the equation, you know, in states that have majority vote statutes and states that do not have majority vote statutes. I have seen it in both areas.[127]

The undemocratic attitude that supports plaintiffs' political strategy, namely, that winning candidates should be chosen by a few "leaders," is revealing. It illustrates how undesirable plurality voting can be, particularly if the plaintiffs are correct in their theory that politics is race-driven. There is no meaningful rationale for imposing a system that allows a small clique, whether comprised of blacks, whites, or both, to dictate to voters who their choice may be prior to an election.

Furthermore, if politics were as race-driven as the plaintiffs believe, eliminating majority voting would have no appreciable effect on the ability of black candidates to attain elected office. Political contests would be informally paired down to a one-on-one, black-white contest, and the elimination of majority voting would be meaningless. As a practical matter, securing a party's nomination merely enables a candidate to appear on the ballot in the general election. Given the two-party nature of American politics, the hypothetical black nominee must then win a majority of the votes. While Georgia politics have traditionally been dominated by the Democratic party, that fact has clearly changed in many areas, as evidenced by the 1994 elections. Georgia's present congressional delegation, for example, includes seven Republicans and four Democrats. Again, given the plaintiffs' contention that race is more important than party alignment, issues, or other nonracial political variables there is a strong possibility the black candidate would face white opposition in the general election. Thus, as a practical matter, the elimination of majority voting would likely have little if any positive effect on the election of black candidates.

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[127] *Id.* at 134-36.

The Issue of Purpose and Intent in the Majority Vote Cases

The *Brooks II* plaintiffs and the United States alternatively contend that majority voting should be stricken because it was adopted or, rather, made universal and mandatory, in 1964 for racial reasons. The defendants disagree, and have introduced significant evidence to the contrary. This issue cannot be understood without an in-depth understanding of Georgia's political history up to 1964 and, in particular, Georgia's experience with plurality and majority voting.[128]

Historically, Georgia's primary elections were scarcely regulated.[129] Political parties determined all aspects of an election, including whether majority or plurality voting was used, the date of the election, the qualifying period, the qualification fees, and all other details. As a practical matter, the Democratic party in Georgia was the only party that held primaries until 1962, when the Republicans conducted their first primaries for State Senate offices in Clayton and DeKalb Counties. The Democratic party delegated to the local county executive committees the authority to determine how county and state legislative races should be run. Political party control of these practices continued until the enactment of the 1964 Code.

Under the pre-1964 system of local autonomy, majority voting was used in some counties and plurality voting in others. Georgia's 159 counties were more or less evenly split as to which practice was in effect before 1964. Independent of any racial issue, local democratic executive committees often abused their authority to the detriment of the public and the majority of the voters, most of whom were white. For example, local primary elections were held in many counties on a different date than the state wide primary, sometimes long before the scheduled general election for the office at issue. As a practical matter, at the time of the primary, neither the public nor possible candidates were concerned about a general election to be held in the distant future. Thus, the primary date would come and go unnoticed. This deterred candidates and voters from participating in the political process, and it perpetuated the power of what was,

[128] Support for this section may be found, *inter alia*, in the deposition testimony of Tyrone Brooks, *Brooks I*, 775 F. Supp. 1470 (S.D. Ga. 1989).

[129] *See, e.g.*, 1891 Ga. Laws 210.

in those days, routinely referred to as the "courthouse crowd." Vote fraud, vote buying, and corrupt courthouse, machine-controlled voting was a common occurrence in many counties in the state. In many counties across Georgia, dead people remained on the voting rolls, and ballots were cast in their name. The same thing happened with voters who had moved away from a county.

Where it was used, plurality voting was also widely abused. The candidates favored by the "courthouse crowds" stayed in office by gaining a plurality. The courthouse crowds controlled such a large bloc of votes that their candidates were able to garner thirty to forty percent of the vote in many races, even though they often could not have secured a majority of votes, had there been a majority vote requirement.

Plurality voting was manipulated throughout the state. The most common tactic occurred when spurious candidates entered a race. These candidates, called "stalking horses," were put into the race by incumbents in order to split the opposition vote. Incumbents, who were routinely able to garner thirty to forty percent of the vote in any election due to their inherent advantage, were virtually unbeatable under this system. There was wide-spread criticism of plurality voting because of such rank manipulation, and because it thwarted the will of the majority. These criticisms had nothing to do with any racial issue.

The majority vote provision at issue in the *Brooks* and *United States v. Georgia* cases was adopted as part of the 1964 administration bill to provide a new election code for Georgia. The new election code made dramatic and progressive reforms in Georgia's election laws. The goal of having a uniform system throughout the state characterized the efforts of the drafters of the code at every level. As a practical matter, local executive committees of the Democratic party were stripped of their power. While they remained nominally in charge of conducting elections under the new code, this residual authority was a purely ministerial one. All discretion as to when and how elections were to be conducted was withdrawn and prescribed throughout the state by uniform statute. Other major progressive thrusts of the new election code included a substantial liberalization of voter registration. Previously, voter registration ended six months before an election. Under the new statute, one could register as late as fifty days before an election. In addition, under the old law, voters were required to register at the courthouse. In the past, there had been problems with peo-

ple, including blacks, attempting to register, and finding no one to take their application. The new code ended that problem.

By prescribing uniform rules for all aspects of primaries and general elections, the new election code was a major progressive move aimed at protecting all voters, white and black, from local manipulations. Faced with a choice between prescribing a uniform plurality vote and a uniform majority vote, Governor Sanders's administration rejected plurality voting because it had been severely manipulated, where it was used.

The historical record shows that plurality voting was characterized by serious problems in those counties where it was used. Nonetheless, the United States and the private plaintiffs still believe that plurality voting would be better than majority voting for African-Americans. Plaintiffs will likely attempt to introduce evidence at the trial on the merits of the majority vote cases (expected to be tried in late 1995), to support their view that some legislators voted for the majority vote law in 1964 because of racial considerations. It is doubtful that the actual evidence produced will be as compelling as the plaintiffs allege. For example, in *Georgia v. Reno*, the Department of Justice called two gentlemen to testify who had served as legislators in the Georgia General Assembly in 1964. These witnesses were offered to establish that the majority vote law was racially motivated but, after cross-examination, their testimony was a great deal more equivocal and indefinite than the Department had hoped.[180]

IX. Conclusion

The Voting Rights Act has been with us for three decades. It must be ranked as one of the most significant and effective pieces of legislation ever passed. Combined with changing attitudes, and desegregation in general, the Voting Rights Act has had a tremendously positive role in bringing black Americans into the political process.

With registration barriers gone, the Act, and the Constitution itself, were used effectively in the 1970s and 1980s to virtually eliminate at-large, multimember district elections throughout the South. That was critical to the significant increase in the number of African-Americans elected

[180] *See* Testimony of Leroy Johnson and James Mackay, Georgia v. Reno, 881 F. Supp. 7 (D.D.C. 1995).

to state and local government. More recently, voting advocates have tried to apply the law to new and uncharted areas where there is much less of a consensus among well-meaning people as to the proper role of federal mandates. One must ask whether the novel application of section 5 in the judicial cases is a legitimate effort to construe and apply the Voting Rights Act, or an effort to distort the law by applying it to situations where it does not fit and was not intended to fit.

Similar questions can be asked about the efforts of the Department to force the southern states to maximize the number of minority districts in their congressional, state, and local reapportionments. The Department has tried to circumvent the clear rulings of the *Beer* and *Lockhart* cases. The Department's strategy has been simple, albeit disingenuous. Using the intent prong of section 5, the Department continually objects to reapportionments that do not achieve maximization by ruling that a state has failed to carry its burden of proving that racial discrimination was not a motive in failing to adopt a more pro-minority reapportionment. The Department's abuse of section 5 in this fashion is a breach of the public trust. Nonetheless, such a breach is scarcely surprising. Is it not inevitable that abuses will occur where such tremendous political power is wielded by a federal bureaucracy?

There is little question that the courts are resistant to the newer claims of voting rights advocates. While advocates routinely denounce the courts' decisions as reactionary, backwards, and racist, the truth may be quite a bit different. In fact, for the most part, the courts have simply refused in the past few years to go along with further extensions of the law as argued for by civil rights advocates. There is no great evidence yet that existing voting laws or their interpretations have been weakened.

Whether that will occur, too, remains to be seen.

COMMENTS

INTERSTATE GAMBLING—CAN STATES STOP THE RUN FOR THE BORDER?

I. INTRODUCTION

Several companies in this country facilitate the purchase of out-of-state lottery tickets. These businesses generally do not own their own stores, but rather operate retail outlets within other businesses, such as convenience stores and fast-food restaurants. Such businesses are often termed "interstate lottery ticket messenger services."

In a typical interstate lottery ticket messenger service transaction, a customer places an order for an out-of-state lottery ticket. The customer may choose to purchase a "Quick Pick" ticket in which the computer selects the numbers to be played, or may choose his or her own numbers. The retail agent transmits the order via computer to purchasing agents in the state sponsoring the lottery the customer has chosen. The company's out-of-state purchasing agents then purchase the lottery tickets directly from state-authorized lottery agents in that state. At the time the order is placed, the retail agent gives the customer a receipt bearing the numbers to be played. The actual lottery ticket remains in a vault in the state in which the lottery is being conducted. The company usually charges the customer about one dollar for this service, plus the cost of the lottery ticket itself.

In 1991, the Commonwealth of Pennsylvania made its first of two unsuccessful attempts to enjoin the operation of Pic-A-State, one such interstate lottery ticket messenger service, by filing an action against Pic-A-State in Pennsylvania's Commonwealth Court.[1] Pennsylvania claimed that Pic-A-State's business violated Pennsylvania's lottery law[2] and federal

[1] Commonwealth v. A.G. Goen, No. 218 M.D. (Pa. Commw. Ct., August 19, 1991).
[2] 18 PA. CONS. STAT. § 5512 (1983). *See* Appendix A.