UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 71 | Number 2 Article 6

1-1-1993

Mere Voting: Presley v. Etowah County Commission and the Voting Rights Act of 1965

Robert Bryson Carter

NOTE

Mere Voting: *Presley v. Etowah County Commission* and the Voting Rights Act of 1965

The Voting Rights Act of 1965[1] addressed one of the most fundamental goals of the civil rights movement: the chance to manifest political will through voting. The United States Supreme Court most recently interpreted the Act and its relation to that goal in *Presley v. Etowah County Commission*.[2] Since 1965, decisions in the federal courts and subsequent congressional amendments gradually had expanded the reach of the Act, so that by the time of *Presley*, the Act peered substantially more deeply into states' voting practices than it did just after enactment.[3] In *Presley*, the Court considered for the first time whether the Act was broad enough to encompass changes in the relative authority of elected officials.[4]

Black suffrage gained explicit constitutional protection with the passage of the Fifteenth Amendment in 1870.[5] For nearly a century after its enactment, however, the Fifteenth Amendment's promise of colorblind suffrage remained a dream deferred. Not until 1965 did Congress exercise its "power to enforce [the] article by appropriate legislation,"[6] in the form of the Voting Rights Act.[7] The Act traces its history to three post-Civil War amendments that marked the first federal effort to enfranchise blacks. Ratified in 1865, the Thirteenth Amendment[8] abolished slavery, but the meaning of abolition was open to conflicting interpretations, so that it was not clear "whether the Amendment was an end or a beginning."[9] Some observers assumed that abolition resolved in one fell swoop the issue of race in America, while others viewed the amendment more soberly as a requisite first step.[10]

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1. Pub. L. No. 89-110, 79 Stat. 445 (1965) (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1988)).

2. 112 S. Ct. 820 (1992).

3. *See infra* notes 122-63 and accompanying text.

4. *Presley*, 112 S. Ct. at 824.

5. U.S. CONST. amend. XV.

6. *Id.* § 2.

7. Pub. L. No. 89-110, 79 Stat. 445.

8. U.S. CONST. amend. XIII.

9. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 67 (1988).

10. *Id.* at 66-67. For example, Congressman Cornelius Cole declared: "The one question of the age is *settled*." Many Republicans believed that the Thirteenth Amendment furnished

The Fourteenth Amendment, ratified three years later, granted full citizenship to "[a]ll persons born or naturalized in the United States."[11] Section two, which reduced a state's representation in Congress to the extent that it "denied to any of the male inhabitants" "the right to vote,"[12] was intended to force Southern states to choose between extending the suffrage to blacks or submitting to reduced influence in Congress.[13] Although this section punished states' denial of black suffrage, it implicitly affirmed the right to such a denial as long as states were willing to pay the price in representation.[14] That the amendment offered an incentive to black suffrage, instead of an outright requirement of it, reflected a political compromise: The amendment's authors deliberately omitted a direct guarantee of black voting rights in order to ensure passage in Congress.[15]

Not until the passage of the Fifteenth Amendment in 1870 did black suffrage gain explicit constitutional protection.[16] The amendment, however, made no guarantee of the right to hold office, and it left in place many of the most effective barriers to voting, such as the poll tax, literacy tests, and property requirements.[17] The amendment was buttressed with the passage in 1870 and 1871 of several enforcement acts,[18] that authorized the President to appoint election supervisors who could bring to trial in federal court offenses against the right to vote.[19] These efforts met with initial success—at the height of Reconstruction "about two-thirds of eligible black males cast ballots" in state and national elections, and about fifteen percent of elected officials in the South were black.[20]

Owing in large part to a severe depression beginning in 1873, voters soundly overturned the Republican congressional majority in the elec-

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the federal government with a sufficient tool for protecting the fundamental rights of blacks as citizens. *Id.* But Frederick Douglass maintained that "[s]lavery is not abolished until the black man has the ballot," and James A. Garfield asked, "Is [freedom] the bare privilege of not being chained? . . . If this is all, then freedom is a bitter mockery, a cruel delusion." *Id.*

11. U.S. CONST. amend. XIV, § 1.

12. *Id.* § 2.

13. FONER, *supra* note 9, at 254.

14. *Id.* at 255.

15. *Id.* at 257. One black lobbyist explained, "Several Congressmen tell me, 'the negro must vote,' but the issue must be avoided now so as 'to keep up a two thirds power in Congress.' " *Id.* at 261.

16. U.S. CONST. amend. XV.

17. FONER, *supra* note 9, at 446-47.

18. *See, e.g.*, Enforcement Act of 1870, ch. 114, 16 Stat. 140 (1870).

19. FONER, *supra* note 9, at 454.

20. Chandler Davidson, *The Voting Rights Act: A Brief History*, *in* CONTROVERSIES IN MINORITY VOTING 7, 10 (Bernard Grofman & Chandler Davidson eds., 1992).

tions of 1874.[21] With the party of Reconstruction out of power in Congress, many in the North viewed the Civil War as a closed chapter in American history, and enthusiasm for federal intervention in the South began to wane.[22] Soon after the Democratic ascendancy in Congress, two 1876 decisions of the United States Supreme Court[23] "virtually gutted the Fourteenth and Fifteenth Amendments as protectors of the black franchise."[24] In the 1890s Southern whites began a consolidated campaign of disfranchisement, marked by state constitutional conventions, literacy tests, gerrymandering, intimidation, and voting fraud.[25] The retreat from the ideals of Reconstruction continued inexorably during the last decades of the nineteenth century until virtually all the progress made in black enfranchisement after the Civil War had been eliminated.[26]

From the turn of the century to the modern civil rights era of the 1950s and 1960s, the slow progress to regain the franchise was concentrated primarily in a handful of United States Supreme Court cases, most notably *Smith v. Allwright*,[27] which struck down various indirect bars to black voting. Further progress followed in the direct precursors to the Voting Rights Act: the Civil Rights Acts of 1957, 1960, and 1964. These "tentative, piecemeal efforts"[28] proved no match for intransigent white majorities, largely because they depended on ineffective case-by-case litigation brought by private citizens.[29]

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21. FONER, *supra* note 9, at 523.

22. *Id.* at 524.

23. United States v. Reese, 92 U.S. 214 (1875) (holding unconstitutional statutes prohibiting interference with the right to vote; because the statutes did not base the prohibition directly on race, they were beyond the scope of the Fifteenth Amendment); United States v. Cruikshank, 92 U.S. 542 (1875) (same).

24. Davidson, *supra* note 20, at 10.

25. *Id.* at 10-11; U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: THE FIRST MONTHS 6-7 (1965).

26. Davidson, *supra* note 20, at 11; *see* FONER, *supra* note 9, at 512-601.

27. 321 U.S. 649 (1944). In *Allwright*, the Court considered whether the Texas Democratic Party, as a private organization, could hold a whites-only primary. The Court held the primary unconstitutional—the party's nominal private status did not control, since it was an integral part of the electoral process. *Id.* at 664-66; *see also* Guinn v. United States, 238 U.S. 34, 364-677 (1915) (declaring unconstitutional Oklahoma's grandfather clause, which excused any person who had the right to vote in 1866, or that person's descendants, from taking the otherwise required literacy test before voting). The obvious effect of the challenged practice was to deny voting rights to most blacks but not illiterate whites.

28. Davidson, *supra* note 20, at 13.

29. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 25, at 8. The Court explained that such private litigation was ineffective because it was "too onerous and time-consuming to prepare, obstructionist tactics by those determined to perpetuate discrimination yielded unacceptable delay, and even successful lawsuits too often merely resulted in a change in methods of discrimination." McCain v. Lybrand, 465 U.S. 236, 243-44 (1984).

In response to their limited success in federal courts and in Congress, civil rights groups intensified efforts in a grass-roots campaign to register blacks in the South in the early 1960s.[30] On March 7, 1965, demonstrators marching from Selma to Montgomery, Alabama were met at Selma's Edmund Pettus Bridge by state troopers and sheriff's deputies wielding clubs, teargas, and electric cattle prods.[31] Extensive national press coverage of the violence that ensued created enormous public outrage and momentum for Executive action.[32] Spurred to respond to these events, President Lyndon Johnson presented his voting rights bill to Congress and the nation in a dramatic televised address one week later.[33] Congress worked quickly to pass the bill that summer, and the President signed the Voting Rights Act into law on August 6, 1965.[34]

The remedies fashioned by the Act to enforce the Fifteenth Amendment prescribed unusually strong medicine to match the resourcefulness with which white majorities adapted their state electoral systems to exclude minority participation.[35] The Act's chief enforcement mechanism, commonly known as "section five,"[36] held the potential to alter radically traditional notions of federalism.[37] Section five requires certain states and political subdivisions to "preclear" all new voting regulations (i.e., to receive the prior approval of federal authorities) before enforcing them. This preclearance requirement is triggered by a determination that a particular state or political subdivision is "covered"[38] by the statute. The state or political subdivision must seek either the approval of the United States Attorney General or, in the alternative, a declaratory judgment

30. Davidson, *supra* note 20, at 15.

31. *Id.* at 16; HUGH D. GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-1992, at 165 (1990).

32. *See* Davidson, *supra* note 20, at 16.

33. *Id.*

34. *Id.* at 17.

35. *See* South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966) ("Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated . . . through unremitting and ingenious defiance of the Constitution. . . . [It] concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures . . . .").

36. Section 5 of the Act is codified at 42 U.S.C. § 1973c (1988).

37. *See infra* notes 131-34 and accompanying text.

38. Covered jurisdictions are those: (1) which the Attorney General has determined maintained on November 1, 1972, any "test or device" with respect to voting *and* (2) where less than 50% of voting-age citizens were registered or less than 50% actually voted in the Presidential election of November 1972, according to the Census Bureau's determination. 42 U.S.C. § 1973b(b) (1988). The states and subdivisions covered by the original Act of 1965 were exclusively Southern. The subsequent amendments to the Act extended coverage to several non-Southern jurisdictions. For a list of covered jurisdictions, including date of coverage, see 28 C.F.R. § 51 (App. 1991).

from the District Court for the District of Columbia holding the rule nondiscriminatory.[39] If a plaintiff[40] believes a particular rule should have been subjected to preclearance, he must bring his claim before a three-judge panel of the local federal district court; appeal from such a judgment lies directly to the United States Supreme Court.[41] To determine whether the proposed rule is new or different, the reviewing court must compare it to the rule in effect in that jurisdiction on November 1, 1964.[42]

This "uncommon exercise"[43] of federal power over substantive state law has proved to be the cornerstone of the Act's remarkable success because it removed what had been the insurmountable barrier of bringing a separate suit against every new discriminatory voting rule only *after* it had become effective.[44] With section five's preclearance rule, the designated federal authorities can preempt any discriminatory voting practice by keeping it off the books in the first place.

While it has become widely apparent that the preclearance procedure is a powerful federal tool, it has never been clear exactly what constitutes a "standard, practice, or procedure with respect to voting"[45] so as to invoke the preclearance requirement. During its most recent term, the United States Supreme Court probed the outer limits of section five coverage in *Presley v. Etowah County Commission*.[46] The Court held that a reallocation of power among elected officials is not sufficient by itself to require preclearance because it has "no direct relation to, or impact on, voting."[47] This decision stands in contrast to the Court's earlier opinions, which suggested that section five should be interpreted broadly. Ever since section five first survived a constitutional challenge, in *South*

39. 42 U.S.C. § 1973c (1988).

40. The plaintiff may be either the Attorney General or a private litigant. 42 U.S.C. § 1973a(b) (1988); *see also infra* note 136 (describing the Court's interpretation of the Act to allow private parties standing to sue).

41. 42 U.S.C. § 1973c (1988) ("Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court."); *see also* Allen v. State Bd. of Elections, 393 U.S. 544, 560-63 (1969) (upholding the three-judge requirement).

42. 42 U.S.C. § 1973c (1988). If a significant change has *already* been made since November 1, 1964, *it* may be the appropriate standard. *Presley*, 112 S. Ct. at 825. For example, if a jurisdiction precleared significant changes to its voting procedures in 1972, the proper standard for review would be the approved 1972 procedures, not the 1964 rules.

43. South Carolina v. Katzenbach, 383 U.S. 301, 334 (1966).

44. *See* SENATE JUDICIARY COMM., VOTING RIGHTS ACT OF 1965-EXTENSION, S. REP. No. 295, 94th Cong., 1st Sess. 11-12 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 777-78.

45. 42 U.S.C. § 1973c (1988).

46. 112 S. Ct. 820 (1992).

47. *Id.* at 830; *see infra* notes 52-111 and accompanying text.

Carolina v. Katzenbach,[48] a steady stream of federal cases, as well as amendments to the Act,[49] have gradually expanded the scope of section five.[50] These cases and statutory provisions require section five preclearance of state and local actions not limited literally to voting or election procedures.[51] This Note charts the previous expansion of section five jurisprudence, asks why the buck stopped with *Presley*, and considers whether the case has redirected section five toward new goals.

Presley, originating in the Middle District of Alabama,[52] consolidated claims that two county commissions violated the Voting Rights Act by failing to seek section five preclearance for changes in the relative authority of their members and appointees.[53] The first alleged change involved the Etowah County Commission, whose primary duty was to construct and maintain all county roads.[54] Prior to 1986, the Etowah County Commission had consisted of four white members elected at large from residency districts.[55] A federal district court found that this system violated section two of the Voting Rights Act because it unlawfully diluted black voting strength.[56] In response to this holding, the parties entered into a consent decree providing, *inter alia*, for each member of the commission to be elected solely by the voters of his own district.[57] The decree also provided for the creation of two new districts, whose representatives would have "all the rights, privileges, duties, and immunities of the other commissioners."[58]

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48. 383 U.S. 301, 308 (1966).

49. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 134 (1982); Pub. L. No. 94-73, 89 Stat. 402 (1975); Voting Rights Act Amendment of 1970, Pub. L. No. 91-285, 84 Stat. 314 (1970).

50. *See infra* notes 122-63 and accompanying text.

51. *But see* Beer v. United States, 425 U.S. 130, 141 (1976) (only holding prior to *Presley* restricting the scope of § 5). See *infra* notes 152-56 and accompanying text for a discussion of *Beer*.

52. Jurisdictional Statement for the Appellant at A-1, Presley v. Etowah County Comm'n, 112 S. Ct. 820 (1992) (No. 90-711). The entire state of Alabama is a covered jurisdiction under the Act. 28 C.F.R. § 51 (App. 1991).

53. *Presley*, 112 S. Ct. at 822.

54. *Id.* at 825.

55. Brief for Appellants at 2-4, *Presley* (No. 90-711).

56. Dillard v. Crenshaw County, 640 F. Supp. 1347 (M.D. Ala. 1986). At-large voting has the potential to disperse black votes among the white majority, thus preventing election of any black members. *See* Chandler Davidson & George Korbel, *At-Large Elections and Minority Group Representation*, *in* MINORITY VOTE DILUTION 65-81 (Chandler Davidson ed., 1984); *see also infra* note 178 (providing an example of the discriminatory potential of changing from district to at-large voting).

57. *Presley*, 112 S. Ct. at 825 (citing Dillard v. Crenshaw County, CA No. 85-T-1332-N (M.D. Ala. Nov. 12, 1986)).

58. Jurisdictional Statement for the Appellant at A-5, *Presley* (No. 90-711).

One of the new districts established by the consent decree contained a black majority, and Lawrence Presley, who is black, was elected as its first commissioner.[59] Before Presley's election to the Etowah County Commission, each member had exercised exclusive control over the road funds earmarked for his district,[60] deciding what road projects to undertake, whom to hire, promote, and with whom to contract.[61] When the change to district voting enabled Presley to be elected the county's first black commissioner, the four white incumbents "refused to yield any of their . . . power[ ]" over road and bridge operations in the county.[62] Instead, the commission passed two resolutions,[63] both over Presley's objections, without clearing them as voting changes under section five.[64]

The "Road Supervision Resolution" provided that the four white incumbent commissioners, who had been elected before the commission expanded, would retain control over the road funds according to the old district lines.[65] Thus, the two new commissioners had no control over spending on projects benefitting their constituents. Presley was assigned instead the custodial duties of "oversee[ing] . . . the repair, maintenance, and operation of the Etowah County Courthouse."[66]

The "Common Fund Resolution," passed the same day, shifted control over each district's funds from that district's representative to the commission as a whole.[67] Each commissioner, including Presley, gave up individual control over intradistrict spending, which would now be subject to a majority vote of the entire commission.[68] Thus, although the consent decree had enabled Presley's black-majority district to elect a black commissioner, these two resolutions made the spending of any road funds in that district subject to a majority vote of the white-controlled commission.

The alleged violation of the Act that formed the basis of the second claim in *Presley* involved the Russell County Commission, which in 1985 had entered into a consent decree similar to that resolving the Etowah

59. *Presley*, 112 S. Ct. at 825.

60. *Id.*

61. Brief for Appellants at 9, *Presley* (No. 90-711).

62. *Id.* at 6.

63. Jurisdictional Statement for the Appellant at A-18-21, *Presley* (No. 90-711).

64. Since Etowah County is a covered jurisdiction under the Act, *see supra* note 52, all voting changes must be precleared.

65. *Presley*, 112 S. Ct. at 825.

66. Brief for Appellants at 8, *Presley* (No. 90-711) (quoting Road Supervision Resolution at 5-6). The other new commissioner, Billy Ray Williams, who is white, was placed in charge of the county's Engineering Department. *Id.*

67. *Presley*, 112 S. Ct. at 825-26.

68. *Id.*

County dispute, also designed to remedy minority vote dilution by changing from an at-large to a district system.[69] The following year, with their votes no longer dispersed among the county at large, voters in the two majority-black districts elected the county's first black commissioners "in modern times."[70] The two black commissioners, Nathaniel Gosha, III, and Ed Peter Mack, then challenged a 1979 law transferring all authority for county road projects from the commission to its appointee, the county engineer.[71] Before this change to a so-called Unit System, each Russell County commissioner had enjoyed autonomy over spending his own district's road funds, just as the Etowah commissioners had prior to the Common Fund Resolution.[72] Gosha and Mack alleged that the 1979 law shifted power from an elected official to an appointed one and therefore should have been precleared under section five.[73]

Plaintiff Presley and his Russell County counterparts in their consolidated complaint in district court alleged that these three resolutions were changes "with respect to voting," and that Etowah and Russell Counties therefore had violated the Voting Rights Act by failing to preclear them.[74] In a split decision, the three-judge court held that Etowah County's Common Fund Resolution and Russell County's change to a Unit System were not subject to federal preclearance.[75] Because Etowah County's Road Supervision Resolution had the potential to reduce substantially the electoral influence of voters in the two new districts, however, the court said it should have been precleared.[76]

The United States Supreme Court affirmed the district court's decision, holding that only changes bearing "a direct relation to voting" are subject to the Act's preclearance requirement.[77] In the majority's view, the Etowah and Russell County changes involved only internal transfers of power among officials, not rules governing voting, and so were not covered by section five.[78] Justice Kennedy, writing for six members of the Court,[79] began his analysis by expressly affirming the expansive scope

69. Sumbry v. Russell County, Civil Action No. 84-T-1386-E (M.D. Ala. Mar. 17, 1985).

70. *Presley*, 112 S. Ct. at 827.

71. *Id.* at 826.

72. *Id.*; *see supra* notes 67-68 and accompanying text.

73. Brief for Appellants at 11, *Presley* (No. 90-711).

74. Jurisdictional Statement for the Appellant at A-2, *Presley* (No. 90-711).

75. *Id.* at A-18-20.

76. *Id.* at A-20-21. Because the district court ruled in favor of appellants on this first resolution, it was not before the Supreme Court. *Presley*, 112 S. Ct. at 826.

77. *Presley*, 112 S. Ct. at 832.

78. *Id.* at 830-31.

79. Chief Justice Rehnquist and Justices O'Connor, Scalia, Souter, and Thomas joined Justice Kennedy's opinion. *Id.* at 824.

afforded section five in the Court's previous cases.[80] He referred specifically to the four categories of changes[81] held subject to preclearance in *Allen v. State Board of Elections*.[82] While noting that the *Allen* categories span a wide spectrum, he emphasized that they shared a common denominator: "a direct relation to voting and the election process."[83] Etowah County's Common Fund Resolution, by contrast, implicated only "the internal operations of an elected body"[84] and thus lacked the requisite direct relation to voting.

The United States Attorney General joined the case as an appellant to argue that the changes at issue were subject to preclearance.[85] While great deference ordinarily is afforded to the Attorney General's interpretation of the statute, the Court chose to emphasize the limits of that deference.[86] Only when congressional intent is unsettled does the Court owe deference to the Attorney General's construction.[87] Since the Court found section five unambiguous in limiting its coverage to rules governing voting, it felt no compulsion to defer to the administrative position.[88]

The appellants had argued that Etowah County's Common Fund Resolution was linked to voting. They reasoned that, by decreasing the power of each individual commissioner, every vote for that commissioner had been diluted.[89] The Court never addressed directly the validity of this argument; rather, it rejected the appellants' interpretation because of its alleged impracticability.[90] According to the majority, without some "workable standard" to define rules governing voting the scope of section five would expand indefinitely, because "in a real sense every decision taken by government implicates voting."[91] In order to avoid holding *every* governmental action subject to section five, the Court excluded from preclearance "changes which affect only the distribution of power among officials."[92]

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80. *Id.* at 827.

81. *Id.* at 828; *see infra* notes 137-40 and accompanying text.

82. 393 U.S. 544, 550-53 (1969). For a discussion of *Allen*, see *infra* notes 135-45.

83. *Presley*, 112 S. Ct. at 829.

84. *Id.*

85. *Id.* at 831.

86. *See* NAACP v. Hampton County Election Comm'n, 470 U.S. 166, 178-79 (1985).

87. *Presley*, 112 S. Ct. at 831.

88. *Id.* at 832.

89. *Id.*

90. *Id.* at 829.

91. *Id.*

92. *Id.* at 830. Note the irony of this exclusion: Just such a reallocation of authority among officials—the Voting Rights Act—first gave the Supreme Court jurisdiction over state

In considering the Russell County claim, the Court conceded that the change to the Unit System was in some respects analogous to the fourth category of voting changes identified in *Allen*, the replacement of an elected official with an appointed one.[93] Justice Kennedy distinguished the two situations, however, on the grounds that the Unit System did not prohibit voters " 'from electing an officer formerly subject to the[ir] approval.' "[94] Rather, the Russell County resolution effected only a *transfer of authority* from an elected official to an appointed one; it did not abolish the elective office altogether.[95] The majority recognized that these internal changes may reduce an elected official's power, but held that such "routine matters of governance" were not covered by section five.[96] Justice Kennedy concluded the Court's opinion by emphasizing that the Voting Rights Act was drafted to fight "specific evils" and should not be stretched beyond recognition to cover all manner and method of discrimination.[97]

Justice Stevens, who was joined in dissent by Justices White and Blackmun,[98] pointed to prior holdings by federal courts that similar changes in the power of elected officials did indeed fall within the scope of section five.[99] The dissent cited eight instances in which the Department of Justice denied approval for reallocations of authority among offi-

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election laws. Clearly such reallocations can have a tremendous impact on voting. *See* South Carolina v. Katzenbach, 383 U.S. 301, 355-62 (1966) (Black, J., concurring in part and dissenting in part).

93. *Presley*, 112 S. Ct. at 830; *see infra* note 140 and accompanying text.

94. *Presley*, 112 S. Ct. at 830 (quoting Allen v. State Bd. of Election, 393 U.S. 544, 570 (1969)).

95. *Id.* The Court expressly refused to consider whether a reallocation of authority could ever constitute "a de facto replacement of an elective office with an appointive one" and therefore be covered by § 5 because such facts were not before the Court. *Id.* at 831.

96. *Id.*

97. *Id.* at 832 ("The Voting Rights Act is not an all-purpose antidiscrimination statute.").

98. *Id.* (Stevens, J., dissenting).

99. Robinson v. Alabama State Dep't of Educ., 652 F. Supp. 484, 486 (M.D. Ala. 1987) (holding subject to preclearance a transfer of power from a body elected by the county at large to one appointed by the city council); County Council of Sumter County v. United States, 555 F. Supp. 694, 701 (D.D.C. 1983) (holding subject to preclearance a law transferring power from governor and general assembly to a county council elected by county voters at large); Horry County v. United States, 449 F. Supp. 990, 997 (D.D.C. 1978) (holding subject to preclearance a statute changing offices from appointive to elective).

Early in the history of the Act, the federal courts recognized the importance of § 5 in deterring such indirect methods of reducing black electoral influence. For a catalogue of cases from the early 1970s holding that internal transfers of authority are subject to preclearance, see U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER 168-72 (1975).

cials.[100] Justice Stevens also referred to preclearance statistics from the Attorney General tending to show that covered jurisdictions' routine seeking of preclearance for reallocations of decision-making authority did not unduly burden their ability to govern efficiently.[101]

Justice Stevens then traced the interpretation of section five from its beginnings, with a "narrow literal construction,"[102] to its gradual expansion to encompass changes which bore a more tangential relation to voting.[103] In the dissent's view, the history of section five "reveal[s] a continuous process of development in response to changing conditions in the covered jurisdictions."[104] As covered jurisdictions devised new ways to minimize black electoral influence, the Court had expanded section five to meet the latest barriers. The courts and the Department of Justice had not applied the preclearance requirement mechanically to a discrete list of voting procedures, according to Justice Stevens, but instead had taken into consideration " 'the reality of changed practices as they affect Negro voters.' "[105] Furthermore, the legislative history of the amendments to the Act manifested, in Justice Stevens' view, clear congressional approval of the courts' expansive interpretation.[106]

Despite these statistical and historical assurances, Justice Stevens nevertheless responded to the majority's fears of an unchecked expansion of section five by offering some practical guidelines that the Court believed were missing.[107] He suggested that reallocations of authority should be subject to section five *at least* in cases where a black person has just been elected pursuant to a consent decree designed to increase minority representation, as had occurred in Etowah County.[108] Such a test would provide the bright-line standard that the majority demanded while enabling the Court here to rule in favor of the Etowah County appellants.[109] Justice Stevens offered a different standard to cover the Russell

100. *Presley*, 112 S. Ct. at 833 n.3 (Stevens, J., dissenting). The changes denied preclearance were similar to those in the cases cited by Justice Stevens. *See supra* note 99.

101. *Presley*, 112 S. Ct. at 833 (Stevens, J., dissenting). For example, in a recent year the Department of Justice approved 99% of the 17,000 preclearance requests it received without unduly delaying enactment of the legislation involved. *Id.* at 833-34 (Stevens, J., dissenting).

102. *Id.* at 835 (Stevens, J., dissenting).

103. *Id.* at 834-37 (Stevens, J., dissenting); *see infra* notes 122-63 and accompanying text.

104. *Presley*, 112 S. Ct. at 834 (Stevens, J., dissenting).

105. *Id.* at 836 (Stevens, J., dissenting) (quoting Georgia v. United States, 411 U.S. 526, 531 (1973)).

106. *Id.* at 837-38 (Stevens, J., dissenting); *see infra* notes 146-51 and accompanying text.

107. *Presley*, 112 S. Ct. at 839-40 (Stevens, J., dissenting).

108. *Id.* at 839 (Stevens, J., dissenting).

109. *Id.* (Stevens, J., dissenting).

County case:[110] When a majority votes to transfer power from a district representative to a person or entity controlled by the majority, the potential for a significant dilution of constituents' voting power is clear enough to require preclearance.[111]

A brief examination of several United States Supreme Court voting rights cases in the years leading up to the passage of the Voting Rights Act in 1965 offers some perspective on the Court's most recent construction of section five.[112] In *Gomillion v. Lightfoot*,[113] decided in 1960, the Court first upheld a Fifteenth Amendment challenge to an *indirect* denial of the right to vote, as opposed to the more direct frontal barriers traditionally employed by whites, such as poll taxes, literacy tests, and fraud in counting votes.[114] The city of Tuskegee, Alabama redrew its municipal boundaries so as "to remove from the city all save only four or five of its 400 Negro voters while not removing a single white voter or resident."[115]

The city called into question the Court's authority to rule on the issue, claiming a virtually unrestricted right of the states to reorganize their political subdivisions.[116] The Court recognized the state's power, but held that a state could not exercise that power in violation of the Fifteenth Amendment: "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right."[117] Recognizing that seemingly innocuous and routine governmental functions could deny black suffrage, the *Gomillion* Court reaffirmed that " '[t]he [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination.' "[118]

After *Gomillion*, the Court in the next few years issued several decisions which recognized other bases besides redistricting on which a voting rights challenge could be brought. For example, a series of cases

110. The dissent's first standard would not apply to Russell County because the transfer of authority was made *before* the entry of the consent decree. *Id.* at 826.

111. *Id.* at 839-40 (Stevens, J., dissenting).

112. For two excellent general discussions of Supreme Court voting rights decisions before the Act's enactment, see DERRICK A. BELL, JR., RACE, RACISM, AND AMERICAN LAW 190-200 (3d ed. 1992) and Davidson, *supra* note 20, at 30-32.

113. 364 U.S. 339 (1960).

114. *See* BELL, *supra* note 112, at 190-96.

115. *Gomillion*, 364 U.S. at 341. The law changed the shape of the city from a perfect square to "an uncouth twenty-eight sided figure." *Id.* at 340.

116. *Id.* at 342.

117. *Id.* at 347.

118. *Id.* at 342 (quoting Lane v. Wilson, 307 U.S. 268, 275 (1939)).

considered the discriminatory effect of legislative malapportionment and concluded that when some districts are much more heavily populated than others, the votes of citizens in districts with large populations are unconstitutionally diluted.[119] Further, in *Fortson v. Dorsey*,[120] decided the year the Voting Rights Act was passed, the Court held that multimember state senatorial districts could be unconstitutional if they operated "to minimize or cancel out the voting strength of racial or political" groups.[121] These cases suggest that by the time the Act was enacted in 1965, the Court understood the right to vote to encompass far more than the mere ability to cast a ballot.

The history of the Voting Rights Act in the federal courts might lead one to expect a different result in *Presley*. As Justice Stevens pointed out in his dissent, the ambit of section five has expanded steadily since 1965.[122] Only a year after its enactment, the United States Supreme Court first considered the constitutionality of selected portions of the Act, including the preclearance requirement, in *South Carolina v. Katzenbach*.[123] South Carolina challenged Congress's authority to require federal approval of proposed state laws, claiming that section five violated the Tenth Amendment[124] by encroaching on powers reserved to the states.[125] The Court responded that the states' power to violate the Fifteenth Amendment is nowhere protected in the Constitution: "The gist of the matter is that the Fifteenth Amendment supersedes contrary exertions of state power."[126]

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119. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 568-71 (1964) (holding legislative apportionment violated the Equal Protection Clause of the Fourteenth Amendment because it diluted the votes of residents of districts with large populations); Gray v. Sanders, 372 U.S. 368, 379-81 (1963) (holding that the Fifteenth Amendment prohibits dilution of votes on the basis of race); Baker v. Carr, 369 U.S. 186, 237 (1962) (holding legislative apportionment justiciable).

120. 379 U.S. 433 (1965).

121. *Id.* at 439.

122. *Presley*, 112 S. Ct. at 834-37 (Stevens, J., dissenting).

123. 383 U.S. 301 (1966).

124. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

125. *Katzenbach*, 383 U.S. at 323. Another basis for the § 5 challenge was that preclearance violated Article III by empowering the District Court for the District of Columbia to issue advisory opinions. The Court concluded that review by the district court does not constitute an advisory opinion. Since the Act suspends any new voting regulation, the Court reasoned, the state or subdivision that enacted it has "a concrete and immediate 'controversy' with the Federal Government." *Id.* at 335.

South Carolina also attacked other sections of the Act on the grounds that it denied due process, was a bill of attainder, and violated the principles of separation of powers and equality between the states. *Id.* at 323.

126. *Id.* at 325.

Recognizing that section five seriously implicated the coequal status of the state and federal governments,[127] the *Katzenbach* Court took great pains to emphasize the extraordinary circumstances that necessitated so drastic a remedy as preclearance.[128] The Court catalogued the painfully slow and inefficient case-by-case approach to voting rights that had preceded the Act.[129] The Court also noted that states hostile to minority political participation had easily stayed one step ahead of the law by enacting new discriminatory rules as soon as old ones were struck down. It was only "[u]nder the compulsion of these unique circumstances,"[130] the Court explained, that Congress enacted the federal preclearance requirement.

In dissent, Justice Black's primary constitutional objection was that through the Act's preclearance requirement the United States was usurping power from the states in flagrant violation of the Tenth Amendment.[131] By requiring federal approval before a state can enforce its laws, he maintained, section five "so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless."[132] Congress's power to enforce the Fifteenth Amendment,[133] he believed, does not encompass such a shift of power from the states to the federal government.[134]

Three years after *Katzenbach* the Court issued in *Allen v. State Board of Elections*[135] its principal opinion defining the scope of voting changes subject to section five preclearance. *Allen* consolidated four separate claims; the Court found the disputed change in each subject to preclearance.[136] The four broad categories held by the Court to require

127. *Id.*

128. *Id.* at 313-15.

129. *Id.*

130. *Id.* at 335.

131. *See id.* at 358-61 (Black, J., concurring in part and dissenting in part).

132. *Id.* at 358 (Black, J., concurring in part and dissenting in part).

133. U.S. CONST. amend. XV, § 2.

134. *Katzenbach*, 383 U.S. at 357-58 (Black, J., concurring in part and dissenting in part). Justice Black also disputed whether the preclearance requirement created a case or controversy so as not to violate Article III. The Court, he said, was manipulating the established meaning of "case or controversy" to find one where none really existed. *Id.* (Black, J., concurring in part and dissenting in part).

135. 393 U.S. 544 (1969).

136. *Id.* at 572. Although the Act is silent on the issue, the Court also held that a private litigant (as well as the Attorney General) may seek a declaratory judgment in a district court that a proposed rule is covered by § 5. *Id.* at 554-55. This right was codified in the 1975 amendments to the Act. *See* 42 U.S.C. § 1973a(b) (1988).

preclearance included: (1) changes in the manner of voting,[137] (2) modifications in the qualifications and requirements for candidacy,[138] (3) switching from district to at-large elections,[139] and (4) replacing an elected office with an appointed one.[140]

To justify placing these changes under the umbrella of section five, the *Allen* Court emphasized the broad sweep of the Act, dismissing the notion that section five was limited to the literal act of voting or registering to vote.[141] Rather, the Court stressed that the Act was intended "to reach any state enactment which altered the election law of a covered State in even a minor way."[142] It "was aimed at the subtle, as well as the obvious, state regulations" that deny blacks their right to vote.[143] Further, the Court held that a change which merely *dilutes* voting power is subject to section five just as surely as a direct denial of the right to vote.[144] *Allen*'s expansive view has served as the touchstone for all subsequent courts' attempts to define the scope of section five.[145]

The United States Supreme Court's expansive construction of sec-

137. *Allen*, 393 U.S. at 570. The change relaxed standards for determining the validity of write-in votes. Illiterate voters had attempted to vote using preprinted labels. Their votes were not counted because the new standards did not authorize this method of casting write-in ballots. *Id.* at 553. Although the change probably would have increased the black vote count, the Court restricted its role to determining only whether a voting procedure had *changed*, not whether the new procedure was in fact discriminatory. *Id.* at 570.

138. *Id.* The proposed change made it more difficult for an independent candidate to run in a general election by requiring that no one who votes in a primary election may run as an independent candidate in the general election, and by substantially increasing the number of signatures required for the independent candidate's qualifying petition. *Id.* at 551.

139. *Id.* at 569. The 1966 amendment to the Mississippi Code provided that "the board of supervisors of each county may adopt an order providing that board members be elected at large by all qualified electors of the county." *Id.* at 550. Before the amendment, all counties elected members of the board of supervisors on a district basis. *Id.*

140. *Id.* at 569-70. Another 1966 amendment to the Mississippi Code required the board of education to appoint the superintendent of education. *Id.* at 551. Prior to the amendment, counties had the option of making the position of superintendent an elective or appointive office. *Id.*

141. *Id.* at 565-68.

142. *Id.* at 566.

143. *Id.* at 565.

144. *Id.* at 569. This reasoning follows logically from the "denying *and abridging*" language in the Act and in the Fifteenth Amendment, although the Court does not expressly state this connection. *See* U.S. CONST. amend. XV (emphasis added) (requiring that "[t]he right . . . to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude"); 42 U.S.C. § 1973c (1988) (ensuring that voting changes do not "have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color").

145. For other voting-related changes subsequently held by the United States Supreme Court to require preclearance, see City of Rome v. United States, 446 U.S. 156, 160-61 (1980) (changing residency requirements for candidates); City of Richmond v. United States, 422 U.S. 358, 368 (1975) (altering municipal boundaries); Georgia v. United States, 411 U.S. 526, 532

tion five in *Allen* met with congressional approval when the time came to extend the Act. The legislative response to *Allen* and other decisions in the Court's initial section five cases indicates that Congress intended that the preclearance requirement be applied as broadly as possible. For example, the Senate Report accompanying the 1975 amendments to the Act refers approvingly to the "broad interpretations"[146] given to section five by the Court in *Allen*. It quotes *Katzenbach*'s[147] conclusion that Congress was justified in adopting the preclearance requirement to combat the " 'extraordinary stratagem[s]' " of recalcitrant white majorities, and emphasizes the importance of section five in fulfilling the promise of the Act.[148] The report summarizes the purpose of the preclearance requirement as "insur[ing] that any future practices of these jurisdictions be free of both discriminatory purpose and effect."[149] The report also refers to dilution of minority voting strength as a change subject to preclearance, in accordance with the *Allen* Court.[150]

When the Act was again before Congress for extension in 1982, a Senate report explained how the targets of section five had changed since 1965:

> Following the dramatic rise in registration, a broad array of dilution schemes were employed to cancel the impact of the new black vote . . . . The ingenuity of such schemes seems endless. Their common purpose and effect has been to offset the gains made at the ballot box under the Act.
>
> Congress anticipated this response. The preclearance provisions of Section five were designed to halt such efforts.[151]

Such comments illustrate that Congress approved the expansive construction first placed on section five by the Court in *Allen*, and that it intended section five to proscribe whatever new discriminatory schemes might arise in the future.

Despite Congress's apparent intention that the Act receive liberal interpretation, the Court imposed its first significant limitation on section five as early as 1976 in *Beer v. United States*.[152] The Court held that if a

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(1973) (enacting reapportionment and redistricting plans); Perkins v. Matthews, 400 U.S. 379, 387 (1971) (changing location of polling places).

146. S. REP. No. 295, *supra* note 44, at 16, *reprinted in* 1975 U.S.C.C.A.N. at 782.

147. 383 U.S. 301 (1966).

148. S. REP. No. 295, *supra* note 44, at 15, *reprinted in* 1975 U.S.C.C.A.N. at 781 (quoting South Carolina v. Katzenbach, 383 U.S. 301, 335 (1966)).

149. *Id.*

150. *Id.* at 16, *reprinted in* 1975 U.S.C.C.A.N. at 782.

151. S. REP. No. 417, 97th Cong., 2d Sess. 6 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 183.

152. 425 U.S. 130 (1976). In *Beer*, the city of New Orleans sought preclearance of a reap-

proposed change *augments* minority voter participation, even though it may still have some discriminatory effect, it cannot violate section five.[153] The change at issue in *Beer* improved the lot of minority voters from bad to "not-*as*-bad." Nevertheless, a group of black voters claimed that the change was subject to section five because the new rule *itself* would be discriminatory,[154] notwithstanding that it was less discriminatory than what it replaced. The Court rejected this reasoning, asserting that changes are judged under section five relative to what they replace, and not in absolute terms.[155] Thus, section five applies only to changes that would lead to a relative *retrogression* in minority voting.[156]

In its next section five case, *Dougherty County Board of Education v. White*,[157] however, the Court reaffirmed its expansive interpretation of the Act. The Court held that a board of education's rule requiring its employees to take unpaid leave while seeking public office was a "standard, practice, or procedure with respect to voting" and therefore required preclearance.[158] The Court likened the requirement to a filing fee, focusing on its actual electoral effects rather than its nominal form as a personnel rule.[159] The Court concluded that the rule, although only indirectly related to voting, had as substantial an effect on the political process as some of the direct changes that Congress and the Court previously had held subject to preclearance.[160] In considering whether the board's rule had the potential for discrimination,[161] the Court did not limit its scrutiny to the language of the rule itself, but looked beyond it to

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portionment plan that would have increased black voting strength. *Id.* at 135-36. The United States Attorney General refused to preclear the plan on the grounds that the new reapportionment was nonetheless discriminatory because it diluted black votes. *Id.* at 136.

153. *Id.* at 141. The Court's caveat was that this rule held true only so long as the proposed change did not otherwise violate the Constitution. *Id.*

154. *Id.* at 136-38.

155. *Id.* at 141.

156. *Id.* Justice Marshall, dissenting, traced the Act's historical connection to the Fifteenth Amendment to argue that § 5 shares the absolute constitutional standard of denial or abridgement. *Id.* at 146-49 (Marshall, J., dissenting). Thus the proper test for a proposed voting rule, he asserted, is whether it may *in fact* discriminate, not simply whether it improves upon what it replaces. *Id.* at 153 (Marshall, J., dissenting). He further asserted that the language of the statute unambiguously called for an absolute standard and left no room for the Court's inference of "retrogression." *Id.* at 149-50 (Marshall, J., dissenting).

157. 439 U.S. 32 (1978).

158. *Id.* at 42. A second holding in *Dougherty* was that the board of education, although it did not control elections, was a "political subdivision" for purposes of the Act. *Id.* at 44-45.

159. *Id.* at 40.

160. *Id.* at 41.

161. When a change is claimed to be subject to § 5, the test that the Supreme Court or the three-judge district court applies is whether the proposal has the *potential* for discrimination. *See* Perkins v. Matthews, 400 U.S. 379, 383-85 (1971). It is important to remember that in so doing the Court is not upholding or striking down the rule; it is merely deciding whether it

all relevant circumstances.[162] The Court concluded that it should not limit section five to a discrete or predetermined set of changes, but should adapt it to meet whatever obstacles stand in the way of minority political participation. Congress, the Court said, intended to preclear "all potentially discriminatory enactments whose source and forms it could not anticipate but whose impact on the electoral process could be significant."[163]

There are several ways of interpreting *Presley*'s place within the Court's section five jurisprudence. Perhaps the most straightforward is to take the Court's opinion at face value. The gist of the Court's opinion is logically satisfying in its simplicity: The Voting Rights Act speaks only to voting.[164] The *Presley* Court expressly affirms section five's expansive scope as to voting,[165] but simply refuses to extend that scope to include internal transfers of authority. It is not a strained argument to maintain that the changes involved in *Presley* were significantly farther removed from voting than changes previously held subject to preclearance under the Act.[166] *Presley*, after all, did not *narrow* the scope of section five, it merely refused to *expand* it beyond its reasonable statutory meaning. Although this argument's reliance on plain meaning has a facial appeal, it is ultimately unsatisfying because it does not address "the reality of changed practices as they affect Negro voters."[167]

A second analysis of *Presley*, by contrast, roughly tracks the argument set out by Justice Stevens in his dissent; namely, that the holding is directly inconsistent with the Court's own history of expansive construction of section five.[168] By tracing the gradual expansion of section five coverage,[169] one could reasonably conclude that, in fact, reallocations of power are simply the latest in a line of voting-related changes that must be precleared. Even if one accepts that the Act, passed soon after the violence in Selma and President Johnson's address, may have had as its

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must be precleared by the Attorney General or the District Court for the District of Columbia. *Id.*

162. *Dougherty*, 439 U.S. at 40-42. In this case, the principal circumstance counseling in favor of a preclearance requirement was the fact that the rule was adopted less than a month after the first black in recent years filed for candidacy. *Id.* at 34. Apart from studying the rule itself, the Court sought to determine whether "the circumstances surrounding its adoption and its effect on the political process are sufficiently suggestive of the potential for discrimination to demonstrate the need for preclearance." *Id.* at 42.

163. *Id.* at 47.

164. *Presley*, 112 S. Ct. at 832.

165. *Id.* at 827-28.

166. *See supra* notes 137-40 and accompanying text.

167. Georgia v. United States, 411 U.S. 526, 531 (1973).

168. *See Presley*, 112 S. Ct. at 834-38 (Stevens, J., dissenting).

169. *See supra* notes 122-63 and accompanying text.

immediate goal a simple increase in black registration,[170] it soon moved on to new challenges once it had largely succeeded in that fundamental first step. The *Allen* Court recognized that once registration had solidified, the battle then focused on dilution schemes,[171] and the Court held these changes equally subject to preclearance. In *Presley*, Justice Stevens contends that once dilution is brought under control and blacks are elected, the next step is to prevent blacks from being stripped of power.[172] Justice Stevens supports his assertion that in fact such a shift in section five's interpretation has already occurred in the federal courts by highlighting a series of decisions in which transfers of power had been held to constitute voting changes.[173]

Evidence of this historical inconsistency becomes apparent when one compares *Presley* to the reasoning of the Court in *Dougherty County Board of Education v. White*,[174] in which the change at issue arguably was not directly related to voting.[175] Nonetheless, the *Dougherty* Court held that the change required preclearance because it was able to trace the change, albeit indirectly, to voting.[176] Under this analysis *Dougherty* can be said to stand for the proposition that changes *indirectly* affecting voting, of which a reallocation of authority is one, are subject to section five.[177]

Under this broad view of section five expounded by Justice Stevens in his dissent, the *Presley* Court's conclusion that Etowah County's Common Fund Resolution was not a change with respect to voting is an un-

170. For the view that this was Congress' *only* intention, and that § 5 never should have been extended beyond this narrow goal, see ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 236-37 (1987). Her book begins, "The Voting Rights Act of 1965 had a simple aim: providing ballots for southern blacks." *Id.* at 11.

171. *See* Allen v. State Bd. of Elections, 393 U.S. 544, 569 (1969). Dilution schemes are practices that do not prevent black voting per se, but disperse the black vote to prevent black candidates from winning office. *See generally* JOINT CENTER FOR POLITICAL STUDIES, MINORITY VOTE DILUTION 4-5 (Chandler Davidson ed., 1984) (outlining the essential aspects of vote dilution schemes).

172. *Presley*, 112 S. Ct. at 838-39. (Stevens, J., dissenting).

173. *Id.* at 833 (Stevens, J., dissenting); *see supra* note 99 (citing instances of the Court's application of the preclearance requirement to cases involving transfers of power among officials).

174. 439 U.S. 32 (1978).

175. *Id.* at 34. The change involved the board of education's adoption of a rule requiring candidates for public office to take leave without pay. *Id.* The other indirect link to voting in *Dougherty* was the Court's conclusion that the board of education was a "political subdivision" because its rule could affect candidacy, although it had no direct link to voting or elections. *Id.* at 43-46.

176. *Id.* at 41-43.

177. Of course, this is a proposition that *Presley* flatly rejects. *Presley*, 112 S. Ct. at 832.

warranted elevation of form over substance. The practical effects of the change constitute exactly the type of discrimination that section five has been construed previously to preempt. *Allen* recognized the discriminatory effect of switching from district to at-large voting[178] and held that such a change was subject to preclearance.[179] Since that decision, indirect dilutive changes, such as the district-to-at-large switch, have comprised the vast majority of objections lodged by the Attorney General.[180]

Yet just such a change, only one step removed, was denied section five coverage in *Presley*. The Etowah County consent decree prohibited at-large election to the county commission, thus creating a black-majority district from which Lawrence Presley was elected.[181] Although they could no longer maintain their at-large advantage directly, the white majority achieved largely the same result by instituting the change *within* the commission instead of at the electoral level. By looking at the Etowah County Commission as a mini-electorate, the relevance to section five of the two resolutions is thrown into sharp relief. Before passage of the two resolutions, the commission's internal "elections"—decisions on how to spend the road funds—were made on a district basis.[182] The "electorate" of each district (its commissioner) decided how and when to spend the road money allocated to it. The commission's two resolutions, however, changed this district system to an at-large one. Under the new system, the entire "electorate" (the full commission), with its white majority, enjoyed electoral control over spending in all the districts, including the majority-black one (Commissioner Presley's seat).[183] Thus, Etowah County, having failed to retain an at-large general election, simply imposed the at-large system on the commission itself, thereby effectively circumventing the intended results of the consent decree. In establishing its rigid definition of voting, the *Presley* Court turned a blind eye toward the commission's subterfuge.

The holding in the Russell County case works in much the same

178. A simple example illustrates the discriminatory potential of a switch from district to at-large voting. Suppose a county as a whole is 75% white and 25% black. It is divided into four districts, one of which has a black majority of 70%. When voting is by district, blacks have the electoral strength to select one of the four county commissioners. When voting is conducted at-large (i.e., countywide, without regard for district lines), the overall white majority will control each of the four seats.

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

180. *Hearings Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary, House of Representatives, on Extension of the Voting Rights Act*, 97th Cong., 1st Sess., pt. 3, at 2243-44 (1981).

181. *Presley*, 112 S. Ct. at 825.

182. *Id.*

183. Brief for Appellants at 7-9, *Presley* (No. 90-711).

manner to circumvent the requirement of preclearance in changes to at-large elections. Under Russell County's Unit System, the county engineer, appointed by majority vote of the commission, assumed all responsibilities for county road work.[184] The *Presley* Court found that this change did not fit into the second *Allen* category because it did not abolish an elective office. Furthermore, the Court reasoned, the reduction of the commissioners' power was not a *de facto* abolition because the commission "retain[ed] substantial authority, including the power to appoint the county engineer."[185] The Court failed to recognize that while the commission *as a whole* retains that power, the Unit System *is* a de facto abolition of most of the power of the two new black commissioners. Just as in Etowah County, individual control over district road funds has been surrendered to the white majority.

The change from district to at-large voting can have the same effect on minority participation whether the change occurs at the level of the citizen or at the level of the elected official. The *Presley* Court offers no convincing reason why the Voting Rights Act should allow a covered jurisdiction to let in through the back door what it bars through the front. The lesson is clear for jurisdictions that want to limit minority influence: If you cannot dilute the votes of black citizens themselves, you can simply dilute the vote of the representative they elect. The relation to voting should be clear to the Court—both resolutions stripped the majority-black districts of any electoral influence over road operations, "the most important aspect of county governance."[186] The practical effect of the changes challenged in *Presley* is to reestablish the preconsent decree status quo in both counties.[187] In other words, any black influence over road matters is once again subject to the county's white majority, just as it had been before blacks were elected to the commissions.

If, as the preceding analysis suggests, *Presley* has in fact arrested the sweep of section five short of the kinds of indirect voting changes existing in Etowah and Russell Counties, minorities will be forced to look elsewhere for their remedy. One possible answer to potentially discriminatory transfers of power would be to amend the Voting Rights Act to

184. *Presley*, 112 S. Ct. at 826. This is not a new tactic. For example, in 1877, when Reconstruction enfranchisement threatened to give North Carolina blacks significant electoral power, the state legislature passed the "County Government Act," which empowered the legislature to appoint justices of the peace, who in turn appointed the county commissioners. Thus, the counties with large black populations were controlled by the white-majority legislature. DONALD N. BROWN, SOUTHERN ATTITUDES TOWARD NEGRO VOTING IN THE BOURBON PERIOD, 1877-1890, at 131-32 (1960) (Ph.D. dissertation, University of Oklahoma).

185. *Presley*, 112 S. Ct. at 831.

186. Jurisdictional Statement for the Appellant at A-20, *Presley* (No. 90-711).

187. *See supra* notes 55-68 and accompanying text.

make such changes explicitly subject to section five scrutiny. Such an amendment could in effect codify the standard proposed by Justice Stevens in his *Presley* dissent. Justice Stevens would subject to preclearance any reallocation of authority among elected officials that occurs "(1) after the victory of a black candidate, and (2) after the entry of a consent decree" designed to remedy minority vote dilution.[188] So as not to intrude unnecessarily into state and local autonomy, preclearance could be strictly limited to the decisional rules of the legislative body, not its policy outcomes.[189] Such a statute could be drafted with enough precision to avoid the line-drawing problems feared by the *Presley* majority.

A third analysis of the Court's decision in *Presley*, although not focusing on section five at all, may best explain why the Court held as it did and what the decision may mean for future section five claims. To the extent that *Presley* may be inconsistent with the case law and legislative history of the Act, it may be more enlightening to consider the case as a constitutional objection to section five than as a simple matter of statutory construction. Although the references are muted,[190] the *Presley* holding may rest implicitly on a view of federal-state relations similar to that expressed by Justice Black in his dissent in *South Carolina v. Katzenbach*;[191] namely, that the preclearance requirement unconstitutionally usurps powers "reserved to the states."[192] If a majority of the Court now

188. *Presley*, 112 S. Ct. at 839 (Stevens, J., dissenting).

189. Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1510-11 (1991). Professor Guinier, who contributed to the appellants' brief in *Presley*, has written at length about the inadequacy of a mere tally of black electoral victories as an accurate measure of black influence on policy decisions. *See also* Drew S. Days, III & Lani Guinier, *Enforcement of Section 5 of the Voting Rights Act*, *in* MINORITY VOTE DILUTION 167, 171-76 (Chandler Davidson ed., 1984) (focusing on the extensions of the Act and the 1982 amendments to § 5); Lani Guinier, *Voting Rights and Democratic Theory—Where Do We Go From Here?*, *in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 283, 292 (1992) (arguing that the Voting Rights Act should promote "a substantive measure of political equality," not mere access to the political system); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1101-34 (1991) (arguing that black electoral success alone will not guarantee a corresponding black influence on policy).

190. Indicative of the *Presley* Court's sensitivity to concerns of federalism are the following statements: "If federalism is to operate as a practical system of governance and not a mere poetic ideal, the States must be allowed both predictability and efficiency in structuring their governments." *Presley*, 112 S. Ct. at 832. "[T]he constant adjustments required for the efficient governance of every covered State illustrate the necessity for us to formulate workable rules to confine the coverage of section 5 . . . ." *Id.* at 830.

191. 383 U.S. 301, 358-61 (1966) (Black, J., concurring in part and dissenting in part).

192. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are *reserved to the States* respectively, or to the people.") (emphasis added).

harbors serious doubts about the constitutionality of section five, *Presley* may begin to look much more understandable.

That this Tenth Amendment concern may have motivated the *Presley* Court is not without precedential basis. Evidence of the current Court's views on this aspect of federalism can be found in recent United States Supreme Court decisions in other areas. In *Gregory v. Ashcroft*,[193] for example, the Court relied heavily on the sanctity of state sovereignty in refusing to enforce a federal statute in conflict with a Missouri mandatory retirement law for judges. Although not doubting Congress's power under the Supremacy Clause[194] to legislate in areas of state law,[195] the Court emphasized that the statutory language must make Congress's intention to do so "unmistakably clear."[196]

This concession to federal power was undercut seriously, however, by the Court's own analysis of federalism which followed.[197] Remarking that the framers intended the federal and state governments to balance one another, the *Gregory* Court warned, "These twin powers will act as mutual restraints only if both are credible."[198] The Court echoed Justice Black's states'-rights concerns in *Katzenbach* by reiterating that " '[j]ust as "the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections," ' "[199] so also " ' "[e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen." ' "[200] Such a statement flies directly in the face of the Voting

193. 111 S. Ct. 2395 (1991). For an even more recent example of the importance the current Court places on state sovereignty, see *New York v. United States*, 112 S. Ct. 2408 (1992), decided five months after *Presley*. In *New York*, the Court struck down that part of the Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. No. 99-240, 99 Stat. 1842 (1985) (codified at 42 U.S.C. § 2021b *et seq.*), requiring states either to regulate the disposal of low-level radioactive waste according to Congress' instructions or accept ownership of (and liability for) it. *New York*, 112 S. Ct. at 2414. The Court held that the statute would unconstitutionally force the states to implement legislation enacted by Congress. *Id.* Using the classifying language of the Voting Rights Act, it added, in dicta, that "[s]tates are not mere *political subdivisions* of the United States." *Id.* at 2434 (emphasis added).

194. U.S. CONST. art. VI.

195. *Gregory*, 111 S. Ct. at 2400.

196. *Id.* at 2401.

197. *See id.* at 2399-2400.

198. *Id.* at 2400. Justice Black expressed the same concern in his constitutional attack on § 5 in South Carolina v. Katzenbach, 383 U.S. 301, 358-62 (1966) (Black, J., concurring in part and dissenting in part); *see supra* notes 131-34 and accompanying text.

199. *Gregory*, 111 S. Ct. at 2401 (quoting Sugarman v. Dougall, 413 U.S. 634, 647 (1973) (quoting Oregon v. Mitchell, 400 U.S. 112, 124-25 (1970))).

200. *Id.* (quoting *Sugarman*, 413 U.S. at 647 (quoting Boyd v. Thayer, 143 U.S. 135, 161 (1892))). The mandatory retirement law for judges did not involve voting per se, but did affect the prerequisites to holding state office, as in Allen v. State Board of Elections, 393 U.S. 544, 570 (1969). *See supra* note 138. Such electoral authority, the Court said, "lies at ' "the heart

Rights Act, which expressly *removes* electoral control from covered states.[201] It is surely relevant to note that some of the most vehement opposition to both the Fifteenth Amendment and later to the Voting Rights Act invoked states'-rights arguments.[202] *Gregory*, in a different context, conveys essentially the same constitutional message as Justice Black's in *Katzenbach*.[203] Thus, there is at least some strong suggestion that *Presley*, decided about six months later, was informed by many of the same concerns for federalism set forth in detail in *Gregory*.[204]

If *Presley* is viewed in the constitutional light of Justice Black's *Katzenbach* dissent and the current Court's expressed opinions on federal/state relations, it is evident that statutory interpretation and legislative history may not be determinative in the next section five case. The inquiry into the scope of change "with respect to voting"[205] may be only a red herring to divert attention from the Court's antipathy, as expressed in *Gregory*, to federal intrusion into state election law. Viewed in this light, some of the Court's affirmations of liberal section five coverage in *Presley* begin to ring hollow.[206] If the Court still genuinely adheres to the constitutional decision reached in *Katzenbach*,[207] one wonders why it felt compelled to arrest section five at the line it drew in *Presley*.

For example, if overburdening state and local governments[208] was not a determinative factor in earlier cases, why should it be so now?[209] Similarly, if a personnel rule, *indirectly* related to voting, should be subject to preclearance in *Dougherty County Board of Education v. White*,[210] why should not *Presley*'s internal transfer of authority, which also indirectly affects voting, be equally subject to review? Finally, if replacing an

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of representative government." '" *Id.* at 2402 (quoting Bernal v. Fainter, 467 U.S. 216, 221 (1984)).

201. 42 U.S.C. § 1973c (1988) (stating that "no person shall be denied the right to vote for failure to comply with" any voting change that has not been precleared).

202. On states' rights objections to the Fifteenth Amendment, see FONER, *supra* note 9, at 446-47. On objections to the Act, see Davidson, *supra* note 20, at 18.

203. 383 U.S. 301, 358-62 (1966) (Black, J., concurring in part and dissenting in part).

204. All of the justices in the *Presley* majority who were seated on the Court when *Gregory* was decided also joined *Gregory*'s majority opinion. Justice Thomas had not yet joined the Court when *Gregory* was decided.

205. 42 U.S.C. § 1973c (1988).

206. *See Presley*, 112 S. Ct. at 827 (affirming *Allen*'s "reject[ion of] a narrow construction, one which would have limited § 5 to state rules prescribing who may register to vote").

207. 383 U.S. at 327-28.

208. *Presley*, 112 S. Ct. at 830.

209. *See id.* at 834 n.7 (Stevens, J., dissenting). After all, the sum of changes *already* held subject to preclearance implicate a substantial portion of the duties of many small subdivisions. The Court offers no evidence to show that the changes at issue in *Presley* would significantly increase that burden.

210. 439 U.S. 32, 47 (1978).

elected official with an appointed one is within the scope of section five,[211] why is a *substantial* transfer of the elected official's power not similarly covered?[212] Surely if the Court still fully accepts section five's extraordinary alteration of federal/state relations, it would not have so many qualms about infringing on states' rights.

This is not to suggest that section five is under any imminent danger of being overturned on Tenth Amendment grounds. Indeed, nothing in the *Presley* opinion indicates that the Court is eager to revive the constitutional objections to the Act that have been settled law since the Court's decision in 1966, in *South Carolina v. Katzenbach*.[213] On the other hand, as long as the Court is unwilling to overturn the constitutional underpinnings of section five, it will never be able to offer a very convincing rationale for restraining its scope. After all, the constitutional justification for the preclearance requirement rested in part on its being the only effective way to combat the "extraordinary stratagem[s]"[214] of covered jurisdictions. Thus, by placing the latest "stratagem" beyond the reach of section five, the Court has, perhaps not unwittingly, eroded the Act's constitutional legitimacy.

After *Presley*, the Court is caught in a contradiction of its own making: It affirms the validity of federal preclearance authority, but at the same time would restrain that power short of its goal. Such hamstringing frustrates the Act's congressional intent.[215] Both the structure of the Act and its legislative history evince an aggressive approach to combatting barriers to black political power. Section five for the first time allowed the federal government to take the offensive instead of waiting to react piecemeal to every state action. The preclearance requirement cast the Attorney General's net as widely as possible. To the Court's concerns about overburdening state and local governments, a dissenter could reply that the Act was *meant* to be intrusive, to snoop into *any* action that might threaten minority participation. If the Court has concerns about intruding on state sovereignty, then perhaps it should reconsider the constitutional justification for the Act; it should not instead place artificial restrictions on the Act.

Because the appellants in *Presley* framed the issue as one of statu-

211. *See supra* note 140 and accompanying text.

212. The Court answered that the official involved "retained substantial authority." *Presley*, 112 S. Ct. at 831. But by the same token, he also *relinquished* substantial authority, and the Court has noted that Congress intended "that all changes, no matter how small, be subjected to § 5 scrutiny." Allen v. State Bd. of Elections, 393 U.S. 544, 568 (1969).

213. South Carolina v. Katzenbach, 383 U.S. 301 (1966).

214. *Id.* at 335.

215. *See supra* notes 146-51 and accompanying text.

tory interpretation, the Court was not obliged to address any constitutional motivations that may have informed its decision. The dissent also proceeds along statutory lines by trying to force reallocations of authority into the mold of "voting."[216] The dissent might have been better served by calling the majority's bluff and acknowledging that *Presley* certainly is *not* about voting *per se*, but voting in the literal sense never was the ultimate goal of the Voting Rights Act. Rather, the Act is properly invoked in *Presley* because the change at issue had a strong smell of diminishing black political power, and minority empowerment—not merely casting a ballot—lies at the very soul of the Act. The right to vote, after all, is meaningless in itself. It is only the symbol of a political voice. By focusing so narrowly on voting, the *Presley* Court failed to do justice to the spirit of the Voting Rights Act.

ROBERT BRYSON CARTER

216. *See Presley*, 112 S. Ct. at 832-40 (Stevens, J., dissenting).