

2013

Partisanship, Politics, and the Voting Rights Act: The Curious Case of U.S. v. Ike Brown

Donald E. Campbell

Mississippi College School of Law, dcampbe@mc.edu

Follow this and additional works at: <http://dc.law.mc.edu/faculty-journals>



Part of the [Election Law Commons](#), [Law and Politics Commons](#), and the [Law and Race Commons](#)

Recommended Citation

29 Harv. J. on Racial & Ethnic Just. 33 (2013).

This Article is brought to you for free and open access by the Faculty Publications at MC Law Digital Commons. It has been accepted for inclusion in Journal Articles by an authorized administrator of MC Law Digital Commons. For more information, please contact walter@mc.edu.

Please note that the copyright in the Journal on Racial and Ethnic Justice is held by the President and Fellows of Harvard College, and that the copyright in the article is held by the author.

PARTISANSHIP, POLITICS, AND THE VOTING RIGHTS ACT: THE CURIOUS CASE OF *U.S. v. IKE BROWN*

Donald Campbell¹

ABSTRACT

The Voting Rights Act of 1965 has been described as the “crown jewel” of the Civil Rights Movement. The success of the Act to remove official obstacles to voting is undeniable, and the influx of African American voters into the political system changed the nature of politics in the United States at all levels. The political and cultural context has changed so greatly that in 2006, it was politically possible for the President Bush’s Justice Department to bring the first claim against an African American for violating the voting rights of white citizens. This article seeks to explain how this suit was possible by the opening up of “enforcement space” on the Justice Department’s agenda. The article also warns that African American politicians today should be concerned that traditional methods of proving discriminatory intent under the Voting Rights Act could be perversely harmful by allowing statements made during the civil rights era to be used against them in a Voting Rights Act suit.

TABLE OF CONTENTS

INTRODUCTION	34
I. PUTTING THE VOTING RIGHTS ACT IN CONTEXT	35
A. <i>White Primaries</i>	36
B. <i>Poll Tax, Literary Test, and Intimidation</i>	39
II. THE VOTING RIGHTS ACT AND ITS PREDECESSORS	41
A. <i>The 1957 Civil Rights Act</i>	42
B. <i>The 1960 Civil Rights Act</i>	43
C. <i>The 1964 Civil Rights Act</i>	44
D. <i>The 1965 Voting Rights Act</i>	44
III. MOVING FROM VOTE DENIAL TO VOTE DILUTION	46
A. <i>Establishing a Violation of Section 2 After the 1982 Amendments</i>	54
IV. CONSIDERING THE VOTING RIGHTS ACT IN CONTEXT	56
V. THE CASE OF <i>IKE BROWN</i>	61
VI. EVALUATING THE VOTING RIGHTS ACT IN TODAY’S PARTISAN ENVIRONMENT	66
VII. CONCLUSION	68

1. Assistant Professor of Law, Mississippi College School of Law

INTRODUCTION

On February 17, 2005, an historic event occurred in Jackson, Mississippi. On that day, the United States Justice Department filed a lawsuit alleging violations of the 1965 Voting Rights Act. What made the action extraordinary was that the suit marked the first charge by the federal government against an African American for intimidation and discrimination against white voters. The suit was controversial and would have been unheard of less than a decade before. The defendant in the suit was Ike Brown – a political activist in a rural county in east Mississippi.²

The case assumed immediate partisan overtones. The Justice Department argued that the suit was necessary to ensure Americans of all races the right to vote free from intimidation. Others disputed the government's characterization. The president of the Mississippi Chapter of the NAACP questioned the decision to proceed with the suit against Brown when claims of voting discrimination by African American voters had not been addressed by the Bush administration, and called the suit "highly unusual and suspect."³ The case went to trial, lasted twelve days with 54 witnesses (41 government witnesses and 13 on behalf of the defendants). The district court held that Brown had violated the Voting Rights Act and the Fifth Circuit affirmed.⁴

The Ike Brown case is important. It represents a potential new use for the Voting Rights Act. How did it happen that this claim was politically possible? What does it mean for the future of the Voting Rights Act? This article addresses these two questions. The first question is answered by considering the changing and more partisan political context coupled with enforcement space that opened up after the original barriers to voting were eliminated by the Voting Rights Act. The answer to the second question is less certain. It is not a stretch to say, however, that while the case against Ike Brown was the first claim against an African American under the Voting Rights Act, it will not be the last. This article should serve as a warning to African American politicians and officeholders – particularly in the South – of the potentially perverse interaction between civil rights activism and the test to determine discriminatory intent under the Voting Rights Act.

It is impossible to understand the Voting Right Act today, without understanding the context in which it was enacted. Therefore, the article first examines the passage of the 1965 Act (Part I). Part II then traces the legislative history of voting rights legislation, culminating in passage of

2. The government named two other defendants in the suit – the Noxubee County Democratic Executive Committee and the Noxubee County Election Commission. All allegations presented by the government were against Ike Brown in his position as chairman of the Noxubee County Election Commission. Therefore, references in this article will be limited to the actions of Brown.

3. Jake Tapper & Avery Miller, *Reverse Racism?*, ABC NEWS (Dec. 28, 2005), <http://abcnews.go.com/WNT/story?id=1449254> ("We've had several issues over the years of what appeared to be racial discrimination against black voters and the Justice Department has yet to come in and do a thorough investigation . . . And for them to take on this case is highly unusual and very suspect.").

4. *United States v. Brown*, 494 F.Supp.2d 440 (S.D. Miss. 2007), *aff'd*, 561 F.3d 420 (5th Cir. 2009).

the 1965 Voting Rights Act. Part III discusses how Southern politicians responded to the Voting Rights Act by shifting tactics from an outright denial of the right to vote to vote dilution. Part IV considers how the political realities have changed since passage of the Act, and how the Act operates in today's highly partisan environment. Part V examines the Justice Department's case against Ike Brown. Finally, Part VI argues that African Americans – particularly in the South – should be concerned about a shift to a partisan-based enforcement of the Voting Rights Act because of the interaction between the activism in the civil rights movement and the proof necessary to establish discriminatory intent under the Voting Rights Act.

Perhaps it is appropriate that Mississippi is the site of this historic suit. Mississippi was one of the first states to enact Jim Crow laws after reconstruction, and the first state to engage in “massive resistance” after the passage of the Voting Rights Act. It was also the site of some of the first and most important litigation testing the contours of the Voting Rights Act.⁵ With the case of *United States v. Ike Brown*, the state continues its place in the evolution of voting rights law in the United States.

I. PUTTING THE VOTING RIGHTS ACT IN CONTEXT

To understand the role the Voting Rights Act played in ensuring African Americans access to the ballot, it is necessary to set out the methods of disenfranchisement that existed before the Act's passage – methods that were the impetus for the passage of this piece of legislation. Southern government officials devised creative methods to prevent African Americans from voting. The four primary tools were the poll tax, literary test, white primaries, and intimidation.⁶

The genesis of these tactics was the passage of the Fifteenth Amendment in 1870. The Amendment provided that citizens could not be deprived the right to vote based on “race, color, or previous condition of servitude.”⁷ Critically, the Amendment was a political compromise and did not guarantee the right to vote – but merely prohibited governments from denying the right to vote based on the listed categories.⁸ With passage of the Fifteenth Amendment, Southern governments intent on main-

5. FRANK R. PARKER, *BLACK VOTES COUNT: POLITICAL EMPOWERMENT IN MISSISSIPPI AFTER 1965* 4 (1990) (“[W]hat happened in Mississippi is particularly important because the first legal battles to overcome . . . new structural barriers were fought there, and therefore the future prospects for elimination of those new barriers throughout the South were critically dependent upon the results in the Mississippi cases.”).

6. Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273, 288 (2011) (“[T]he Democratic Party's complete monopoly on the South [prior to 1965] was not the product of routine forces of political competition Instead, that monopoly came about through a sequence of purposeful actions taken at the end of Reconstruction, which included violence, intimidation, informal manipulation, and fraud during elections.”).

7. U.S. CONST. amend. XV, § 1.

8. STEVEN F. LAWSON, *BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944-1969* 3 (1976) (“While the final draft [of the Fifteenth Amendment] may have adhered to the canons of political realism, it proved inadequate as an instrument for protecting the southern Negro. The Fifteenth Amendment did not confer the on anybody, but

taining a segregated society designed new methods to restrict African Americans from voting by adopting voting requirements that appeared facially neutral.

While this section will focus on the four most prominent voting restrictions, they were not the only methods used to disenfranchise (primarily African American) voters. For example, South Carolina passed a law requiring voters to register between May and June of 1882 or risk forever being banned from registering to vote.⁹ South Carolina also enacted a law that required individuals to re-register to vote each time they moved (a requirement that particularly affected African American migrant farmers).¹⁰ More generally, the move from party ballots (which allowed voters to identify candidates by party moniker) to secret ballots which removed the party identifiers, also created difficulty for voters. Illiterate voters found it difficult to select their preferred candidate from the listing of candidates on the ballot. While this change impacted both blacks and whites, it was a particular barrier for African Americans because of lack of educational opportunities.¹¹

A. *White Primaries*

There was perhaps no greater subterfuge in the area of voting rights than the white primary. Primaries – preliminary voting held before the general election to determine which candidates would compete in the general election – arose out of a desire to ensure that white political candidates did not appeal to African American voters to get elected.¹² The goal was to keep disputes within the (white) party.¹³ In 1921, the United States Supreme Court in *Newberry v. United States* held that primaries were not part of the “election” of the candidate, but instead were “merely methods by which party adherents agree upon candidates whom they intend to offer and support for ultimate choice by all qualified electors.”¹⁴ Under *Newberry*, the primary was a method for private individuals to organize and select candidates for the general election. Because the process was not administered by the state and there was no state action, the Fifteenth Amendment prohibition on restricting the right to vote did not apply.

merely stipulated that states could not invoke race as a ground for disfranchising people otherwise eligible to vote.”).

9. *Id.* at 6.

10. *Id.*

11. *Id.*

12. *Id.* at 13 (“Without the legal primary the fear was expressed by several that the divisions among white men might result in bringing about a return to the deplorable conditions when one faction of white men called upon Negroes to help defeat another faction.”) (quoting Josephus Daniels, editor of the Raleigh, North Carolina *News and Observer*).

13. Morton Stavis, *A Century of Struggle for Black Enfranchisement in Mississippi: From the Civil War to the Congressional Challenge of 1965 – and Beyond*, 57 *Miss. L. J.* 591, 603 (1987) (“Democrats were warned ‘if whites split . . . the Negroes would hold the balance of power.’ Ultimately, effective disfranchisement of blacks in order to prevent coalitions with dissident Democrats became the device for suppressing not only blacks but white dissidents as well.”).

14. *Newberry v. United States*, 256 U.S. 232, 250 (1921).

The distinction between primaries and general elections provided a vehicle for the disenfranchisement of African American voters for those seeking to maintain white supremacy in the South. States relied on the categorization of primaries as private affairs to lawfully restrict participation in primaries to whites. In the one-party Democratic South, the primary election essentially decided the general election. Therefore, by limiting African American access to the primaries, states were able to deny them the opportunity to cast a meaningful vote.¹⁵

Over the years, the white primary went through a number of machinations. As courts invalidated particular practices, new, more finely-tuned discriminatory procedures would appear. The white Texas primary serves as an example of this evolved practice. In 1923 (two years after *Newberry*), the Texas legislature enacted a statute which provided that "in no event shall a negro be eligible to participate in a Democratic party primary election in the State of Texas."¹⁶ The statute was challenged and Justice Holmes writing for a unanimous Supreme Court in *Nixon v. Herndon*, noted "it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth" Amendment.¹⁷ The presence of legislation – clearly state action – and explicit reference to and distinction based on race made this an easy case for the Court.¹⁸

Taking advantage of the limiting language of *Nixon*, the Texas legislature amended the statute to eliminate the facially discriminatory aspect of the law, shifting eligibility decisions to the political parties: "[e]very political party in this state through its state executive committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party . . ." ¹⁹ Executive committees of the political parties immediately passed rules that disqualified African Americans from voting.²⁰ Texas defended the new process, arguing that any discrimination was the result of private (and not state) action – and therefore did not implicate the Fourteenth and Fifteenth Amendments.²¹ In response,

15. LAWSON, *supra* note 8, at 23-54. See also *Civil Rights – Denial of Vote to Negroes in Pre-Primary Election*, 101 U. . PA. L. REV. 145 (1952).

16. *Nixon v. Herndon*, 273 U.S. 536, 540 (1927).

17. *Id.* at 541.

18. *Id.* ("The statute of Texas . . . assumes to forbid negroes to take part in a primary election the importance of which we have indicated, discriminating against them by the distinction of color alone. States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case.").

19. *Nixon v. Condon*, 286 U.S. 73, 82 (1932).

20. *Id.* The Texas Democratic executive committee adopted the following resolution: "[T]hat all white Democrats who are qualified and under the Constitution and laws of Texas . . . , and none other, be allowed to participate in the primary elections"

21. *Nixon v. Condon*, 34 F.2d 464, 468 (W.D. Tex. 1929) (the Texas statute "provides no action by a state, and directed no action be taken upon the part of any person or individuals, that is prohibited by either the Fourteenth or Fifteenth Amendments. . . . [The action by] defendants in denying and refusing to permit plaintiff to vote at such Democratic primary election, is not shown to be the act of the state of Texas, but to be that taken by private individuals"), *rev'd*, 286 U.S. 73 (1932).

the Texas State Democratic Party enacted a resolution barring African Americans from membership in the Democratic Party. With the qualification decision now made through the state party membership (and not at the direction of state law), the question was whether this – now purely private action – was constitutional.

In 1935, Justice Roberts writing for a unanimous Court in *Grovey v. Townsend*, held that the decision by the state party did not constitute state action and was therefore constitutional. While acknowledging statutes that governed operation of Texas primary elections in great detail, the Court held that such regulation did not make the decision of the political party the equivalent of state action.²² To demonstrate the private nature of the primaries, the Court noted that the party bore the primary expenses, provided ballots, and counted the votes cast in the election.²³ Finally, the Court noted that the state recognized the state convention of the political parties for the purpose of determining the policies of the party.²⁴ With this decision, the one-party South had an effective method of completely disenfranchising blacks from the political process.

The tide turned on white primaries in 1941. In *United States v. Classic*, the Supreme Court held that primaries in Louisiana were “elections” in the constitutional sense – and therefore were subject to constitutional limitations.²⁵ While distinguishing (and therefore not overruling) *Grovey*,²⁶ *Classic* provided a list of factors to determine when an election would violate the Fourteenth and Fifteenth Amendments. Three years after *Classic*, in the case *Smith v. Allright*, the Court expressly overturned *Grovey*.²⁷ Relying on *Classic*, the Court held,

It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election is a right secured by the Constitution. . . . By the terms of the Fifteenth Amendment that right may not be abridged by any state on account of race. Under our Constitution the great privilege of the ballot may not be denied a man by the State because of his color.²⁸

The Court held that, because of the numerous regulations placed on primary elections and the importance of those regulations in determining the general election candidate, being a member of a political party becomes “the essential qualification for voting in a primary to select nomi-

22. *Grovey v. Townsend*, 295 U.S. 45, 49-50 (1935). The Court provided a litany of statutes that regulated primary elections. The regulations included, *inter alia*, the form of the ballot, how the ballot was to be marked, the number of ballots to be provided by the party for the election, the oath that primary election officials were required to take, how ballot boxes were to be handled, and how election contests would proceed.

23. *Id.* at 50.

24. *Id.*

25. *United States v. Classic*, 313 U.S. 299 (1941).

26. Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 FLA. ST. U. L. REV. 55, 61-63 (2001).

27. *Smith v. Allwright*, 321 U.S. 649 (1944).

28. *Id.* at 661-62 (citation omitted).

nees for a general election," and therefore "the state makes the action of the party the action of the state."²⁹ The Court further noted:

When primaries become a part of the machinery for choosing officials, state and national, as they have here, the same tests to determine the character of discrimination or abridgement should be applied to the primary as applied to the general election. If the state requires a certain electoral procedure, prescribes a general election ballot made up of party nominees so chosen and limits the choice of the electorate in general elections for state offices, practically speaking, to those whose names appear on such a ballot, it endorses, adopts, and enforces the discrimination against Negroes, practices by a party entrusted by Texas law with the determination of the qualifications of participants in the primary. This is state action within the meaning of the Fifteenth Amendment.³⁰

In spite of the Court's ruling, Mississippi continued to hold white-only primaries – alleging that the *Allwright* case did not apply to the state.³¹ However, African Americans in the state viewed the *Allwright* opinion as the "second emancipation" and as an encouragement to seek the vote.³²

The *Allwright* decision must be considered in its social context. It came at a time when African American soldiers were returning from World War II. The idea that the right to vote – the core of democracy – should be denied from those who had fought on behalf of democracy, made it difficult for elites in the South (Mississippi notwithstanding) to justify continuing exclusion of African Americans through the white primary. Instead, Southern elites began to focus on other methods of exclusion. These tactics included the poll tax, the literacy test, and the intimidation.

B. Poll Tax, Literary Test, and Intimidation

The strategy of disenfranchising African American voters without explicit reference to race is what V.O. Key called the "Magnolia formula."³³ This "formula" described methods set out in Mississippi's 1890 Constitution to restrict African Americans from voting.³⁴ All southern states amended their constitutions in a similar fashion, but Mississippi was the first. Two provisions proved particularly effective. First was the inclusion of what are referred to as "literacy and understanding tests."³⁵ These provisions provided that, to qualify to vote, the applicant must "be able to read any section of the constitution of this State" or, if illiterate,

29. *Id.* at 664-65 (citation omitted).

30. *Id.* at 664.

31. LAWSON, *supra* note 8, at 101.

32. *Id.*

33. V.O. KEY JR., *SOUTHERN POLITICS IN STATE & NATION* 538 (1949). It is also referred to as the "Mississippi Plan." See Stavis, *supra* note 13, at 602.

34. The provisions had their desired effect. In Mississippi, after adoption of the 1890 constitution, only 6 percent of adult African Americans were registered to vote (8,615 of 147,205 residents). See LAWSON, *supra* note 8, at 15.

35. *Id.* at 11.

must be able to “understand the same when read to him, or give a reasonable interpretation thereof.”³⁶ This gave great discretion to the white registrars who made the determination of not only what section of the constitution to read, but also whether the interpretation was “reasonable.”³⁷ Louisiana, in its 1898 constitution, included what was known as a “Grandfather Clause” – providing that males who were eligible to vote on or before January 1, 1867, were exempt from the literacy requirement.³⁸ Of course, because most African Americans were not eligible to vote before that date, the exception applied almost exclusively to white voters.³⁹

After the Supreme Court invalidated the white-only primary in *Allwright*, southern states began to utilize the literacy test as a fall-back to prevent otherwise qualified blacks from voting. Campaigning for the Senate from Mississippi in 1946, Theodore Bilbo explicitly encouraged local registrars to utilize their discretion in administering the literacy test to exclude African Americans from registering to vote, going so far as to say that if “there is a single man or woman serving . . . who cannot think up questions enough to disqualify undesirables then write Bilbo or any good lawyer, and there are a hundred good questions which can be furnished.”⁴⁰

The second preferred method to disenfranchise voters was the requirement of a poll tax. The Mississippi Constitution of 1890 set the tax at two-dollars. The tax operated to disenfranchise both poor whites as well as blacks. The United States Supreme Court upheld Mississippi’s poll tax in *Williams v. Mississippi*.⁴¹ In that case, the Court held that the poll tax requirement was not discriminatory on its face, and that there was no evidence that it had been enforced in a discriminatory manner.⁴² Forty years later in *Breedlove v. Suttles*, the Supreme Court again upheld the poll tax (this time from Georgia) against claims that it violated equal protection (Fourteenth Amendment) and was an improper restriction on the right to vote (Fifteenth Amendment).⁴³

36. MISS. CONST. art. 12, § 244 (1890).

37. In *Williams v. Mississippi*, the literacy test was challenged based on the fact that the requirement was abused by the registrars administering the test – that the officer would ask “all sorts of vain, impertinent questions.” *Williams v. Mississippi*, 170 U.S. 213, 221 (1898).

38. LAWSON, *supra* note 8, at 12-13.

39. *Id.*

40. *Id.* at 100.

41. *Williams*, 170 U.S. 213 (1898).

42. *Id.* at 225 (1898) (holding that poll taxes and literacy tests “do not on their face discriminate between the races, and it has not been shown that their actual administration was evil; only that evil was possible under them.”).

43. *Breedlove v. Suttles*, 302 U.S. 277, 283(1937) (“To make payment of poll taxes a prerequisite of voting is not to deny any privilege or immunity protected by the Fourteenth Amendment. Privilege of voting is not derived from the United States, but is conferred by the state and, save as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, the State may condition suffrage as it deems appropriate.”), *overruled by* *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966).

There were a number of congressional attempts to restrict the use of the poll tax, all of which were unsuccessful largely because opponents feared that invalidating the poll tax would lead to calls for greater enfranchisement of African American voters. For example William Colmer, a member of the House of Representatives from Mississippi, argued, "[T]he direct object of this movement [to invalidate the poll tax] is to enfranchise the Negro in the South. If Congress can remove poll tax requirements it can also remove educational requirements and registration itself."⁴⁴ Mississippi Senator Theodore Bilbo said bluntly: "If the poll tax bill passes, the next step will be an effort to remove the registration qualification, the education qualification of the negroes. If that is done we will have no way of preventing negroes from voting."⁴⁵

Southern Democrats and sympathetic Republicans in the Senate used the filibuster to stop passage of legislation to limit use of the poll tax.⁴⁶ Ultimately it took passage of the Twenty-Fourth Amendment in 1964 to abolish it in federal elections.⁴⁷

Intimidation of African Americans, while always present in the South, gained importance as the inequities and discriminatory tactics of Southern whites were exposed nationally and as legal methods of suppressing the vote came under greater judicial scrutiny. Intimidation could be based on violence or fear. In 1946, Senator Theodore Bilbo, made it clear that if all else failed, white Mississippians should resort to extra-legal means to prevent African Americans from voting: "But you know and I know what's the best way to keep the nigger from voting. You do it the night before the election. I don't have to tell you any more than that. Red-blooded men know what I mean."⁴⁸ As an example of officially sanctioned intimidation, in 1962 the Mississippi legislature enacted a law requiring the names of all those taking the voter registration test to be published in a newspaper. The purported reason was to give public notice so that voter qualifications could be challenged, but in practice "many black applicants found that after their name had been published they were arrested on spurious charges; subjected to physical violence, economic reprisals, or loss of employment; or found themselves unable to get jobs."⁴⁹ The law discouraged citizens from even attempting to register to vote.

II. THE VOTING RIGHTS ACT AND ITS PREDECESSORS

The end of World War II along with the growing momentum of the civil rights movement and the violent opposition to the movement made

44. LAWSON, *supra* note 8, at 67.

45. *Id.* at 70.

46. *Id.* at 55-85 (extensive discussion of the legislative attempts to abolish the poll tax).

47. U.S. CONST. amend. XXIV § 1. The Amendment provides: "The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax."

48. LAWSON, *supra* note 8, at 100.

49. PARKER, *supra* note 5, at 28.

civil rights a political issue that could not be ignored. In response to these pressures, Congress passed three Civil Rights bills, in 1957,⁵⁰ 1960,⁵¹ and in 1964.⁵² For voting purposes, the culmination was passage of the Voting Rights Act of 1965.⁵³

A. *The 1957 Civil Rights Act*

The Eisenhower Justice Department, prompted by the killings of George Lee and Emmett Till in Mississippi, proposed what became known as the 1957 Civil Rights Act.⁵⁴ The 1957 Act, while not the first Civil Rights legislation put forward, was the first to overcome the filibuster of southern senators and their allies. The Act, as originally proposed, created a Civil Rights Commission (Part I)⁵⁵; provided an additional assistant to the attorney general (Part II)⁵⁶; provided the attorney general the authority to seek injunctions against civil rights violations (Part IV)⁵⁷; and provided specifically for enforcement of voting rights (Title V).⁵⁸ The most contested provision was in Title V – which gave authority to federal judges to hold individuals in criminal contempt without a jury trial.⁵⁹ Opposition to this provision came not only from southerners but also from unions – who had seen this power used against labor activists. A compromise on the provision was reached by making jury trials unavailable only where punishment would not be more than 45 days in jail and a fine of not more than \$300.⁶⁰

The 1957 Act had three primary characteristics that carried forward in future legislation. First, the Act provided the possibility of civil actions rather than criminal prosecution of local officials.⁶¹ Second, the Act provided a means for the federal government – through the Civil Rights Commission and the Justice Department – to gather information from states and localities about voting practices in the South.⁶² This information was necessary to prove violations of the Act. Finally, the Act provided that suit would be brought in federal court against election officials

50. Civil Rights Act of 1957, Pub. L. 85-315, 71 Stat. 634-38 (1957) (codified at 42 U.S.C. § 1971 (1957)).

51. Civil Rights Act of 1960, Pub. L. 86-449, 74 Stat. 86-92 (1960) (codified at 42 U.S.C. § 1974 (1960)).

52. Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241-68 (1964) (codified at 42 U.S.C. § 2000d (1964)).

53. Voting Rights Act of 1965, 42 U.S.C. § 1973 (1965).

54. Civil Rights Act of 1957, 71 Stat. at 634; see LAWSON, *supra* note 8, at 141-64 (discussing the political considerations behind the civil rights positions of the Republican and Democratic parties).

55. Civil Rights Act of 1957, 71 Stat. at 634.

56. *Id.* at 637.

57. *Id.*

58. *Id.*

59. Civil Rights Act of 1957, 71 Stat. at 638.

60. *Id.* at 191-97.

61. RICHARD M. VALELLY, *THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT* 187 (2004).

62. *Id.*

– with federal courts having the power to ensure that the laws were followed.⁶³

B. *The 1960 Civil Rights Act*

After passage of the 1957 Act, civil rights activists and supporters argued the Act was insufficient. Because Congressional members from both parties (with the exception of Southern members) did not want to risk losing black voters, they attempted to draft legislation that would provide further protection for voting rights, without ostracizing the majority of white voters.⁶⁴ The result was the Civil Rights Act of 1960.

The 1960 Act, while a political compromise, did have some additional provisions to protect the franchise. The Act (1) provided additional criminal penalties for violations of federal court orders;⁶⁵ (2) required that election officials maintain voting records for federal elections for twenty-two months;⁶⁶ (3) allowed the federal government to provide education for the children of members of the armed forces when schools they attended were closed to avoid integration;⁶⁷ (4) provided the Attorney General the power to bring suit to establish that a particular area or jurisdiction was engaged in a “pattern or practice” of depriving African Americans of the right to vote;⁶⁸ and finally (5) the Act allowed a federal judge that found a pattern of discrimination to appoint a referee to review applications of those rejected from registering to vote and report back to the court.⁶⁹ If the court then found that the application was wrongfully rejected, the court had the power to add the individual to the voting rolls.⁷⁰

While the 1957 and 1960 Acts demonstrated a growing commitment to civil rights, they were plagued with problems of delay and obstruction.⁷¹ The Acts utilized a time-consuming litigation-based approach and relied on voluntary compliance by state and local officials.⁷² Voluntary compliance and participation was not forthcoming. Local officials would withhold voter information. In Mississippi, state legislators changed registration requirements to thwart federal enforcement attempts.⁷³ The changes “cleverly turned the pattern or practice requirement of the 1960

63. *Id.*

64. *Id.* at 164-67.

65. Civil Rights Act of 1960, 74 Pub. L. 86-449, 74 Stat. 86-88 (1960) (codified at 42 U.S.C. §1974 (1960)); Richard K. Caputo, *Civil Rights Act of 1960*, in *THE ENCYCLOPEDIA OF CIVIL RIGHTS IN AMERICA* 207 (David Bradley & Shelley Fischer Fishkin eds., 1998).

66. Civil Rights Act of 1960, 74 Stat. at 88; Caputo, *supra* note 65.

67. Civil Rights Act of 1960, 74 Stat. at 89-90; Caputo, *supra* note 65.

68. Civil Rights Act of 1960, 74 Stat. at 90; Caputo, *supra* note 65.

69. Civil Rights Act of 1960, 74 Stat. at 90; Caputo, *supra* note 65

70. Civil Rights Act of 1960, 74 Stat. at 90; Caputo, *supra* note 65

71. The judicial process, upon which all existing remedies depend, is institutionally inadequate to deal with practices so deeply rooted in the social and political structure.” JAMES EASTLAND, *VOTING RIGHTS LEGISLATION*, S.R. 162, at 10, 14 (1965) (statement of Nicholas Katzenbach, Att’y Gen. of the United States). “Litigation on a case-by-case basis simply cannot do the job.” *Id.*

72. VALELLY, *supra* note 61, at 189.

73. *Id.*

law against the federal government.”⁷⁴ In order to establish a pattern and practice of discrimination the government needed data from a number of elections. By changing the registration requirements before data could accumulate, Mississippi made it difficult for federal officials to gather the necessary data to assess compliance. ⁷⁵ In addition to relying on state and local election officials, the 1957 and 1960 Acts were premised on enforcement by federal judges in these areas.⁷⁶ Federal judges were nominated at the recommendation of the Senator from the state and reflected the values of their community. They often opposed expansion of civil rights and the right to vote to African Americans.⁷⁷ These judges would either rule against the government or use their power to delay resolution of claims.⁷⁸

C. *The 1964 Civil Rights Act*

The 1964 Civil Rights Act passed after the assassination of President John Kennedy.⁷⁹ President Johnson pushed the issue of civil rights further than any prior administration. The 1964 Act’s primary focus was on ending discrimination in places of public accommodation – the voting rights provisions were the least controversial aspects of the bill.⁸⁰ However, the Act did contain certain provisions relating to voting rights. The Act’s provisions required that all voting procedures be administered in a consistent manner and prohibited the denial of the right to vote based on non-material errors on registration documents.⁸¹ The Act also required that all literacy tests be in writing and that a sixth-grade education created the presumption of literacy.⁸² Additionally the legislation empowered the Attorney General to bring suit before a three judge panel when there was an allegation of pattern or practice of voting discrimination.⁸³ Finally, the Civil Rights Commission was given the authority to investigate voter fraud as well as denial of the right to vote.⁸⁴

D. *The 1965 Voting Rights Act*

Despite the passage of the Civil Rights Acts of 1957, 1960, and 1964, the goal of achieving wide-spread voter registration and participation of African Americans – particularly in the deep south – proved elusive. To demonstrate this, consider this fact noted by Professor Neil McMillen: “Mississippi . . . permitted fewer blacks to vote for Lyndon Baines Johnson in 1964 than had been eligible to vote for William McKinley in

74. *Id.*

75. *Id.*

76. *Id.* at 188.

77. *Id.* at 189.

78. *Id.*

79. Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 268 (codified at 42 U.S.C. § 2000d (1964)).

80. LAWSON, *supra* note 8, at 299.

81. Civil Rights Act of 1964 § 101(2)(B), 78 Stat. at 241, LAWSON, *supra* note 8, at 299.

82. Civil Rights Act of 1964 §§ 101(2)(C), (3)(b), 78 Stat. 241-42.

83. *Id.* at § 101(3)(h), 78 Stat. at 242.

84. *Id.* at § 104(a)(1), 78 Stat. at 251

1896.”⁸⁵ In 1966, the Supreme Court summarized the problems faced under prior legislation:

Voting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 man-hours spent combing through the registration records in preparation for trial. Litigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings. Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or enacted difficult new tests designed to prolong the existing disparity between white and Negro registration. Alternatively, certain local officials have defied and evaded court orders or have simply closed their registration offices to freeze the voting rolls. The provision of the 1960 law authorizing registration by federal officers has had little impact on local maladministration because of its procedural complexities.⁸⁶

The Voting Rights Act of 1965 moved from a case-by-case analysis to a uniform system of regulation that went into effect without the necessity of individual lawsuits.⁸⁷ For example, Section 4 of the Act outlawed literacy tests for five years in certain states.⁸⁸ Section 5 of the Act provided that if a jurisdiction met the criteria of Section 4, (commonly referred to as “covered” jurisdictions) all voting regulations were frozen, and any changes had to be submitted to either the Attorney General of the United States or the U.S. District Court of the District of Columbia for approval – a process known as preclearance.⁸⁹ Jurisdictions that were covered under this formula at the time the Act was passed included the states of Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia, 26 counties in North Carolina, and one county in Arizona.⁹⁰

The Act also gave the Attorney General the authority to appoint federal officers (“registrars”) to monitor registration of voters in the jurisdictions covered under Section 4 to ensure that all those legally entitled to

85. Neil R. McMillen, *Black Enfranchisement in Mississippi: Federal Enforcement and Black Protest in the 1960s*, 43 J. OF S. HIST. 351, 351-52 (1977).

86. *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966).

87. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437-46 (1965) (codified at 42 U.S.C. § 1973 (1965)); *Katzenbach*, 383 U.S. at 328 (“Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits. After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims.”); see also Stavis, *supra* note 13, at 661.

88. Voting Rights Act of 1965 § 4(a), 79 Stat. at 438. Covered states were those using literacy tests on November 1, 1964. *Id.* at § 4(b)(1). It also covered states where voter registration on November 1, 1964 or voter turnout in 1964 presidential election was less than 50 percent of the voting age residents. *Id.* at § 4(b)(2).

89. *Id.* § 5, 79 Stat. at 439.

90. *Katzenbach*, 383 U.S. at 328.

vote were registered.⁹¹ The Attorney General was also given the power to appoint poll-watchers to observe the voting process in covered jurisdictions.⁹²

Other provisions authorized the Attorney General to challenge the constitutionality of the poll tax in jurisdictions that retained it for state elections (the poll tax was abolished in federal elections by the Twenty-fourth Amendment⁹³). The Act also provided penalties for those interfering with the right to vote or engaging in voter fraud.⁹⁴ The most significant and controversial provisions of the Act were upheld as a valid exercise of Congress's power under the Fifteenth Amendment in *South Carolina v. Katzenbach*.⁹⁵

III. MOVING FROM VOTE DENIAL TO VOTE DILUTION

The Voting Rights Act was successful in its primary goal of removing officially sanctioned barriers to voting or registering to vote. However, after the Act passed, African Americans faced challenges equal to any official barrier. Though the Voting Rights Act guaranteed the franchise, but if African Americans were unable to or failed to utilize the right to vote, then it was a hollow victory. In the elections following the 1965 Act's passage, it was discovered that while black voter registration greatly increased, black participation did not – African American candidates did not win elections even in the counties where African Americans represented a majority of the population.⁹⁶ This result has been termed the “realization gap” – the fact that although African Americans could now register to vote they could not realize the benefits of that right.⁹⁷

Two primary reasons have been cited for the existence of this gap. First, because of the stringent caste system that placed education – both as a matter of literacy and civics – off-limits to African Americans, there was limited cultural awareness of the franchise. As Fannie Lou Hamer stated: “I had never heard until 1962 that black people could register to vote I didn't know we had the right,” served as a disheartening example of the dearth of knowledge about African American's right to vote⁹⁸ The second barrier was fear of economic reprisal and suppression.⁹⁹ Ownership and control in the business and finance world, gave

91. Voting Rights Act of 1965 § 6-8, 79 Stat. at 440.

92. *Id.* at § 8, 79 Stat. at 441.

93. U.S. CONST. amend XIV, § 1; Voting Rights Act of 1965 §10, 79 Stat. at 442.

94. *Id.* at § 11(c), 79 Stat. at 442.

95. *Katzenbach*, 383 U.S. at 318.

96. Lester M. Salamon & Stephen Van Evera, *Fear, Apathy, and Discrimination: A Test of Three Explanations of Political Participation*, 67 AM. POL. SCI. REV. 1288, 1290 (Dec. 1973). For example, in the 1971 Mississippi elections, “309 blacks ran for public office at either the state or county level. Of these, 259 lost, including 28 out of 29 candidates for state legislature, 10 out of 10 candidates for Chancery Clerk (county executive), 14 out of 14 candidates for Sheriff, 10 out of 10 candidates for county School Superintendent, and 67 out of 74 candidates for county Board of Supervisors, even though virtually all of candidates were running in districts with black majorities.”

97. PARKER, *supra* note 5, at 30-31.

98. McMillen, *supra* note 85, at 352.

99. Salamon & Van Evera, *supra* note 96, at 1300. “The evidence suggests quite powerfully that the heritage of exploitation and repression, sustained by persistent

the white political and business elite a particularly powerful weapon to discourage African Americans from asserting civil or political rights. As one scholar noted: "If a black became 'uppity' and began demanding his 'rights,' it was easy to organize a comprehensive program of coercion: to have him fired, deprived of a loan at the bank or store, barred from receiving welfare, and harassed by the authorities."¹⁰⁰ One banker is quoted as telling a black customer seeking a loan: "If you can afford to vote, you don't need a loan."¹⁰¹ Black Mississippi teachers commonly cited fear of losing their job as the reason they chose not to vote.¹⁰² These express or implied threats of economic retaliation – with the commiserate harm not only to the potential voter but also to their family – created strong disincentives for some African Americans to go to the polls. Add to this the reality that technology and automation were changing the nature of the farming industry – where many African Americans in the south worked – making their economic position even more vulnerable to economic coercion.¹⁰³ Thus, for individuals in the rural south, even while living in a democratic society, their individual situation was more akin to what James Prothro described as a "totalitarian local system" because of the fear of economic reprisal by the white economic and political elite for asserting the right to vote.¹⁰⁴ These cultural and social barriers to participation could not be remedied merely by passage of a statute. Instead, what was needed was a concerted effort to educate and mobilize the African American community. Only through organization and collective action could an individual, who separately might be hesitant to participate due to fear of reprisal, be willing to become an active participant in the electoral process. However, collective action organized by non-local individuals provided further ammunition for local families as local white community members were inclined to blame "outsiders" for mobilization efforts instead of local citizens.¹⁰⁵

There are a number of scholars who debate the reasons that motivated individuals come together to assert their collective rights.¹⁰⁶ In the con-

economic dependence and coercion, may be doing to the Voting Rights Act of 1965 what it did to the Emancipation Proclamation a century before: transforming it into a legal form lacking social content." *Id.*

100. *Id.* at 1294.

101. PAT WATERS & REESE CLEGHORN, *CLIMBING JACOB'S LADDER: THE ARRIVAL OF NEGROES IN SOUTHERN POLITICS* 129 (1967).

102. *Voting Rights: Hearing on H.R. 6400 and Other Proposals to Enforce the 5th Amendment of the Constitution Before the H. Comm. on the Judiciary*, 89th Cong. 301 (1965) (Exhibit No.56 – Voting Rights of Negro Teachers in Four Mississippi Counties by James W. Prothro & Lewis Lipstats).

103. McMillen, *supra* note 85, at 361 ("Always dependent on the beneficence of white landowners, these Delta Negroes were made doubly vulnerable by the encroachments of such labor-displacing developments as chemical herbicides and mechanical harvesters. . . .").

104. McMillen, *supra* note 85, at 354 ("A dependent people in a land of unremitting white supremacy, blacks in some quarters of Mississippi lived under what James W. Prothro chose to call 'a totalitarian local system.'").

105. Salamon & Van Evera, *supra* note 96, at 1299.

106. See Mancur Olson, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965); Elinor Ostrom, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1990); Kenneth A. Shepsle & Mark S.

text of civil rights it has been theorized that organization for collective action may be stimulated by past harms that were inflicted on those involved in the movement. The memories of these events – e.g. the Emmett Till lynching in 1955¹⁰⁷ or the images of the Selma to Montgomery marches in 1965 – created a collective consciousness that political entrepreneurs utilized to encourage collective action. In other words, “a group’s shared sense of the past could contribute to collective action by strengthening the bonds of group identity, providing a frame to articulate grievances, or by reducing material incentives for group members to engage in cooperative action.”¹⁰⁸ Black consciousness could also be achieved through education of the nature and basis of their status. Instead of assuming, as the white political elite would stress, that the poor and disenfranchised African Americans were in that position because of inherent characteristics or the lack of a work ethic, African Americans began to recognize that the cause of their plight was not their own shortcomings – but instead a social construction by the ruling elite.¹⁰⁹ As this realization grew, the sense of collective political empowerment also grew: “The result [was] a mentally healthier and politically more active black citizenry. The strong sense of self-confidence and a deep suspicion regarding the willingness and ability of government to respond to their needs. . . proved to be an important catalyst, mobilizing blacks to seek to influence the policy process.”¹¹⁰

An activated group consciousness could be utilized as an effective weapon against the closed system of the 1960s South. Events such as the mock elections in which large numbers of African Americans participated, the Freedom Summer, and (in Mississippi) the formation of the Mississippi Freedom Democratic Party “heralded the birth in Mississippi of a proud new black psyche, a new sense of militancy and racial solidarity.”¹¹¹ The rise of slogans such as “black power” gained particular salience in Mississippi – where it was believed that the only way of overcoming the obstruction of the ruling elite was to gain power through

Bonchek, ANALYZING POLITICS: RATIONALITY, BEHAVIOR, AND INSTITUTIONS 221–243 (1997).

107. *Stories: The Long Arm of the Law – Reopened Investigation into the 1955 Kidnapping and Murder of Emmett Till*, FEDERAL BUREAU OF INVESTIGATION (June 1, 2004), <http://www.fbi.gov/news/stories/2004/june>
108. Frederick C. Harris, *It Takes a Tragedy to Arouse Them: Collective Memory and Collective Action During the Civil Rights Movement*, 5 SOC. MOVEMENT STUD. 19, 20 (May 2006). See Charles Payne, I’VE GOT THE LIGHT OF FREEDOM: THE ORGANIZING TRADITION AND THE MISSISSIPPI FREEDOM STRUGGLE 201–202 (1995) (“[I]n the spring of 1963, those whites desperately opposed to the [civil rights] movement were slow to understand that the calculus of repression had changed. They had now entered a situation in which a significant number of Greenwood [Mississippi] Blacks, no longer feeling so alone and in some cases no longer fearing that there was much that could be done to them anyway, reacted to each additional act of intimidation by becoming more aggressive themselves.”).
109. See Richard D. Shingles, *Black Consciousness and Political Participation: The Missing Link*, 75 AM. POL. SCI. REV. 76 (1981).
110. *Id.* at 89.
111. McMillen, *supra* note 85, at 369.

solidarity.¹¹² In fact, the right to register and vote became synonymous with the goals of solidarity and collective action. "Voter registration [is a source of] black power. Power is invested in the ballot and that's why the white man worked like hell to keep you away from it. . . . We were even taught that it was not right to register [to vote]."¹¹³

The creation of a race-based collective consciousness, while controversial in the civil rights community, was critical to ensure the mobilization necessary to press for change. It helped to encourage and develop black leaders, to prompt the participation of individuals who might otherwise stay on the sidelines, which in turn provided the nation a glimpse of the trials of southern blacks in seeking to vote. In short, black consciousness created an effective counter to the obstructions of the white power elite. Black consciousness had a concrete goal – black political power – demonstrated through voting and winning elections.¹¹⁴

For activists, solidarity was a means to an end. The end was political power. Activists believed that, through the vote, African Americans would be able to have a voice in the political institutions from which they had been excluded.¹¹⁵ A presumption underlying the push for the vote for African Americans was that once an African American preferred candidate was elected, then they would work to enact legislation that benefited the African American community.

As the African American community came together to assert their collective rights, those opposed to the rise in black political power and the commensurate loss of power for themselves, started to look for methods that would dilute the African American vote. A primary method was to adjust voting laws – known as "massive resistance statutes."¹¹⁶ Prior to 1966 Mississippi law required all counties in the state to be divided into five districts with a representative from each district sitting on a board of supervisors. In 1966 – in direct response to the Voting Rights Act – the Mississippi legislature allowed counties to abolish the districts and elect members of the board of supervisors based on the vote of the entire

112. Joyce Ladner, *What 'Black Power' Means to Negroes in Mississippi*, 5 SOCIETY 7, 8 (1967). "Since many of the efforts Mississippi Negroes made to change the social structure – through integration – were futile, they began to reconceptualize their fight for equality from a different perspective, one designed to acquire long-sought goals through building bases of power." *Id.*

113. *Id.* at 12.

114. *Id.* "Black power is political power held by Negroes. It means political control in places where they comprise a majority . . . Black power is legitimate because any time people are in a majority, they should be able to decide what will and will not happen to them."

115. *Id.* ("Black power means controlling the Negro community. It means that if the Negro community does not want white cops coming in, they can't come in. It means political, economic, and social control."). Activists also discussed collective power African Americans could acquire if they started putting "money together to organize cooperatives, and other kinds of businesses." *Id.* "We can get political power by putting Negroes into public offices We will have to tell them to vote only for Negro candidates." Joyce Ladner, *What 'Black Power' Means to Negroes in Mississippi*, 5 SOCIETY 7, 8 (1967). See also PARKER, *supra* note 5, at 30.

116. PARKER, *supra* note 5, at 7, 35. Many of these changes were enacted during the 1966 Mississippi legislative session (the "massive resistance session.").

county (an at large election) but required that each supervisor actually reside in the district she was to represent.¹¹⁷ Additional tools utilized to neutralize the impact of the Voting Rights Act included: “racial gerrymandering of district lines, abolishing elective offices and making them appointive, and increasing the qualifying requirements for candidates running for elective office.”¹¹⁸ While legislators certainly knew that these procedures would be challenged, they could take comfort in the fact that the legal challenges would take years to resolve (a lesson learned in the school desegregation cases) and that they had a greater chance of having their actions upheld by avoiding explicit references to race in debating the changes.¹¹⁹

The question was whether these type of structural changes to the voting process implicated the Voting Rights Act. If they were changes to the “procedure with respect to voting” then these changes required preclearance from the Justice Department before going into effect. Inevitably, southern states implemented these procedures without approval.

In *Allen v. State Board of Elections*, the Supreme Court faced the question of whether the Mississippi change from district to at-large voting implicated the Voting Rights Act and thus were subject to preclearance review. Though the change did not restrict anyone from voting. It was not a procedure, such as the poll tax or literary test, that placed actual barriers. The court had to determine if this type of change – which had the effect of denying African Americans *representation* but not the franchise – should fall under the preclearance provisions of the Voting Rights Act. Chief Justice Warren, writing for the court, determined that Section 5 [of the Voting Rights Act] “was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of race.”¹²⁰ He went on to note that,

The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot. . . . Voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole. This type of change could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting.¹²¹

The *Allen* decision not only expanded the types of voting changes that were subject to Justice Department preclearance review, it also provided an expanded concept of vote dilution. The Court had previously recog-

117. *Allen v. State Bd. of Elections*, 393 U.S. 544, 550 (1969). In addition to the change from district to at large elections of members of the board of supervisors, the *Allen* case dealt with a number of other similar changes – e.g. an amendment that changed the county superintendents of education position from an elected position to an appointed position. This amendment also placed restrictions on the ability of independent candidates to run in general elections. *Id.*

118. PARKER, *supra* note 5, at 1.

119. See PARKER, *supra* note 5, at 7, 39.

120. *Allen*, 393 U.S. at 565. Voting Rights Act of 1965 § 5, Pub. L. No. 89-110, 79 Stat. 437-46 (1965) (codified at 42 U.S.C. § 1973 (1965)).

121. *Id.* at 569.

nized vote dilution claims with regard to the individual vote in reapportionment cases, but *Allen* broadened the concept to include dilution of a group of voters.¹²²

Since changes to laws that resulted in the dilution of the vote had been deemed as the effective denial of the right, it stood to reason that such dilution would “deny or abridge” voting rights, which was prohibited under Section 2 of the Act.¹²³ The Supreme Court addressed this issue in the 1979 case *Mobile v. Bolden*.¹²⁴

In *Bolden*, African American citizens of Mobile challenged the at-large system of electing City Commissioners - arguing that the system diluted African American voting strength and therefore, under *Allen* effectively denied them the right to vote under Section 2 of the Voting Rights Act.¹²⁵ The challenged procedure had been in effect in Mobile since 1911.¹²⁶ The Court ruled that Section 2’s prohibition was identical to the prohibitions of the Fifteenth Amendment.¹²⁷ Turning to prior decisions interpreting the Fifteenth Amendment, the Court held that, to demonstrate a denial or abridgement of the right to vote when the challenged action was neutral on its face, the challenger must prove that the action was motivated by a discriminatory purpose.¹²⁸ Absent proof of a “racially discriminatory motivation” in enacting the challenged voting procedure, there was no Section 2 violation.¹²⁹ This was an explicit rejection of the argument that any dilution of African American votes was actionable. As the Court succinctly put it:

The Fifteenth Amendment does not entail the right to have Negro candidates elected That Amendment prohibits only purposeful discriminatory denial or abridgement by government of the freedom to vote “on account of race, color, or previous condition of servitude.” Having found that Negroes in Mobile “register and vote without hindrance,” the District Court and Court of Ap-

122. QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990 32-33 (Chandler Davidson & Bernard Grofman, eds., 1994).

123. *Mobile v. Bolden*, 446 U.S. 55, 60 (1980), *superseded by statute*, The Voting Rights Act of 1965 § 2, 79 Stat. 437, 437 (1965), *as recognized in* *Thorton v. Gingles*, 478 U.S. 30 (1986). “No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by an State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.” *Id.*

124. *Bolden*, 446 U.S. at 55.

125. *Id.* at 58.

126. *Id.* at 59.

127. *Id.* at 61 (“The view that [Section 2] simply restated the prohibitions already contained in the Fifteenth Amendment was expressed without contradiction during the Senate hearings.”).

128. *Id.* at 62.

129. *Id.* On remand, the challengers were faced with discovering evidence that the decision to adopt an at large system in the early twentieth century was motivated by racial discrimination. After hiring three historians who spent numerous hours researching the issue, the court found sufficient evidence that adoption of the at large system was in fact racially motivated. DAVIDSON & GROFMAN, *supra* note 122, at 33-34.

peals were in error in believing that the [City of Mobile] invaded the protection of that Amendment in the present case.¹³⁰

Bolden triggered Congressional response. Debate centered on whether the test for discrimination under Section 2 should be based on the *results* of elections (results test) or should instead focus on the intent of the state actors to determine whether discrimination occurred (the *Bolden* intent test).¹³¹

Proponents of the results test argued that courts, in identifying discrimination, should look to the totality of the circumstances, instead of focusing solely on the intent of the state actors who adopted the system.¹³² Those opposed to the results test argued that it would, in effect, create a proportionality standard, where voting practices are considered discriminatory if minority officials are elected at a lower rate than the makeup of the community – regardless of the presence of discriminatory intent.¹³³ Language was included in the bill that proportionality would not be a basis for violation – but opponents were skeptical that the language would be sufficient to satisfy their concerns.¹³⁴

Intent test supporters contended that *Bolden* merely restated prior law and no amendment to the Voting Rights Act was necessary.¹³⁵ Under *Bolden*, they argued, a claimant could establish a violation through more than direct evidence of discriminatory motive. A violation could also be established through indirect evidence of improper motive.¹³⁶ Questions arose as to whether evidence of discriminatory intent (direct or indirect) could be established in most cases because some of the challenged voting systems were decades old – and evidence of the intent at the time the challenged process was enacted would be difficult if not impossible to obtain.¹³⁷ Opponents also argued that the Voting Rights Act should focus on more than merely the intent of the original actors – its purpose should be to prohibit discrimination regardless of whether the intent of establishing the system was discriminatory.¹³⁸

Senator Robert Dole (R-KS) provided a compromise. He suggested amending the language to provide that the test for discrimination should be whether the *implementation* of the voting system was discriminatory – not the ultimate outcome of elections. Under this approach, the question became not who minorities voted for, but whether they had “access and

130. *Bolden*, 446 U.S. at 65.

131. See generally Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1397-98 (1983) (detailing the principle elements of the controversy regarding in Section 2).

132. *Voting Rights Act, Vol. 1, Hearing on S.53, S.176, S.1975, S.1992, & H.R. 3112 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary, 97th Cong., 2nd 199* (1982) (statement of Orrin Hatch, Sen.).

133. Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1397-98 (1983)

134. *Id.* at 1400-01.

135. *Id.* at 1397.

136. *Id.* at 1404.

137. *Id.*

138. *Id.* at 1405.

whether or not the system is open.”¹³⁹ Senator Dole’s amendment alleviated the proportionality concern of enough Senators to lead to the amendment’s passage.¹⁴⁰

As amended Section 2 prohibits conduct that “results in a denial or abridgement of” voting rights.”¹⁴¹ A new subsection was also added, to reflect Senator Dole’s proposal.¹⁴² Thus, the amendment created a Section 2 violation when there was either direct evidence that a system was adopted because of discrimination or “that the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process.”¹⁴³ The concern that this test would become essentially a quota system for particular groups – i.e. blacks or Hispanics –prompted two actions. First, the Dole Amendment provided that Section 2 did not create “a right to have members of a protected class elected in numbers equal to their proportion in the population.”¹⁴⁴ Second the Senate Judiciary Committee Report set out “typical factors” that might be considered when analyzing a claim under the “totality of the circumstances” test. These factors include:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

139. *Voting Rights Act, Vol. 2 Appendix, Hearing on S.53, S.176, S.1975, S.1992, & H.R. 3112 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary, 97th Cong., 2nd 80 (1982) (statement of Robert Dole, Sen.).*

140. Boyd & Markman, *supra* note 105, at 1420-21.

141. Voting Rights Act of 1965 §2, 42 U.S.C. § 1973(a) (1982).

142. 42 U.S.C. § 1973(b)(1982) (“A violation . . . is established if, based on the totality of circumstances, it is show that the political process . . . are not equally open to participation by members of a class of citizens protected . . . in that its members have less opportunity than other[s] . . . to participate in the political process . . . the extent to which members of a protected class have been elected to office . . . is one circumstance which may be considered: *Provide That* nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.”).

143. S. REP. NO. 97-417, at 205 (1982).

144. Voting Rights Act of 1965, 42 U.S.C. 1973(b)(1982).

6. whether political campaigns have been characterized by overt or subtle racial appeals;
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.¹⁴⁵

Additional factors include “whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group” and “whether the policy underlying the state or political subdivision’s use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.”¹⁴⁶

A. *Establishing a Violation of Section 2 After the 1982 Amendments*

The Supreme Court first considered the totality of the circumstances test proposed in Section 2 in *Thornburg v. Gingles*.¹⁴⁷ The case involved challenges to North Carolina’s redistricting plan for its state legislative bodies after the 1980 census. The challengers claimed that the redistricting scheme violated Section 2 by diluting African American citizens’ “ability to elect representatives of their choice.”¹⁴⁸ As Justice Brennan, writing for the Court, noted, “[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.”¹⁴⁹ Thus, for example, if multimember districts operate to cancel out the voting strength of a racial group within the district it would result in a violation of the Act.¹⁵⁰ However, as the Court notes, the fact that a racial group loses an election does not automatically create a violation of Section 2. The challengers have the burden of demonstrating that the challenged procedure “operates to minimize or cancel out their ability to elect their preferred candidates.”¹⁵¹ A violation is found when the impact not only to deprives a racial group of the ability to elect their preferred candidate, but also “allows those elected to ignore [minority] interests without fear of political consequences, leaving the minority effectively unrepresented.”¹⁵²

The *Thornburg* Court adopted the factors from the Senate report.¹⁵³ The Court, citing the factors held that the North Carolina redistricting plan violated Section 2.¹⁵⁴ First, they found that North Carolina had “officially discriminated against its black citizens with respect to their exercise of the voting franchise from approximately 1900 to 1970” through various procedural mechanisms (such as the poll tax and literacy test).¹⁵⁵ Second, “historic discrimination in education, housing, employment, and health

145. S. REP. NO. 97-417, at 206-07 (1982) (quoted with approval in *Thornburg v. Gingles*, 478 U.S. 30, 36-37 (1986)).

146. *Id.* at 207.

147. *Gingles*, 478 U.S. 30 (1986).

148. *Id.* at 46.

149. *Id.* at 47.

150. *Id.* at 46-51.

151. *Id.* at 48.

152. *Id.* at 48 n.14 (1986) (citation omitted).

153. S. REP. NO. 97-417, at 206-07 (1982)

154. *Thornburg v. Gingles*, 478 U.S. 30, 36-37 (1986)

155. *Id.* at 38.

services had resulted in a lower socioeconomic status for North Carolina blacks as a group than for whites."¹⁵⁶ This lower status "both gives rise to special group interests and hinders blacks' ability to participate effectively in the political process and to elect representatives of their own choice."¹⁵⁷ Third, the voting procedures were found to "operate to lessen the opportunity of black voters to elect candidates of their choice."¹⁵⁸ Here, the court noted that North Carolina had a majority vote requirement for primary elections – which "present[ed] a continuing practical impediment to the opportunity of black voting minorities to elect candidates of their choice."¹⁵⁹ Fourth, white candidates encouraged voters to choose candidates based on race by appealing to racial prejudice. The impact "lessen[ed] to some degree the opportunity of black citizens to participate effectively in the political processes and to elect candidates of their choice."¹⁶⁰ Fifth, the court considered how successful African Americans had been in winning elections for office.¹⁶¹ The Court noted that, while it had become possible for African Americans to be elected to public office in North Carolina, "in comparison to white candidates running for the same office, black candidates [are] at a disadvantage in terms of relative probability of success"¹⁶² and that "the overall rate of black electoral success has been minimal in relation to the percentage of blacks in the total state population."¹⁶³ Finally, the Court noted that voting in the challenged area was racially polarized.¹⁶⁴

In addition to delineating the necessary elements to evaluate in a Section 2 claim, the Court faced the question of determining how challenges should demonstrate racial polarization. The district court looked for a correlation between race and voting – simply identifying whether race correlated with vote.¹⁶⁵ North Carolina argued that the test should consider more than correlation – that the Court should consider factors other than race to ensure that race was the true motivating factor for polarization.¹⁶⁶ The state proposed a test in which the court took into account factors such as "party affiliation, age, religion, income, incumbency, education, campaign expenditures."¹⁶⁷ The goal, according to the State, was to utilize statistical analysis to separate out these different motivations and calculate the likely impact of race versus party affiliation versus age, etc.¹⁶⁸ The goal would be to determine whether or not race was the "primary determinant of voter behavior."¹⁶⁹ In other words, if statistical anal-

156. *Id.* at 39.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Thornburg v. Gingles*, 478 U.S. 30, 40 (1986).

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 41.

165. *Id.* at 61.

166. *Thornburg v. Gingles*, 478 U.S. 30, 61 (1986).

167. *Id.*

168. *Id.*

169. *Id.* at 62.

ysis demonstrated that voting patterns are correlated more with socioeconomic level than race – then the voting, while perhaps polarized, could not be considered *racially* polarized.¹⁷⁰

The Court rejected this approach – holding that voter polarization “means simply that the race of voters correlates with the selection of a certain candidate or candidates; that is, it refers to the situation where different races (or minority language groups) vote in blocs for different candidates.”¹⁷¹ The problem with the North Carolina approach, according to the Court, was that race and socioeconomic status were highly correlated and indicative of past discrimination.¹⁷² For example, an African American voter who worked menial jobs (low socioeconomic position) because of discrimination could appear to be motivated by socioeconomic status when that characteristic exists because of underlying problems of racism and discrimination.¹⁷³ The Court also noted that a more stringent test would always provide proof that vote was based on something other than race – e.g. African Americans would appear to vote as a “bloc” based not on race but on the policy positions of the candidate who supported positions consistent with socioeconomic status (with the same being true for white voters).¹⁷⁴ The Court held that this analysis would allow discriminatory actions to hide behind these justifications deny “the fact that race and socioeconomic characteristics are often closely correlated” and would “neither a practical evaluation of reality nor a functional analysis of vote dilution.”¹⁷⁵

IV. CONSIDERING THE VOTING RIGHTS ACT IN CONTEXT

With the history and context of the Voting Rights Act in mind, this Part discusses the role of the Act today. The Act is structured to operate as a “command and control” method of regulating voting requirements and prohibiting voting restrictions. The Act imposes rigid standards, and does “not allow regulated actors latitude to make decisions about how most effectively, in their own diverse contexts, to realize the aims of the Act; those actors were the object of the act’s mistrust.”¹⁷⁶ This “command

170. *Id.* at 64 (“Appellants and the United States contend that the legal concept of ‘racially polarized voting’ refers not to voting patterns that merely *correlated with the voter’s race*, but to voting patterns that are *determined primarily by the voter’s race*, rather than by the voter’s other socioeconomic characteristics.”) (emphasis original).

171. *Thornburg v. Gingles*, 478 U.S. 30, 62 (1986).

172. *Id.* at 64.

173. *Id.* at 64-65.

174. *Id.* at 66.

175. *Id.* at 66 (“We can find no support in either logic or the legislative history for the anomalous conclusion to which appellants’ position leads – that Congress intended, on the one hand, that proof that a minority group is predominantly poor, uneducated, and unhealthy should be considered a factor tending to prove a § 2 violation; but that Congress intended, on the other hand, that proof that the same socioeconomic characteristics greatly influence black voters’ choice of candidates should destroy these voters’ ability to establish one of the most important elements of a vote dilution claim.”).

176. Richard H. Pildes, *Political Competition and the Modern VRA*, in *THE FUTURE OF THE VOTING RIGHTS ACT 7-8* (David L. Epstein, Richard H. Pildes, Roldolfo O. de la Garza, & Sharyn O’Halloran eds., 2006).

and control” approach was necessary when African Americans were restricted from full participation in the democratic process. Local officials could not be trusted to have discretion in the area of voting rights because they would utilize any available avenue to deny the vote to African Americans.¹⁷⁷ However, the context – both political and cultural – has changed in the forty-plus years since the passage of the Act.

At the time of the Voting Rights Act’s passage, African Americans made up a majority of the population in many jurisdictions in the South. The lack of participation and representation was not based on too few votes, but on obstacles to voting – the poll tax, literary test, etc. The Voting Rights Act was enacted to remove these obstacles, and it succeeded. Today, in many jurisdictions where there is an African American majority, African Americans have assumed political power. The change is telling. In 2006, black voter registration in Mississippi exceeded white registration by 1.5%.¹⁷⁸ In addition, the number of African American office holders at every level has increased dramatically since 1970.¹⁷⁹

Even more impressive is the number of African American elected officials in the states with the largest percentages of black residents as of the 2010 census. These six states alone – which includes only one state in the top ten in total population – account for over 43% of the total number of black elected officials. To demonstrate the tremendous amount of success, consider that in 2000, Mississippi and Alabama had more elected African American officials than the entire country in 1970.¹⁸⁰

TABLE 1¹⁸¹

State (total population rank)	African American percentage of population	Number of local offices held in 2000 ¹⁸²
Mississippi (31)	38	604
Louisiana (25)	33	383
Georgia (9)	32	387
Maryland (19)	31	92
South Carolina (24)	29	330
Alabama (23)	27	545

177. *Id.*

178. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 227 (2009) (Thomas, J. dissenting) (“The current statistical evidence confirms that the emergency that prompted the enactment of § 5 has long since passed. By 2006, the voter registration rates for blacks in Alabama, Louisiana, and Mississippi had jumped to 71.8%, 66.9%, and 72.2%, respectively. . . . In 2006, the disparity [between white and black voter registration] was only 3 percentage points in Alabama, 8 percentage points in Louisiana, and in Mississippi, black voter registration actually exceeded white voter registration by 1.5 percentage points.”).

179. DAVID A. BOSITIS, JOINT CENTER FOR POLITICAL AND ECONOMIC STUDIES, *BLACK ELECTED OFFICIALS: A STATISTICAL SUMMARY 17* (2000)

180. *Id.* at 5.

181. U.S. CENSUS BUREAU, *THE BLACK POPULATION: 2010* (C2010BR-06) (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf>

182. Local officials are defined as county officials and municipal officials – this includes those serving on a county governing bodies or other county-wide boards, mayors and members of municipal governing bodies and boards.

The political success of African Americans – attributed to the Voting Rights Act – raises an important question. With these successes, what is the role of the Voting Rights Act today? There is no longer the type of blatant, officially sanctioned race-based vote-denying policies that existed in the 1960s. These obstacles were removed in the first decade of the Act, in what has been described as the “Era of Participation.”¹⁸³ As the Voting Rights Act was enforced, there was an influx of new voters into the system. The political parties responded by staking out positions on issues of civil rights to entice these new voters. As the positions crystallized, old divisions and factions that held together the previously ideologically diverse parties began to break down.¹⁸⁴ As the parties became ideologically pure, they also became more polarized. In fact, one scholar argues that the current level of hyper-partisanship was prompted by the passage of the Voting Rights Act and the impact the influx of African American voters had on the system.¹⁸⁵ The 1995 Republican revolution in Congress as the point in time that began the era of extreme partisanship we see today.¹⁸⁶

In the current political and cultural context in which the original barriers to voting have been removed and partisanship rules the day, the Voting Rights Act takes on a new dimension. It is now primarily utilized to make claims of vote dilution – as opposed to intentional discrimination.¹⁸⁷ This is a different type of concern. The point here is not to say that Voting Rights Act has lost relevance, but to note that the Act has taken on new role as societal and political attitudes shifted.

The combination of the change in the focus of the Voting Rights Act from official discriminatory policies to discriminatory results, coupled with the shift to a more polarized national political environment created “enforcement space.” The term “enforcement space” as used in the Voting Rights Act context is analogous to the way the United States Supreme

183. Michael J. Pitts, *The Voting Rights Act and the Era of Maintenance*, 59 ALA. L. REV. 903, 904 (2008) (“[T]he hallmarks of the Era of Participation involved the creation, implementation, and enforcement of voting rights remedies that completely outlawed the use of literacy tests . . . that allowed federal officials to equitably apply registration rules in places where local officials refused to do so, and that mandated the conducting of elections in [languages other than English].”).

184. Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273, 297 (2011) (“The political realignment launched by the VRA [Voting Rights Act] was thirty to forty years in the making. It has helped produce a world of political parties internally more coherent and unified and externally more differentiated and polarized from each other than in the pre-VRA world.”).

185. *Id.*

186. *Id.*

187. Jason Rathod, *A Post-Racial Voting Rights Act*, 13 BERKELEY J. AFR. AM. L. & POL’Y 139, 187 (2011) (“Following litigation in the wake of the 1982 amendment, majority-minority districts became the surest way for states to comply with Sections 2 and 5.”); Benjamin E. Griffith & David D. O’Donnell, *Sections Two and Five as Amended by The Voting Rights Act Reauthorization and Amendments Act of 2006*, in AMERICA VOTES! A GUIDE TO MODERN ELECTION LAW AND VOTING RIGHTS 148 (Benjamin E. Griffin ed., 2008) (“Over the course of time these barriers [poll tax, literacy tests, white candidate slating] were eliminated from the electoral landscape and the courts began to turn their attention to claims of ‘minority vote dilution,’ . . .”).

Court chooses which cases to put on its docket. It has been noted that as societal concerns evolve, space on the Supreme Court's docket opens up to consider the new issues.¹⁸⁸ For example, issues related to civil liberties moved onto the Supreme Court's agenda as the Court resolved the economic issues that had dominated the Court's agenda prior to the 1940s.¹⁸⁹

The same idea of space applies to the Voting Rights Act. After the voting obstacles that existed in 1965 were eliminated, space opened on the Justice Department's agenda to determine what type of actions were sufficiently serious to justify intervention.¹⁹⁰ When the presence of enforcement space with extreme partisanship are combined, and the opportunity arises for the Voting Rights Act to be utilized as a tool for partisan gains. Each new administration is able to determine the type of voting rights violation will take priority.¹⁹¹ In this environment it is not surprising that claims of partisan enforcement of the Voting Rights Act were made against the George W. Bush administration, and have continued against the Obama administration.¹⁹²

188. RICHARD L. PACELE, JR., *THE TRANSFORMATION OF THE SUPREME COURT'S AGENDA: FROM THE NEW DEAL TO THE REAGAN ADMINISTRATION 181-90* (1991).

189. *Id.*

190. The use of the word "space" in this context is important. There are certain types of obligations — such as preclearance under Section 5 of the Act — that exists outside this discretionary space. This is not to say that these non-discretionary actions are immune to claims of partisanship, but this article is particularly concerned with discretionary actions brought by the Justice Department under Section 2 of the Voting Rights Act.

191. Adam B. Cox, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 49-50 (2008) (finding empirical evidence that partisanship governs decision making of federal judges in Voting Rights Litigation).

192. Patrik Jonsson, *New Black Panther Party Voter Intimidation Case: "Bombshell" for Obama?* THE CHRISTIAN SCIENCE MONITOR (Sept. 24, 2010), <http://www.csmonitor.com/USA/Politics/2010/0924/New-Black-Panther-Party-voter-intimidation-case-Bombshell-for-Obama> (discussing testimony of former head of Department of Justice Voting Right's Section "alleging that under President Obama, the dismissive attitude . . . toward white claims of disenfranchisement at the hands of blacks has essentially become Justice Department policy"); Editorial, *Racialist Justice; Attorney General Holder's Lawyers Won't Protect Whites*, THE WASHINGTON TIMES (July 16, 2010), <http://www.washingtontimes.com/news/2010/jul/15/racialist-justice/> (arguing that the Justice Department "has adopted a policy of refusing to enforce civil rights laws on behalf of whites victimized by minority perpetrators"); Bill Nichols, *Voting Rights Act Pointed in a New Direction*, USA TODAY (Apr. 3, 2006), http://usatoday30.usatoday.com/news/nation/2006-04-03-voting-lawsuit_x.htm?csp=34 (stating that the first suit against an African American for violating voting rights of whites "marks a striking change of focus by the Bush administration on voting rights cases"); MARK A. POSNER, *THE POLITICIZATION OF JUSTICE DEPARTMENT DECISIONMAKING UNDER SECTION 5 OF THE VOTING RIGHTS ACT: IS IT A PROBLEM AND WHAT SHOULD CONGRESS DO?* AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY 1 (January 2006) available at <http://www.acslaw.org/files/Section%205%20decisionmaking%201-30-06.pdf> (explaining that an issue raised in considering renewal of Section 5 of the Voting Rights Act "is the degree to which Justice Department enforcement of Section 5 has been corrupted by decisionmaking based not on a good faith application of law to the facts of individual preclearance requests, but instead on partisan political interests."). Posner concluded that there was a "real and significant, but at the same time, limited concern" about use of Section 5 for partisan purposes in the past and in the future. *Id.* at 2.

Ellen Katz, an election law scholar,¹⁹³ argues that partisan use of the Voting Rights Act – even if the idea may seem unsavory – can operate in practice to assert valid claims of voting discrimination.¹⁹⁴ Professor Katz may be correct that partisan enforcement of the Voting Rights Act will often involve valid claims of discrimination even if pursued for partisan purposes. However, there is also a partisan use of the Voting Rights Act that has the potential of having a disproportionate and inappropriate impact on African Americans.

To understand this potential, it is important to understand how discriminatory intent can be established. Often the official policy or action that is at issue is racially neutral on its face. To prove that these types of laws were enacted with a racially discriminatory intent, evidence of past discriminatory conduct could be used to frame the current facially-neutral policy.

The case often cited to demonstrate how this past-conduct-indicating-present-intent approach operates is *Village of Arlington Heights v. Metropolitan Housing Development Corporation*.¹⁹⁵ In that case the Supreme Court addressed a situation in which an organization (the Metropolitan Housing Development Corporation (MHDC)) sought to have a piece of property rezoned to build low- and moderate-income housing.¹⁹⁶ The Village of Arlington denied the rezoning request and MHDC challenged the denial arguing that it was done with racially discriminatory intent – because the decision would have a disproportionate impact on minorities.¹⁹⁷ The Village argued that there was no discriminatory intent, but that the request was denied “to protect property values and the integrity of the Village’s zoning plan.”¹⁹⁸

The Court (which ultimately held there was not sufficient proof of discriminatory intent), noted that “[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.”¹⁹⁹ Then the Court notes, “[t]he historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. . . . The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker’s purposes.”²⁰⁰ In other words, prior statements and conduct could be used as proof of discriminatory intent for actions subsequently taken. In the appropriate context, this is a reasonable (and necessary) test to determine discrimination.

193. Faculty Bio: Katz, Ellen D, UNIVERSITY OF MICHIGAN LAW SCHOOL, <http://www.law.umich.edu/FacultyBio/Pages/FacultyBio.aspx?FacID=ekatz> (last visited May 28, 2013).

194. Ellen D. Katz, *Democrats at DOJ: Why Partisan Use of the Voting Rights Act Might Not Be So Bad After All* 23 STAN. L. & POL’Y REV. 415, 418 (2012).

195. *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977). See also *Texas v. United States*, 887 F. Supp. 2d 133, 152 (D.D.C. 2012).

196. *Arlington Heights*, 429 U.S. at 254.

197. *Id.* at 257.

198. *Id.* at 259.

199. *Id.* at 266.

200. *Id.* at 267.

So what is the problem with this method of proof? As discussed above, many of the political accomplishments made by African Americans regarding the right to vote were based on an appeal to collective consciousness. This collective consciousness was often triggered through an appeal to a common racial objective. Activists made racial appeals to encourage African Americans to assert their rights. With enforcement space opening up and partisan considerations coming to the forefront, these prior statements could now be used as proof of discrimination against these former activists who are now public officials.

It is impossible at this point to say how this concern will arise in cases brought by the Justice Department in the future. The case of Ike Brown – as the first case brought alleging voting discrimination against an African American – provides an interesting case study. The case serves to demonstrate the main points of this paper. First, it shows how space has opened for the Voting Rights Act to become a partisan-based tool, where cases are brought (or perceived to be brought) on the partisan preferences of the administration in office.²⁰¹ It also demonstrates how prior activism by African American politicians could be used as evidence of a racial intent when taking future action.

V. THE CASE OF IKE BROWN

Noxubee County is in eastern Mississippi – bordering on Pickens County, Alabama. As of the 2010 census the county had a population of approximately 11,545, ranking it 67th in population among Mississippi's 82 counties.²⁰² The racial make-up of the county was 71.5% black and 27.4% white.²⁰³ With a median income of \$21,798, 36.1% of the population lives below the poverty line.²⁰⁴ It is ranked as the 55th poorest county in the United States.²⁰⁵

The story of African Americans in Noxubee County is similar to that in other localities around the south. Despite constituting a majority of the population, there was no black member of the county board of supervisors until 1971 (six years after passage of the Voting Rights Act).²⁰⁶ The Mississippi legislature's "massive resistance" to African American voting strength impacted Noxubee County as it did all Mississippi counties. When the legislature passed a statute requiring at-large elections at the

201. The idea of perception and the Voting Rights Act's symbolism is important. The Voting Rights Act has stood the test of time as a credible and objective enforcer of voting rights. If this perception begins to shift, the Voting Rights Act itself runs the risk losing legitimacy among voters.

202. U.S. CENSUS BUREAU, *State & County Quick Facts: Noxubee County, Mississippi* (2010), available at <http://quickfacts.census.gov/qfd/states/28/28103.html> (last visited Apr. 10, 2012).

203. *Id.*

204. *Id.*

205. *Poverty Rate*, DATAPLACE BETA, [http://www.dataplace.org/rankings/?=&period=+2000](http://www.dataplace.org/rankings/?=&period=) (last visited Apr. 10, 2012).

206. *United States v. Brown*, 494 F.Supp.2d 440, 449 (S.D. Miss. 2007) *aff'd*, 561 F.3d 420 (5th Cir. 2009) ("The year 1971 saw the county's first black candidates on the ballot, and the first black elected official, Joseph Wayne, who won a seat on the Board of Supervisors.").

county level (as opposed to the prior ward-based elections), the state-wide paper (the *Clarion Ledger*) reported that the state representative from Noxubee County said that, without the change to county-wide elections, "Noxubee County. . . might have trouble electing a white board because three districts would vote white and two wouldn't."²⁰⁷ Things have dramatically changed since 1970. At the time that Ike Brown's case went to trial,

Four of the five members of the Board of Supervisors are black; five of five members of the Election Commission are black; five of five members of the Board of Education are black; and with the exception of the county prosecuting attorney, all countywide elected officials are black, including the circuit clerk, chancery clerk, sheriff, tax assessor, superintendent of education, coroner, two justice court judges and two constables.²⁰⁸

Ike Brown came to Noxubee County in 1979, in the midst of the transition to African American political incorporation. He quickly developed the reputation as a "political boss" in county politics,²⁰⁹ and assumed the position as chair of the Democratic Executive Committee in 2000.²¹⁰ Brown believed that his goal in politics was to get his candidates elected and he selected and promoted candidates "focused above all else on remedying persistent racial inequality."²¹¹ Over the years, Brown gained a number of supporters and an equal number of enemies.

Brown's tactics as chair of the Democratic Executive Committee drew the attention of the George W. Bush Justice Department. The Department viewed Brown's actions as racially motivated to discriminate against whites in the county. In a move that was "unprecedented"²¹²; "extremely remarkable"²¹³; and a "dramatic symbol of the change of orientation under the current [Bush] administration,"²¹⁴ the Justice Department, for the first time, charged Brown, an African American, with violating the Voting Rights Act against white voters. The Justice Department brought suit under Section 2 of the Voting Rights Act.²¹⁵

As an "atypical Section 2 case" the court faced the threshold question of whether the Act applied to Brown's conduct at all.²¹⁶ In other words, considering the history and context of adoption of the Voting Rights Act,

207. PARKER, *supra* note 5, at 54.

208. *Brown*, 494 F.Supp.2d at 443. The court goes on to discuss African American success not only in elected positions but also with regard to positions of power in the Democratic party in the county, noting that the leading members of the party apparatus are overwhelmingly African American. *Id.*

209. Jerry Seper, *Lawsuit Accuses Black Officials of Violating Whites' Voting Rights*, THE WASHINGTON TIMES (Jan. 31, 2007), <http://www.washingtontimes.com/news/2007/jan/31/20070131-121248-8802r/?page=all>

210. *Brown*, 494 F.Supp. 2d. 440, 442.

211. COLIN CRAWFORD, UPROAR AT DANCING RABBIT CREEK: BATTLING OVER RACE, CLASS AND THE ENVIRONMENT xiv (1996).

212. *Brown*, 494 F.Supp.2d at 443.

213. Nichols, *supra* note 192(quoting Professor Steven Mulroy).

214. *Brown*, 494 F.Supp.2d at 443.

215. *Id.*

216. *Id.* at 444.

the court had to determine whether it applied to situations wherein white voters asserted a claim of discrimination against African Americans. The court first pointed out that the Voting Rights Act essentially restated the Fifteenth Amendment, and therefore should be interpreted in the same way as the Amendment.²¹⁷ Relying on cases holding that the Fifteenth Amendment applied regardless of race, the court held that Section 2 also applied to the denial of voting rights regardless of the race of the accused.²¹⁸

The court then faced the issue of whether the Justice Department had established its claim that Brown had discriminated.²¹⁹ The government claimed that Brown *intentionally* discriminated against white voters – making the case unusual for that reason alone.²²⁰ In order for the court to find a voting rights violation under Section 2 it must examine the “totality of the circumstances” to determine if the challenged action results in “members of the protected class having ‘less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.’”²²¹ The “totality of the circumstances” is usually evaluated by utilizing the factors set out in the Senate Report accompanying the 1982 Amendments. For direct discrimination claims the factors provide *evidence* of discrimination: “direct or indirect circumstantial evidence, including the normal inferences to be drawn from the foreseeability of defendants’ actions would be relevant evidence of intent.”²²²

Under *Arlington Heights*, intent to discriminate can be shown by prior actions — which provides circumstantial evidence to color subsequent action — even though the original actions would not constitute a violation of the Voting Rights Act (because the original actions are private as opposed to state action).²²³ The court found such circumstantial evidence in *Brown*. For example, in 1995, Ike Brown wrote an open letter “To the Black Voters of Noxubee County” in which he exhorted African American voters:

Don’t let them carry you back to the old days, when blacks were found dead in the jail, you couldn’t even go in the courthouse, you weren’t even respected, I help bring change to Noxubee County, and I will be back soon. You must win this one yourself. I am asking you to remember me by supporting these candidates who have pledge to keep the dream alive. . . . Please support these

217. *Id.* at 444-46.

218. *Id.* (quoting *Rice v. Cayetano*, 528 U.S. 495, 512 (2000) and *United Jewish Org. of Williamsburgh, Inc. v. Wilson*, 510 F.2d 512, 520 (2d Cir. 1975), *aff’d sub nom.* *United Jewish Org. of Williamsburgh, Inc. v. Carrey*, 430 U.S. 144 (1977)).

219. *Id.*

220. *Brown*, 494 F. Supp. 2d at 446. (“Most Section 2 cases brought since the 1982 amendment have been ‘results’ cases, rather than ‘intent’ cases, so there are few cases addressing the specific proof requirements in intent cases in the wake of the 1982 amendment.”).

221. *Id.* (quoting *United States v. Jones*, 57 F.3d 1020, 1023 (11th Cir. 1995)).

222. *Id.* at 447 (quoting *McMillan v. Escambia Cnty*, 748 F.2d 1037, 1046-47 (5th Cir. 1984)) (internal quotation marks omitted).

223. See *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977).

candidates. As Jessie Jackson said, ‘Keep Hope Alive Vote Black in ‘95.’²²⁴

This letter was sent five years before Ike Brown became Chairman of the Democratic Executive Committee in Noxubee County.²²⁵ As a private citizen, Brown was free to promote a race-based agenda.²²⁶ However, because this prior action can provide proof of discriminatory intent, these statements by Brown were regarded by the court as evidence that his subsequent official actions were discriminatory:

Brown’s comments and actions predating his tenure as NDEC chairman present a clear picture of Brown’s racial agenda and, to the extent it might otherwise be unclear, give context and meaning to his actions as NDEC chairman. This agenda did not change when he assumed his duties as chairman of the NDEC in 2000 following his election to the position at the 1999 county convention.²²⁷

For the court, without the prior racially-charged statements, it might have been “unclear” whether Brown’s official actions were the result of partisanship or racial discrimination. By considering the official actions in light of Brown’s prior statements the court was able to determine Brown’s intent.

The question before the court was whether Brown’s actions were based on party concerns or racial concerns. Much of his conduct was occurring during the era when a number of Mississippi Democrats were shifting to the Republican party. The court found that, while Brown may have partially been motivated by partisan concerns, he was at least partially motivated by race — to discourage white voters from voting in the Democratic primary.²²⁸

While this article focuses on the potentially dangerous precedent of allowing prior statements from civil rights activists to be used as proof of discriminatory intent under the Voting Rights Act, it is important to note that in the case of Ike Brown, the government presented additional evidence of Brown’s racial intent. After Brown became chairman of the Noxubee County Democratic Executive Committee, he attempted to recruit black candidates who were not qualified to run for office with the purpose of defeating a white candidate.²²⁹ When the candidate’s qualifications were challenged, Brown obstructed the attempt to present the challenge by holding a clandestine meeting on the petition without giving

224. *Brown*, 494 F.Supp.2d at 450. Also in 1994, Brown entered a polling location and announced to those in the room “You’ve got to put blacks in office, our candidates, because we don’t want white people over us anymore.” *Id.*

225. *See id.* at 442.

226. *Id.* at 452 (“All of these remarks and incidents. . . occurred prior to Brown’s ascent to the chairmanship of the NDEC and have not been suggested by the Government to have violated Section 2. Indeed, as an individual, Brown was free to promote his racial views and agenda among the electorate with impunity.”) (citing *Welch v. McKenzie*, 765 F.2d 1311, 1316 (5th Cir. 1985)).

227. *Brown*, 494 F.Supp.2d at 452.

228. *Id.* at 476–77.

229. *Id.* at 452–54.

sufficient notice.²³⁰ In addition, Brown published a letter in the local Noxubee County newspaper appealing to African American voters to vote the only white supervisor out of office – based . The letter read, in part, “[i]n 2003, 138 years after the end of slavery and 38 years after the passage of the Voting Rights Act we still have the vestiges of discrimination and slavery in Noxubee County. There is discrimination in the location of paved roads and slavery to the Board of Supervisors in Noxubee County.”²³¹

There was no evidence that these statements were actually true.

The government also presented evidence that Brown manipulated the absentee ballot process. For example, while Brown was serving as Chair of the Democratic Executive Committee, he hired notary publics to obtain absentee ballots and paid the notaries based on the number of ballots obtained (which is improper under Mississippi election law).²³² In Mississippi, in order to qualify for an absentee ballot, the voter must fit into a particular category (such as being disabled or being out of the country).²³³ There was evidence that Brown’s notaries would accept absentee ballots from individuals who did not fit into one of the statutorily recognized categories.²³⁴ Brown also interfered with the process of counting and challenging absentee ballots.²³⁵ Brown would instruct poll managers to count all the absentee ballots without giving poll watchers the opportunity to challenge them.²³⁶ Finally, at Brown’s direction, black poll workers provided improper “assistance” to voters — by soliciting to provide assistance without being asked — contrary to Mississippi law.²³⁷ In addition, poll workers would in some instances actually marking the ballot without consulting the voter.²³⁸

There was also evidence that Brown and his allies (which included the sheriff’s department) would treat white candidates and their supporters differently at the polls than African American candidates. For example, Brown demanded that a white candidate running for supervisor leave a voting location and threatened to call the sheriff’s office if he did not leave.²³⁹ Under Mississippi law, the candidate had a right to be at the location to cast his vote.²⁴⁰ The court also found that in 2003, Brown sent a press release to the local newspaper listing 174 voters, and stating: “They have either removed themselves from their precinct are in violation of Section 23-15-575. That Code Section says voters who participate in primary elections must support the party nominees in the general elec-

230. *Id.*

231. *Id.* at 455.

232. *Id.* at 455–57.

233. *United States v. Brown*, 494 F.Supp.2d 440, 449 (S.D. Miss. 2007) *aff’d*, 561 F.3d 420 (5th Cir. 2009); MISS. CODE ANN. § 23-15-713 (West 2012). .

234. *Brown*, 494 F.Supp.2d at 455–60.

235. *Id.* at 463–464.

236. *Id.* at 464–65.

237. *Id.* at 470–71; MISS. CODE ANN. § 23-15-549 (West 2012).

238. *Brown*, 494 F.Supp.2d at 470–71; MISS. CODE ANN. § 23-15-549 (West 2012)

239. *Brown*, 494 F.Supp.2d at 471–72.

240. MISS. CODE ANN. § 23-15-895 (West 2012).

tion.”²⁴¹ The 174 listed voters were white.²⁴² Brown could not show that he had performed an investigation to determine how almost any of the individuals listed had been disloyal to the Democratic Party.²⁴³ In addition, the court found it suspicious that almost all of the individuals listed were in the district of the lone white supervisor.²⁴⁴

VI. EVALUATING THE VOTING RIGHTS ACT IN TODAY’S PARTISAN ENVIRONMENT

The case against Ike Brown, much like the man himself, is not simple. On the one hand, as the evidence shows, the Brown case demonstrates the continuing validity of the Voting Rights Act as written. Many of the actions taken by Brown had explicit racial overtones – and were intended to at least dilute whites’ votes and at times even to prevent whites from voting. Viewed through this lens, the case against Brown’s behavior was reminiscent of the type of conduct whites have utilized to prohibit African Americans from voting and which prompted passage of the Voting Rights Act. However, viewed another way, the case demonstrates the unique problems that arise when using the Voting Rights Act is enforced against African Americans.

When viewed in through this alternate lens, the *Brown* decision raises concerns for the Voting Rights Act’s future. This is a particular concern for current African American political officials. At its most basic, the case indicates that future administrations may feel political pressure to pursue discrimination claims that historically would have been unprecedented.

To be even more specific, this partisan-based approach to the Voting Rights Act should be particularly concerning in southern jurisdictions with African American majorities. In these jurisdictions (such as Noxubee County) there is the potential for a perfect storm of a partisan-based discrimination claims. There is a history of discrimination in voting that was not remedied until the Voting Rights Act (and which sometimes persisted well afterward). There will often be political leaders in these jurisdictions that were active during the Civil Rights Movement. These political entrepreneurs likely made statements encouraging black solidarity that involved racial appeals.²⁴⁵ Under *Arlington Heights*, these state-

241. *Brown*, 494 F.Supp.2d at 474. See MISS. CODE ANN. § 23-15-575 (West 2012) (“No person shall be eligible to participate in any primary election unless he intends to support the nominations made in the primary in which he participates.”).

242. *Brown*, 494 F.Supp.2d at 475.

243. *Id.* at 477.

244. *Id.*

245. Consider this statement from Brown’s brief to the Fifth Circuit:

As the district court notes, when Brown first became involved in Noxubee County politics in 1979, blacks were virtually shut out of political power, despite outnumbering whites more than two to one. For over two decades, he and others worked to help black candidates and voters navigate the barriers that the white power structure in Noxubee had placed in their path. The work of Brown and others eventually paid off, but it was not until thirty years after passage of the Voting Rights Act that black candidates held even a bare majority of elected offices in the county.

Brief of Petitioner-Appellant at 9, *United States v. Brown*, 561 F.3d 420 (5th Cir. 2009).

ments could be used to as proof that official actions taken today are done with a discriminatory intent.

It is this aspect of the Brown case that is particularly disturbing. Brown made this argument in his brief to the Fifth Circuit:

Brown's actions, prior to taking his position as Democratic Party chair in 2000, evidenced a commitment to enfranchising the traditionally disenfranchised in a community still beset by racial divisions — exactly the kind of citizen activism that, in the absence of government enforcement of civil rights laws, was responsible for seeing the guarantees of the Voting Rights Act brought to the more remote corners of the Deep South.²⁴⁶

With regard to the letter in which Brown encouraged voters to “vote black in 1995” Brown argued:

[T]he language in this letter is no more a “racial agenda” than the pleas of hundreds of civil rights leaders over the years, who had urged blacks to get out, vote and support candidates who were in favor of civil rights. . . . To infer a racial agenda from such activities is to outlaw the very activities that the Voting Rights Act was designed to protect.²⁴⁷

The use of this type of evidence to prove a present discriminatory intent would be a perverse use of statements used to achieve civil rights accomplishments — such as the Voting Rights Act.

To make it clear, the concern here is not for racial appeals made by someone in an official position. For example, Ike Brown's statements and actions while he was serving as Chair of the Democratic Executive Committee were legitimately constituted proof of a discriminatory present intent. The concern regards the use of statements that were made to encourage African American to take collective action as evidence that subsequent official action was tainted by discriminatory intent.

How likely is it that this type of litigation will occur? It is impossible to know. The Ike Brown case itself would have been unheard of ten years ago. The point is that, with the creation of enforcement space, there is uncertainty as to which way the partisan winds will blow. It might take Congressional action to amend the Voting Rights Act to ensure that evidence of statements made by an activist are excluded from consideration of discriminatory intent if and when the activist becomes a public official. Perhaps courts will adopt rules to exclude this type of evidence when considering claims of discriminatory intent. It is crucial that these concerns are considered moving forward. The Voting Rights Act — once described as the “crown jewel”²⁴⁸ of the civil rights movement — runs the risk of becoming just another tool used by political parties for partisan gain without consideration of the purpose and the history of the Act.

246. *Id.* at 12.

247. *Id.* at 13-14.

248. Griffith & O'Donnell, *supra* note 187, at 147 (internal quotation marks omitted).

CONCLUSION

In 1967, Reverend Martin Luther King, Jr. delivered a speech entitled “Where Do We Go From Here?”²⁴⁹ The speech addressed the ongoing struggle for African American social and economic advancement. The theme of that speech is equally relevant today in the context of the Voting Rights Act. What should be the role of the Voting Rights Act in a rapidly changing society in which race and partisanship intermingle in political decisions? The case against Ike Brown demonstrates that the Department of Justice has come to a point where it is politically acceptable to assert a voting rights claim against an African American. It is an understatement to say that the role of African Americans in political and social life has changed dramatically since the adoption of the Voting Rights Act in 1965. That change is a testament to both the collective will of those fighting for civil rights and to the enforcement of the Voting Rights Act. Once those initial battles were won, however enforcement space opened up giving discretion to those enforcing the Act to decide what type of conduct should be pursued.

The Ike Brown case illustrates a contrast between the past and the present — and provides an indication of what is to come with the Voting Rights Act. A combination of the Voting Right Act’s success and the extreme polarization that exists today has resulted in a necessary reevaluation of the purpose and scope of the Voting Rights Act. This shift will raise unique issues and concerns that have not been faced before. One of those issues is how to prove discriminatory intent when a Voting Rights Act violation is brought against an African American.

249. Speech, Martin Luther King, Jr., *Where Do We Go From Here?*, (Aug. 16, 1967), available at http://mlk-kpp01.stanford.edu/index.php/encyclopedia/document-entry/where_do_we_go_from_here_delivered_at_the_11th_annual_sclc_convention/.