Washington Law Review

Volume 67 | Number 4

10-1-1992

Participation Without Representation: The Meaning of the Right to Vote after *Presley v. Etowah County Commission*, 112 S. Ct. 820 (1992)

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PARTICIPATION WITHOUT REPRESENTATION: THE MEANING OF THE RIGHT TO VOTE AFTER *Presley v. Etowah County Commission,* 112 S. Ct. 820 (1992).

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Abstract: Section 5 of the Voting Rights Act requires governing entities implementing any new practices "with respect to voting" to first permit such changes to be scrutinized for discriminatory effects. In *Presley v. Etowah County Commission,* the United States Supreme Court held that a county government's restructuring of power among commissioners did not require scrutiny because the restructuring did not constitute a change with respect to voting. This Note examines *Presley* and concludes that the Court's decision ignored precedent, created an unreasonable test and misapplied the test. To ensure effective enforcement of the Voting Rights Act, the Court should adopt a two-pronged inquiry that considers discriminatory motive as a factor. Given the Court's reluctance to give the Act its intended broad meaning, Congress should amend the statute to include a broader definition of voting practices.

In Russell County, Alabama, the County Commission controls the funding of road repair and maintenance.[1] Traditionally, each elected commissioner represented a residency district and had individual control over spending within a district.[2] Between 1972 and 1985, federal court orders and consent decrees enlarged the commission in an attempt to eliminate potential discrimination against minority voters.[3] Anticipating the possible election of blacks to the commission, the existing commissioners passed a resolution delegating much of the road operation authority to a county engineer under a plan called the "Unit System."[4] In 1986, Russell County elected its first black commissioners.[5] Once these new commissioners discovered that the new Unit System had stripped away most of the power of individual commissioners, they brought suit under the Voting Rights Act ("Act")[6] alleging that the Unit System required preclearance.[7] Preclearance involves federal scrutiny of changes in practices "with respect to voting" to determine whether the changes have discriminatory effects. Thus, whenever a governing entity implements any new changes affecting voting, the entity must submit the changes for preclearance.[8] The suit by the Russell county comissioners was joined by a newly

1. Presley v. Etowah County Comm'n, 112 S. Ct. 820, 826 (1992).
2. *Id.*
3. *Id.* at 826–27.
4. *Id.* at 826.
5. *Id.* at 827.
6. 42 U.S.C. §§ 1973–1973bb-1 (1988).
7. *See Presley,* 112 S. Ct. at 827.
8. 42 U.S.C. § 1973c (1988).

elected black commissioner in Etowah County, Alabama, where that commission passed a "Common Fund Resolution," stripping the power of individual commissioners to control road operations and funding within their districts.[9] In *Presley v. Etowah County Commission,*[10] the Supreme Court held that the challenged resolutions did not fall within the scope of the Voting Rights Act because they did not constitute practices "with respect to voting."[11]

Contrary to the Supreme Court's decision in *Presley,* this Note argues that abolition of an elected official's decision-making authority constitutes a change in voting practices requiring preclearance under the Voting Rights Act. Part I examines the preclearance mechanism, and illustrates its importance as the primary means of furthering the Act's objectives. Part II critically analyzes the Supreme Court's opinion in *Presley* on three grounds. First, the Court ignored precedent and adopted a category-based definition of voting practices. Second, this new approach created a narrow, inflexible test that disregards the potentially discriminatory effects of the practices at issue. Finally, the Court misapplied its new test by holding that the Unit System and Common Fund Resolution did not abolish an elective office. Part III concludes that an inquiry into whether the practice was implemented with discriminatory motives would better serve the objectives of the Voting Rights Act. Additionally, Congress should amend the statute to clarify the scope of section 5.

I. PRECLEARANCE UNDER THE VOTING RIGHTS ACT

A. Preserving the Right to Vote

The Fifteenth Amendment provides that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[12] Prior to passage of the Voting Rights Act, however, black voters faced pervasive discrimination, especially in certain parts of the country.[13] Resistors to black enfranchisement devised a myriad of discriminatory schemes to prevent black voters from reaching the

9. The Common Fund Resolution abolished individual commissioners' decision-making authority and provided for collective decision-making by the commission as a whole. *Presley,* 112 S. Ct. at 825–26.

10. 112 S. Ct. 820 (1992).

11. *Id.* at 832.

12. U.S. CONST. amend. XV, § 1.

13. H.R. REP. No. 439, 89th Cong., 1st Sess., 8–16 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437.

voting booth,[14] such as poll taxes[15] and literacy tests.[16] Thus, in the late 1950's and early 1960's, Congress sought ways to effectuate the guarantees of the Fifteenth Amendment.

Congress' first attempts, however, proved unsuccessful. Although Congress passed a series of civil rights acts prohibiting interference with the right to vote in federal elections,[17] case-by-case litigation under these provisions proved inefficient[18] and ineffective.[19] Despite these early legislative efforts, discrimination against minority voters persisted, reflected by low voter registration and turnout,[20] and by the low number of minority-elected officials.[21]

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14. Mississippi formed a constitutional convention to devise ways to legally circumvent the Fifteenth Amendment. *See* Laughlin MacDonald, *The 1982 Extension of Section 5 of the Voting Rights Act of 1965: The Continued Need for Preclearance*, 51 TENN. L. REV. 1, 9–10 (1983). A delegate of the convention remarked, "It is regrettable that all the suggestions . . . were not recorded; had they been preserved, the record would be a monument to the resourcefulness of the human mind." United States v. Mississippi, 229 F. Supp. 925, 987 (S.D. Miss. 1964) (Brown, J., dissenting), *rev'd*, 380 U.S. 128 (1965).

15. Poll taxes were levied upon persons as a precondition to voting. These taxes restricted the poor vote and the black vote by using wealth as a measure of voter qualification. Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 567 (1973).

16. Southern registrars tested potential voters for their ability to read and write. These tests effectively restricted the black vote because they were unfairly administered to black applicants. For example, a registrar once tested black applicants on the number of bubbles in a bar of soap, the news in the PEKING DAILY, obscure state constitution provisions and legal terms such as *habeas corpus*. ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT 15 (1987).

17. *See* Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (codified at 42 U.S.C. § 1971 (1988)); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. § 1971 (1988))(restricting literacy tests to written tests and allowing completion of the sixth grade to carry a presumption of literacy); Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (codified at 42 U.S.C. § 1971e (1988)) (permitting a court to determine whether voting discrimination occurred pursuant to a pattern or practice).

18. Assessing enforcement under these Civil Rights Acts' provisions, Congress concluded that

> [p]rogress has been painfully slow, in part because of the intransigence of state and local officials and repeated delays in the judicial process. Judicial relief has had to be gaged not in terms of months—but in terms of years. With reference to the 71 voting rights cases filed to date by the Department of Justice under the 1957, 1960 and 1964 Civil Rights Acts, the Attorney General testified before a judiciary subcommittee that an incredible amount of time has had to be devoted to analyzing voting record—often as much as 6,000 man-hours—in addition to time spent on trial preparation and the almost inevitable appeal.

H.R. REP. NO. 439, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2441.

19. *See id.* ("[T]he judicial process affords those who are determined to resist plentiful opportunity to resist. Indeed, even after apparent defeat resisters seek new ways and means of discriminating. Barring one contrivance too often has caused no change in result, only in methods.").

20. For example, in Alabama the number of registered black voters increased only by 5.2% between 1958 and 1964; in Mississippi only 6.4% of eligible blacks were registered in 1964 compared to 4.4% in 1954, and in Louisiana black voter registration barely increased from 31.7% in 1956 to 31.8% in 1965, whereas 80.2% of white voters were registered. *Id.*

21. *See* H.R. REP. NO. 227, 97th Cong., 1st Sess. 7 (1982).

Congress passed the Voting Rights Act of 1965 in realization that existing civil rights legislation afforded minority voters virtually no protection.[22] The Voting Rights Act prohibited the use of tests and devices,[23] authorized appointment of federal examiners,[24] eliminated the poll tax,[25] and required federal preclearance of any voting changes in the jurisdictions covered by the Act.[26] Through this "uncommon exercise of congressional power,"[27] Congress sought to effectuate the Fourteenth[28] and Fifteenth[29] Amendments and protect minorities' right to vote.[30] Although considered one of the most radical pieces of civil rights legislation,[31] the Supreme Court upheld the constitutionality of the Act, finding it solidly grounded in section 2 of the Fifteenth Amendment.[32]

22. Shortly before passage of the Voting Rights Act of 1965, Congress passed the 1964 Civil Rights Act. These provisions, however, never actually had a chance to go into effect. In the summer of 1965, following the tragic police assault on civil rights activists in Selma, Alabama, President Johnson urged swift implementation of the Voting Rights Act, which superseded the voting rights provisions of the 1964 Civil Rights Act. *See* MacDonald, *supra* note 14, at 25–26.

23. 42 U.S.C. § 1973a (1988).

24. *Id.* § 1973d.

25. *Id.* § 1973h.

26. *Id.* § 1973c. The Act's "special provisions" of § 4 (codified at 42 U.S.C. § 1973b(b) (1988))(specifying jurisdictions subject to special provisions), § 5 (codified at 42 U.S.C. § 1973c (1988))(authorizing preclearance of changes in voting practices), § 3 (codified at 42 U.S.C. § 1973d, f (1988)) (providing for federal examiners) and § 203 (codified at 42 U.S.C. §§ 1973b, 1973a–1a (1988)) (providing for bilingual elections) were drafted as temporary provisions originally in effect for only five years. The amendments have repeatedly extended the coverage period: first in 1970 from five to ten years, Voting Rights Acts Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314, then in 1975 to seventeen years, Pub. L. No. 94-73, 89 Stat. 400 (1975), and finally in 1982 for another nineteen years, Voting Rights Acts Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131.

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

28. The Equal Protection clause of the Fourteenth Amendment protects against explicitly racial voting discrimination. *See* U.S. CONST. amend. XIV, § 1, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1; *see also* Derfner, *supra* note 15, at 569–76 for a discussion of the Fourteenth Amendment and voting discrimination.

29. U.S. CONST. amend. XV, § 1; *see supra* notes 14-16 and accompanying text.

30. H.R. REP. NO. 439, *supra* note 13.

31. LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 336 (1978).

32. South Carolina v. Katzenbach, 383 U.S. 301, 325–26 (1966). The Fifteenth Amendment provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XV, § 2.

B. The Preclearance Process

The Voting Rights Act authorizes federal supervision of state and local electoral practices.[33] Section 5, the core of the Act, prohibits a state or political subdivision from imposing any "voting qualification or . . . practice or procedure with respect to voting" without first subjecting the new procedure to federal scrutiny.[34] This provision, however, applies only to those "covered" jurisdictions that have a history of discriminatory voting practices.[35]

The "extraordinary remedy"[36] of preclearance requires a governmental entity proposing a change to either (1) seek a declaratory judgment in the United States District Court for the District of Columbia that the change complies with the Act, or (2) submit the change to the U.S. Attorney General for determination of its validity.[37] If the entity fails to seek preclearance, a private litigant or the Attorney General may challenge the change in a local federal district court before a panel of three judges. The district court's jurisdiction is limited to deciding whether the change involves a practice with respect to voting, and whether the change was precleared.[38] If the district court determines that the change was within the scope of section 5 and was not accordingly submitted for preclearance, the governmental entity must submit the change to the scrutiny of either the Attorney General or the D.C. District Court.[39] If the D.C. District Court issues a declaratory judgment that the practice is not discriminatory, or the Attorney General fails to object to the practice within sixty days, the governmental entity can legally implement the procedure.[40] Litigants may only appeal these decisions directly to the Supreme Court.[41]

33. *See* 42 U.S.C. § 1973 (1988).

34. Voting Rights Act of 1965, Pub. L. No. 89-100, § 5, 79 Stat. 439 (codified at 42 U.S.C. § 1973c (1988)). [hereinafter referred to as section 5].

35. Section 4(b) defines covered jurisdictions as those that maintained a prohibited test or device and had voter turnout of less than 50% of its voting age population in the 1964, 1968, and 1972 presidential elections. *Id.* § 4(b) (codified at 42 U.S.C. § 1973b (1988)).

36. Morris v. Gressette, 432 U.S. 491, 504 (1977).

37. 42 U.S.C. § 1973c (1988).

38. Allen v. State Bd. of Elections, 393 U.S. 544 (1969). This Note discusses only whether a change is subject to preclearance under § 5, not whether a change has been found discriminatory by preclearance.

39. 42 U.S.C. § 1973c (1988).

40. Neither a declaratory judgment nor the Attorney General's failure to object bars a subsequent challenge to enjoin the practice. *Id.*

41. *Id.*

C. *Judicial Interpretation of Section 5:* Allen *and Its Progeny*

The Supreme Court first enunciated the scope of section 5 in *Allen v. State Board of Elections.*[42] *Allen* was a consolidation of four cases,[43] each alleging that a particular practice required preclearance under section 5. The Court interpreted the Act broadly, declaring that Congress designed the Act to reach any state enactment that had even a minor impact on the election process.[44] Relying on the statutory definition of voting, "all action necessary to make a vote effective,"[45] the Court examined the effect of the practices at issue. The four challenged practices required preclearance because they either affected the ability to cast a ballot or diminished the meaningfulness of a vote. Thus, the Court held that section 5 applied to write-in ballot requirements,[46] candidate qualifications,[47] at-large voting schemes,[48] and rules changing elective offices to appointed ones.[49]

In *Perkins v. Matthews,*[50] the Supreme Court confirmed *Allen*'s broad interpretation of the Act and applied section 5 to changes in polling place locations and municipal boundaries. The Court inquired into both the purpose and effect of the challenged practice,[51] and applied section 5 not only to practices having an obvious effect on vot-

42. 393 U.S. 544 (1969).

43. Bunton v. Patterson, 281 F. Supp. 918 (S.D. Miss. 1967); Fairley v. Patterson, 282 F. Supp. 164 (S.D. Miss. 1967), Whitley v. Williams, 296 F. Supp. 754 (S.D. Miss. 1967); Allen v. State Bd. of Elections, 268 F. Supp. 218 (E.D. Va. 1967).

44. *Allen,* 393 U.S. at 566.

45. 42 U.S.C. § 1971e (1988).

46. The write-in procedures in *Allen* required voters who wished to cast write-in votes to do so in their own handwriting. The Court found that the write-in procedures were a voting practice subject to preclearance because they barred illiterate citizens from voting for the candidate of their choice. *Allen,* 393 U.S. at 570.

47. The challenged candidate requirements prevented a person who voted in the primary from running as an independent candidate on the general election ballot. The Court found the candidate requirement made it difficult for an independent candidate to gain a position on the ballot, thereby undermining the effectiveness of voters wishing to elect independent candidates. Moreover, because the requirement forced potential independent candidates to forego their right to vote in the primary, the Court found it was a voting practice with "substantial impact." *Id.*

48. The challenged at-large scheme required voters from an entire county to elect a board, whereas previously, voters from individual districts elected a representative member of the board. The Court found that the challenged at-large scheme diluted the effect of minority votes. The scheme made it more difficult for majority black districts to elect representatives because they remained a minority county-wide. *Id.* at 569–70.

49. The Court required preclearance of a change from elective to appointed office because it affected the power of a citizen's vote; when the office became appointive, it was no longer subject to the voters' approval. *Id.*

50. 400 U.S. 379 (1971).

51. *Id.* at 387 ("[S]ection 5's explicit concern [is with] both the purpose and the effect of a voting standard.").

ing, but also to those having "a potential for discrimination."[52] The Court then held that changes in polling place locations required preclearance because such changes had obvious effects on citizens' ability to vote.[53] The Court further held that changes to municipal boundaries that annexed majority black districts required preclearance,[54] because by enlarging the district to include a substantial white electorate, the boundary changes had the potential to dilute black voting strength.[55]

After *Perkins*, the realm of voting practices subject to section 5 expanded. Subsequent decisions applying the "potential for discrimination" test found that reapportionment and redistricting plans,[56] changes in candidate filing dates and election dates,[57] numbered posts and staggered terms,[58] changes in an elective office,[59] and school board

52. *Id.* at 389. In explaining why § 5 applied to practices having a potential for discrimination, the Court recognized that the district court was limited to deciding only the *applicability* of § 5, not whether a practice was in fact discriminatory. Nonetheless the Court cautioned against a district court "closing its eyes" to the Act's purpose which is to prevent any practices that have the potential to abridge the right to vote because of race or color. *Id.* at 384–85.

53. *Id.* at 387 ("Even without going beyond the plain words of the statute, we think it clear that the location of polling places constitutes a 'standard, practice, or procedure with respect to voting.' . . . The accessibility, prominence, facilities, and prior notice of the polling place's location all have an effect on a person's ability to exercise his franchise.").

54. *Id.* at 388–89

55. *Id.*

56. The Court held a reapportionment plan that reorganized voting districts was subject to § 5 because it had effects similar to at-large schemes that dilute minority voting strength. Georgia v. United States, 411 U.S. 526, 534–35 (1973).

57. In *NAACP v. Hampton County Election Comm'n,* the Court applied § 5 to candidate filing dates scheduled a year in advance of the election and to an election date scheduled in March instead of November. Because the filing period occurred during a time when the Attorney General had an outstanding objection to the new election plan, those who wanted to wait for the Attorney General's decision were prevented from entering the race as latecomers. Additionally, the change of the election to March was likely to result in lower voter turnout than would holding the election simultaneously with the general election in November. NAACP v. Hampton County Election Comm'n, 470 U.S. 166, 176–78 (1985).

58. Under a numbered post system, posts (seats) are designated by number and candidates must run for a specific seat; in contrast, under an open system all candidates run for all the seats, with the candidates gaining the most votes filling the positions. This system was challenged in *City of Lockhart v. United States,* 460 U.S. 125, 127–30 (1983), which also involved the use of staggered terms. The challenged election plan required the mayor and two councilmen to be elected on even-numbered years for two terms; the other councilmen were elected on odd-numbered years for two terms. The Court found the combination of the numbered post and staggered term system and the addition of seats to a governing body warranted preclearance because the scheme tended to curb minorities' ability to elect minority candidates. *See id.* at 130–32.

59. An increase in the number of council members required preclearance because by altering the nature of the seats at issue, this change affected minority candidate strength. *See Lockhart,*

rules regarding employee-candidates,[60] all warranted preclearance under section 5. In deciding whether a practice had the potential for discrimination, the Court often considered the context of the change. For example, in *Dougherty County, Ga., Bd. of Educ. v. White,* the Court noted that the circumstances surrounding adoption of a practice and the effect on the political process, need only suggest the potential for discrimination to warrant preclearance.[61]

D. Preclearance Effectively Serves the Act's Objectives

Preclearance remains an effective tool to scrutinize and invalidate practices that seek to hinder minority enfranchisement.[62] When Congress amended the Voting Rights Act,[63] it commended the success of section 5.[64] Congress evaluated the Act's progress in increasing registration and voting rates for minorities,[65] and concluded that the Act provided an effective mechanism for protecting voting rights.[66] Congress attributed the Act's success to its broad coverage and endorsed the *Allen* and *Perkins* interpretations of the Act's broad scope.[67] Congress also emphasized the continued need for preclearance. Particularly, Congress noted that as minority registration and voting increase, innovative approaches negatively affecting minority participation emerge.[68] Preclearance was therefore necessary to preserve the "fragile gains" advanced thus far.[69]

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460 U.S. at 131; *see also* Horry County v. United States, 449 F. Supp. 990, 995 (D.D.C. 1978) (changing office from appointive to elective had the potential to deny or dilute voting rights).

60. The Court held that a school board rule requiring its employees to take unpaid leaves of absence while campaigning for elective office required preclearance because (1) it was enacted shortly after the first black person in recent years sought election in that county, and (2) it imposed economic disincentives on employees to enter into campaigns. Dougherty County, Ga., Bd. of Educ. v. White, 439 U.S. 32, 40, 42 (1978).

61. *Id.* at 42.

62. H.R. REP. No. 227, *supra* note 21, at 7.

63. *See supra* note 26 (discussing amendments).

64. H.R. REP. No. 227, *supra* note 21, at 7.

65. Prior to 1965, only 29% of eligible black voters registered; by 1982 over 50% were registered. *Id.*

66. *Id.*

67. S. REP. No. 295, 94th Cong., 2d Sess. 16 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 782.

68. S. REP. No. 295, 94th Cong. 2d Sess. 16 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 782; H.R. REP. No. 397, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 3277, 3283 (1970).

69. H. REP. No. 227 at 7; *see supra* note 62.

E. Presley v. Etowah County Commission: *One Step Backwards*

Courts continued to read the Act broadly, thus bringing about a gradual, but steady reduction in discriminatory voting practices.[70] In *Presley v. Etowah County Commission,*[71] however, the Supreme Court severely restricted the scope of section 5. *Presley* involved resolutions passed by two different Alabama county commissions. Both commissions changed the decision-making authority of its elected members.[72] Consequently, newly elected black members brought suit alleging that the county commissions violated section 5 by failing to submit these changes for preclearance. The Court refused to apply section 5, holding that section 5 applies only to practices that fall into one of four categories of previously covered voting practices.[73]

The Russell County Commission originally had three commissioners, who were elected at-large.[74] Although major funding decisions required the approval of the entire commission, each commissioner had individual authority over routine repair and maintenance expenditures in particular districts.[75] Between 1972 and 1985, federal court orders and consent decrees ultimately enlarged the Commission to seven members,[76] creating four new districts and abolishing the potentially discriminatory at-large voting scheme.[77] Following the 1979 decree, the Commission passed a resolution abolishing the individual road districts. Under this new "Unit System" the county engineer, an appointed official, assumed primary responsibility for road operations.[78] Consequently, the commissioners no longer had any decision-making authority. The first black commissioners were elected in 1986.[79]

The Etowah County Commission originally had four seats, elected at-large, representing residency districts. The Commission voted collectively on the division of funds for road construction, maintenance and repairs, but the commissioners had individual control over spending within their respective districts.[80] Because the at-large voting

70. *See supra* note 65; *see also* S. REP. No. 295, 94th Cong. 2d Sess. 13 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 779.
71. 112 S. Ct. 820 (1992).
72. *Id.* at 825–29.
73. *Id.* at 832.
74. *Id.* at 826.
75. *Id.*
76. *Id.*
77. *See supra* note 48 (discussing discriminatory at-large schemes).
78. *Presley,* 112 S. Ct. at 826.
79. *Id.* at 827.
80. *Id.* at 825.

scheme had potentially discriminatory effects,[81] in 1986, a federal district court panel of three judges issued a consent decree adding two new districts.[82] The decree also restructured the election process so that voters elected commissioners on a district basis.

Following the decree, two new members, one of whom was black, took office.[83] The four white commissioners, elected before the decree, remained on the Commission. The four holdover members passed a "Road Supervision Resolution" that retained the hold-overs' authority, but stripped the new members of all power.[84] Additionally, the holdover commissioners passed a "Common Fund Resolution," providing for county-wide use of funds.[85] This second resolution abolished the prior practice of dividing the funds among the districts for distribution according to each commissioner's discretion.[86]

The aggrieved black commissioners of the Russell and Etowah County Commissions together challenged the resolutions before a three-judge panel in the Alabama Federal District Court. The district court held that neither the Unit System nor the Common Fund Resolution required section 5 preclearance because the Common Fund Resolution did not significantly change government officials' power and the Unit System did not transfer power among elected officials.[87] The black commissioners appealed directly to the Supreme Court.[88]

The Supreme Court affirmed the district court decision, but on different grounds. The Court first emphasized the limited scope of the Act: only changes in voting require preclearance. The Court then adopted a new category-based approach to define "voting practices" subject to section 5.[89] The Court examined the facts of previous cases

81. *See* Brief of Appellants, Presley v. Etowah County Comm'n, 112 S. Ct. 820 (1992) (Nos. 90-711, 90-712), *available in* LEXIS, Genfed library, Briefs file.

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

83. *Id.*

84. The resolution authorized collective decision-making by the commission on road operations and passed by a 4–2 vote, with the new members dissenting. *Id.*

85. *Id.* at 825–26.

86. *Id.*

87. *Id.* at 827. Although the district court found the Road Supervision Resolution subject to preclearance, the Supreme Court did not address this practice because no appeal was taken.

88. 42 U.S.C. § 1973c (1988); *see supra* text accompanying note 41.

89. In addition to changing previous interpretation of § 5's coverage, the *Presley* decision minimized the amount of deference given to the Attorney General's construction of § 5. Relying on its definition of covered practices as "any change affecting voting, even though it appears to be minor or indirect, . . . " 28 C.F.R. § 51.12 (1991), the Attorney General filed an amicus brief in support of appellants. Although precedent reveals that the Court has consistently afforded the Attorney General's construction of the Act considerable deference, the *Presley* majority declined to adopt the Attorney General's position. *Presley,* 112 S. Ct. at 831.

and identified four categories of voting practices:[90] (1) practices involving the manner of voting, (2) candidacy requirements, (3) practices effecting the composition of the electorate, and (4) practices creating or abolishing an elective office.[91] The Court then held that the Common Fund Resolution and the Unit System were not voting practices because they did not fall within any of the categories.[92]

The Court expressed concern over the ramifications of an overly broad reading of the Act. The Court was particularly troubled that a broad construction would blur the distinction between changes in voting rules and routine changes in government organization and functions.[93] Broadly construing the Act would involve subjecting more state actions to preclearance, resulting in interference with state government and independence.[94] Thus, in order to preserve state autonomy, the Court determined that only rules governing how one gains office should require preclearance; it did not want to tamper with those government decisions that involve independent actions taken by officials once they gain office. If courts do not carefully confine the scope of section 5 coverage, the Court reasoned, ultimately any government action would require preclearance.[95]

Justice Stevens, joined by Justices White and Blackmun, argued in dissent that precedent mandates preclearance of these changes. Justice Stevens noted agreement among federal courts that transfers of decision-making power having a potential for discrimination warranted preclearance.[96] Moreover, several Department of Justice decisions refused to preclear changes in the power of elected officials because the changes had a potentially discriminatory impact on minority voters.[97] Justice Stevens noted that in order to achieve the Act's purpose—eradication of racial discrimination in the voting process[98] —section 5 should be given "the broadest possible scope."[99] Justice Stevens argued that the majority decision effectively limited the scope of vot-

90. *Presley,* 112 S. Ct. at 828 ("We agree that all changes in voting must be precleared and with *Allen*'s holding that the scope of § 5 is expansive within its sphere of operation. That sphere comprehends all changes to rules governing voting, changes effected through any of the mechanisms described in the statute. Those mechanisms are any 'qualification or prerequisite' or any 'standard, practice or procedure with respect to voting.' ").

91. *Id.*

92. *Id.* at 829–31.

93. *Id.* at 829.

94. *See id.*

95. *Id.* (according to the Court "every decision taken by government implicates voting").

96. *Id.* at 833 (Stevens, J., dissenting).

97. *Id.* at 833 n.3.

98. *Id.* at 836.

99. *Id.*

ing practices to four exclusive categories,[100] although the majority purported to do otherwise.[101]

Finally, Justice Stevens found significant the timing of the commissions' actions. Particularly, he noted that the Etowah Commission adopted the Common Fund Resolution shortly after election of the first black commissioner. Thus, he concluded, the resolution was an obvious response to the redistricting that made these seats accessible to blacks.[102] At the very least, Justice Stevens would have held that the circumstances surrounding implementation warranted preclearance of the resolution.[103]

II. *PRESLEY* VIOLATES THE SPIRIT AND THE RULE OF SECTION 5

The *Presley* Court improperly excluded the Common Fund Resolution and the Unit System from section 5 coverage for several reasons. First, by adopting a new definition of voting practices, the Court ignored precedent. Second, the Court created a narrow and inflexible test that conflicts with the objectives of the Voting Rights Act. Finally, the Court misapplied its own test by failing to recognize that the Common Fund Resolution and Unit System effectively abolish an elective office and therefore satisfy the Court's fourth category of voting practices. Thus, the *Presley* decision provides an unworkable test and an unsatisfactory result.

A. The Presley *Court Ignored Precedent*

The *Presley* Court's four category analysis created a superficial definition of voting practices that fails to consider the potentially discriminatory effects of a challenged practice. The Court ignored previous interpretations of section 5 by creating a presumption that all practices requiring preclearance constitute practices inherently related to voting. Previously, courts applied section 5 to practices having a potential for discrimination as well as those having an obvious effect on voting.[104] If the challenged practice did not directly affect the way in which people voted, courts inquired further to determine if the prac-

100. *Id.* at 836 n.13.

101. *Id.* at 828 ("Without implying that the four typologies exhaust the statute's coverage, we can say these later cases fall within one of the four factual contexts presented in the *Allen* cases.").

102. *Id.* at 838.

103. *Id.* at 839.

104. *See supra* notes 42–61.

tice had a potential for discrimination.[105] In *Presley,* however, the Court limited its inquiry to whether the challenged practice bore some resemblance to practices previously held subject to section 5 preclearance.

The Court in fact created a presumption that if a challenged practice did not fall within one of the four newly defined categories, the practice was not related to voting.[106] Although refusing to acknowledge the impact of its actions,[107] the Court rendered its categories exclusive: it held that the Common Fund Resolution and the Unit System did not constitute voting practices subject to section 5 because they did not fit into one of the four categories.[108] Thus, contrary to precedent, the *Presley* Court only looked superficially at whether the challenged action fit into one of the four categories, without evaluating the actual effects the actions had on the ability of minorities to participate in the political process.

B. The Presley *Test Is Flawed*

The *Presley* analysis provides an unworkable approach to determining coverage under section 5 for two reasons. First, by formulating four exclusive categories of voting practices, the Court impermissibly narrowed the scope of section 5. Second, the Court's new test also proves inflexible because it fails to consider innovative means of denying minorities the opportunity to participate meaningfully in the political process.

1. The Presley *Test Narrows the Scope of Section 5*

Presley narrowed the scope of section 5 by limiting its coverage to four discrete categories of voting practices. Under *Presley,* section 5 may no longer apply to actions that previously qualified as voting practices—actions that had a potential for discrimination, but did not relate directly to voting. For example, like the challenged practices in *Presley*, transfers of decision-making authority among elected officials that have the potential to diminish the power of a vote[109] will escape

105. *See* Georgia v. United States, 411 U.S. 526, 531 (1973) ("[S]ection 5 is not concerned with a simple inventory of voting procedures, but rather with the reality of changed practices as they affect Negro voters."); *supra* notes 50–57.

106. *See Presley,* 112 S. Ct. at 832.

107. *Id.* at 828; *see supra* note 101.

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

109. Similar transfers of authority have previously required preclearance. *See, e.g., Presley,* 112 S. Ct. at 833 n.2 (Stevens, J., dissenting) (citing Hardy v. Wallace, 603 F. Supp. 174 (N.D. Ala. 1985) (reallocation of governmental powers); Robinson v. Alabama State Dep't of Educ., 652 F. Supp. 484 (M.D. Ala. 1987) (transfer of authority from elected board of education to

coverage. Even though such practices have potentially discriminatory effects on minority voters, they will not require preclearance because they do not fit neatly into any of the Court's categories of voting practices. Thus, *Presley* excludes from the scope of section 5 voting practices previously held subject to preclearance.

The *Presley* Court's narrow definition of voting practices also conflicts with legislative intent. Congress intended section 5 to have the broadest scope possible.[110] Section 5 preclearance remains the only viable method of screening out discriminatory practices; previously adopted anti-discriminatory measures have proven inadequate.[111] Thus, Congress drafted the Voting Rights Act broadly to ensure that courts erred on the side of overinclusiveness when determining whether a given practice requires scrutiny.[112]

Although the *Presley* Court argued that overinclusiveness would result in subjecting routine practices to unnecessary preclearance,[113] overinclusiveness serves the ends of section 5 and effectuates legislative intent. The courts must first scrutinize all practices affecting voting in order to identify those practices that violate the Act. Without the threshold inquiry of preclearance, discriminatory practices will go unchecked. Thus, even seemingly ministerial practices,[114] and practices that may not meet with objection by the Attorney General or the federal courts, require preclearance.[115] By restricting the scope of section 5, however, the *Presley* Court limits the opportunities of discrimination victims to obtain recourse, defeating the central purpose of the Act. Although a somewhat "severe measure,"[116] preclearance remains instrumental in furthering the Act's objectives; by placing the

appointed county council); County Council of Sumter County v. United States, 555 F. Supp. 694 (D.D.C. 1983) (transfer of power from governor and general assembly to a county council elected at large); Horry County v. United States, 449 F. Supp. 990 (D.D.C. 1978) (discussed *supra* note 59)). Because changes affecting minority elected representatives' authority and power minimize, reallocate, or submerge these representatives' authority, they have the potential to dilute minority voting strength. Therefore, they have the potential to discriminate and should be subject to § 5 scrutiny. *See* Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1504–05 (1991).

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

111. *See supra* notes 17–21 and accompanying text.

112. S. REP. NO. 295, supra note 67, at 15–16, 1975 U.S.C.C.A.N. at 781–82.

113. *See Presley*, 112 S. Ct. at 829; *see supra* note 95 and accompanying text.

114. NAACP v. Hampton County Election Comm'n, 470 U.S. 166, 175–76 (1985) (even seemingly "ministerial" practices that had potential for discrimination required preclearance "in light of the sweeping objectives of the Act").

115. During debate over the 1982 amendments, Congress rejected a proposal to limit § 5 to cover only those changes producing the most objection from the Attorney General. H. REP. NO. 227, *supra* note 21, at 34–35.

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

burden on the governing entity, Congress sought through section 5 to "shift the advantage of time and inertia from the perpetrators of the evil to its victims."[117]

2. Presley *Creates an Inflexible Approach to Section 5*

The *Presley* test proves inflexible because it considers only past behavior and does not contemplate future innovative means of discrimination. The *Presley* Court's approach inverts the definition of voting practices. Previous cases compared the statutory definition[118] with the facts at issue to determine whether a challenged action constituted a voting practice.[119] The *Presley* Court, however, compared the facts of previous cases with the facts before the Court.[120] The Court would require preclearance only if the challenged practice was factually identical to a practice previously held subject to scrutiny.

The *Presley* Court thus created a paradox whereby an innovative means of discriminating does not require preclearance by virtue of its previous nonexistence. *Presley*'s paradox frustrates the objectives of section 5. Section 5 sought to identify and eliminate all discriminatory practices, and to ensure that new devices did not replace the old ones.[121] If the Court confines coverage to past practices, however, new discriminatory practices will never be identified. Thus, *Presley*'s four-category test, overemphasizing methods previously held subject to section 5, undermines the central purpose of the Voting Rights Act: to scrutinize innovative voting schemes and thereby prevent the entrenchment of discriminatory practices.

C. *The* Presley *Court Misapplied its New Test*

The *Presley* Court held that the challenged resolutions did not fall within its fourth category, "abolition of an elective office."[122] The Court rejected the argument that the resolutions rendered votes for the

117. South Carolina v. Katzenbach, 393 U.S. 301, 328 (1966).

118. Section 6 defines voting as "all action necessary to make a vote effective." Voting Rights Act of 1965, Pub. L. No. 89-100, § 6, 79 Stat. 439 (codified at 42 U.S.C. § 1971c (1988)).

119. *See supra* notes 45–49 and accompanying text.

120. *See supra* notes 90–91 and accompanying text.

121. S. REP. NO. 417, 97th Cong., 2d Sess. (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 182–83; *see also* H.R. REP. NO. 227, *supra* note 21, at 4 ("Through this remedy the Congress intended to provide an expeditious and effective review which would assure that practices or procedures other than those directly addressed in the legislation . . . would not be used to thwart the will of the Congress finally to secure the franchise for blacks.").

122. Presley v. Etowah County Comm'n, 112 S. Ct. 820, 828 (1992).

commissioners ineffective,[123] but failed to explain its analysis.[124] Instead, the Court concluded that the Common Fund Resolution and the Unit System did not constitute changes abolishing elective office because the office still existed.[125]

Contrary to the *Presley* Court's holding, the challenged practices in *Presley* effectively abolished an elective office. By requiring the majority of the Commission to make decisions for all the districts, the Common Fund Resolution abolished the individual district commissioners' positions as autonomous decision-makers. Similarly, the Unit System's transfer of power to the engineer effectively abolished the commissioners' positions because it stripped them of their only substantial decision-making authority. Therefore, because they rendered the commissioners powerless, the resolutions abolished positions of authority and satisfy the Court's fourth category of covered practices.

Although the Court found it significant that the electorate could technically still vote for the office,[126] the Court ignored the reality that voters could no longer cast a ballot for a politically empowered decision-maker. Mere existence of an elective office does not confer political empowerment upon an electorate. Voting for elective office is only meaningful when the elected official retains decision-making authority. As in *Presley,* voting for a powerless position is comparable to not voting for the position at all. The Court's argument therefore lacks merit.

Both the Common Fund Resolution and the Unit System are also comparable to previously covered practices that created or abolished elective office. As early as *Allen,* the Court held that section 5 applies to rules regarding changes in elective office. In *Bunton v. Patterson,*[127] a companion case to *Allen,* the Court found a change warranted preclearance because it eliminated a position formerly answerable to the electorate.[128] The *Presley* facts involved analogous changes. Because the resolutions transformed the commissioners into virtual figureheads, the commissioners no longer had authority to respond to or represent the electorate. The resolutions therefore warranted

123. The government argued that a vote for an official with less authority has diminished value. *Id.* at 829.

124. The Court simply concluded that the practice "has no bearing on the substance of voting power for it does not increase or diminish the number of officials for whom the electorate may vote." *Id.*

125. *Id.* at 830.

126. *Id.* at 829–30.

127. 281 F. Supp. 918 (S.D. Miss. 1967), *rev'd,* Allen v. State Bd. of Elections, 393 U.S. 544, 569–70 (1969).

128. *See supra* note 49.

preclearance because they prevented elected officials from meaningfully representing their voter constituencies. Thus, the Common Fund Resolution and the Unit System constitute voting practices under section 5. By nullifying elected officials' decision-making authority, these changes effectively abolished elective office. Therefore, applying the *Presley* test, these practices fall under category four and warranted preclearance.

D. Presley *Encourages 'Lawful Discrimination'*

The *Presley* decision encourages governing entities to discriminate against minorities once they gain elective office, holding that a practice abrogating an elected official's power does not affect voting as long as the elected position remains intact. As long as voters still have a voice in who fills the office, governing entities may escape preclearance. They need only transfer the office's previously held powers to an appointed official and thereby render a newly-elected minority a mere figurehead. Governing bodies eager to restrict minority participation in the political process can now retract a minority elected official's power. By its holding in *Presley,* the Court has created a rule that allows governing entities to lawfully implement discriminatory practices once minorities gain elective office, repeating a defiance of the Fifteenth Amendment that precipitated the initial passage of the Voting Rights Act.[129]

III. REFORMULATING THE *PRESLEY* TEST AND REDEFINING VOTING PRACTICES

To avoid the result reached in *Presley,* courts should incorporate another step into the test for determining whether section 5 applies. The Court should require preclearance of those practices that do not fit into one of the four categories, but the implementation of which nonetheless raises an inference of discriminatory intent. Additionally, Congress should amend the Voting Rights Act to clarify the scope of section 5.

A. An Inquiry into Discriminatory Motive

The Supreme Court should adopt a two-pronged approach to determining whether a challenged action requires preclearance. Specifically, district courts must first ask whether the practice fits into one of the four categories enunciated in *Presley.* If the court finds that the

129. *See supra* notes 14–16 (describing ways by which resistors to black enfranchisement circumvented the Constitution and discriminated).

challenged action does not resemble any of the categorized practices, the inquiry should not stop there. The court should also examine all the circumstances surrounding the implementation of the challenged practice and should determine whether the circumstances raise an inference of intent to discriminate.[130] To answer this inquiry, a court should consider, for example, the governing entity's historical discrimination and the timing of the governing entity's implementation of the challenged practice.[131]

Courts should probe the governing entity's history of discrimination by examining various factors. Some relevant factors would include previous objections by the Attorney General, court orders or consent decrees that required the jurisdiction to restructure its election process, and the number of minority candidates and elected officials in the jurisdiction. For example, in *Presley,* both county commissions restructured the commissions and election schemes pursuant to consent decrees and court orders, and previously had no black members on the commission.[132]

Courts should also examine the timing of the practice's implementation. In particular, courts should consider the timing of the action relative to the holding of elections and the issuance of judicial mandates to remedy existing discrimination. For example, in *Presley,* the resolutions were passed close to elections,[133] after court orders and consent decrees,[134] and after minorities were elected to offices dominated by whites.[135] Together, these factors suggested that the challenged practices were adopted with a discriminatory motive.[136] Forced to open the process to minorities, the all-white commissions sought to prohibit minority officials from exercising any significant decision-making authority. Had the Court applied the proposed test and critically examined the timing of the resolutions' passage and the

130. An "intent to discriminate" occurs when an entity implementing a change intended to render a vote meaningless or exclude minorities from the political process.

131. This test incorporates Justice Stevens' preferred holding of *Presley. See* Presley v. Etowah County Comm'n, 112 S. Ct. 820, 839 (1992) (Stevens, J., dissenting).

132. *Id.* at 825–26.

133. The Etowah County Commission passed the Common Fund Resolution immediately after the first black commissioner's election. *See supra* notes 83–86 and accompanying text; *see also supra* note 60 and accompanying text (discussing Dougherty County, Ga., Bd. of Educ. v. White, 439 U.S. 32 (1978)).

134. Both the Etowah and Russell County Commissions passed challenged resolutions after court orders and consent decrees required restructuring of the commissions. *See supra* notes 68–80.

135. Prior to passage of the challenged resolutions, neither the Etowah nor Russell County Commissions included a black member. *See supra* notes 79, 83.

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

context in which the entities operated, the county commissions in *Presley* would not have escaped scrutiny.

This proposed test would also address the Court's concern that a broad reading of section 5 would require unnecessary preclearance of every government decision, constituting undue interference in the internal operations of state and local governments.[137] Justice Kennedy expressed a particular concern that every budget passed by a governing entity would require preclearance.[138] By requiring some evidence of discriminatory intent, however, courts would not subject every government action to preclearance; only those in which the government intended to exclude minorities would undergo preclearance.

B. Defining Voting Practices Under Section 5

Given the Court's reluctance to apply section 5 broadly, Congress should amend the statute to make clear the scope of section 5 and ensure its effectiveness. Previously, the Court has broadly interpreted the statutory language, practices "with respect to voting,"[139] to encompass a variety of challenged actions.[140] The *Presley* Court, however, chose to interpret this language very narrowly, by confining coverage to practices directly related to voting. Congress should amend this language to clarify the scope of section of 5.

Specifically, Congress should reword section 5 to include "practices affecting voting strength or the value of a vote," and "practices affecting participation in the electoral process." The language, "practices affecting voting strength and the value of a vote," embodies the Court's previous interpretation of the scope of voting practices covered under section 5. The Court has continually applied section 5 to actions that had the potential to dilute minority votes or diminish minority voting strength.[141] Likewise, the language, "practices affecting participation in the electoral process," accurately characterizes practices the Court previously subjected to section 5 preclearance: actions that affected a person's ability to vote or run for office and previously required preclearance.[142] Thus, this proposed language would reinstate the Court's previous application of section 5.

137. *Id.* at 830–31.

138. *Id.* at 830.

139. 42 U.S.C. § 1973c (1988).

140. *See supra* notes 44–60.

141. *See supra* notes 46–59 and accompanying text.

142. *See supra* note 60 and accompanying text (discussing Dougherty Bd. of Educ. v. White, 439 U.S. 32 (1978)).

Moreover, this language comports with legislative intent by providing a broader concept of voting practices. This language provides broader coverage because it considers not only practices involving superficial participation as a voter, but also considers practices that affect the ability to meaningfully participate in the political process. Congress intended that the Act have the broadest reach possible. Although initially focused on removing barriers to registration and voting, Congress also designed the Act to eliminate "continuing discrimination."[143] Applying section 5 with this proposed language would address such practices. Under this new definition of voting practices, section 5 would encompass those actions that interfere with minorities' right to vote not only at the ballot box, but also those actions that have the potential to devalue a vote, thereby interfering with the elective office gained by that vote.

Finally, this proposed language would address transfers of decision-making authority like those involved in *Presley*. Because the elected officials no longer have the power to respond to their minority constituents and participate in decision-making, the challenged practices in *Presley* diminish the value of minority votes, denying minorities meaningful representation and participation in the political process.[144] Thus, unlike *Presley*'s literal reading of practices "with respect to voting," applying section 5 to "all practices affecting voting strength" scrutinizes potentially discriminatory transfers of power among elected officials.

Congress must amend section 5 to avoid the undesirable effects of a literal reading of practices "with respect to voting." Changing the language to include all actions "affecting voting strength" or "participation in the electoral process" would provide a more definitive scope to section 5. Moreover, the proposed language is consistent with precedent and effectively furthers the Act's objectives.

143. Congress sought through the Voting Rights Act

> to create a set of mechanisms for dealing with continuing voting discrimination, not just step by step, but comprehensively and finally . . . . As senator Javits put it, the purpose of the Voting Rights Act was "not only to correct an active history of discrimination, the denying of Negroes of their right to register and vote, but also to deal with the accumulation of discrimination . . . . The bill would attempt to do something about accumulated wrongs and the continuance of the wrongs."

S. REP. No. 417, 94th Cong., 2d Sess. (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 181–82.

144. *See supra* note 109 (discussing previously covered practices that diminish a vote's effectiveness).

IV. CONCLUSION

The *Presley* decision created a narrow, inflexible test for determining section 5 applicability. By confining the scope of section 5 to four exclusive categories of voting practices, the Court's new test excludes from coverage potentially discriminatory changes in the power structure of elective office. In order to effectively further the goal of the Voting Rights Act to protect and secure minorities' right to vote, courts should also inquire into whether a challenged practice was implemented with a discriminatory motive. Additionally, Congress should amend section 5's language to provide a broader concept of "voting rights."