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Enactments Altering or Reallocating Elected Officials' Powers Do Not Directly Relate to or Affect Voting and Are Therefore Not Subject to Judicial or Administrative Preclearance under Section 5 of the Voting Rights Act of 1965.

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CONSTITUTIONAL LAW—Elections—Enactments Altering or Reallocating Elected Officials' Powers Do Not Directly Relate to or Affect Voting and Are Therefore Not Subject to Judicial or Administrative Preclearance Under Section 5 of the Voting Rights Act of 1965.

Presley v. Etowah County Commission,
__ U.S. __, 112 S. Ct. 820, 117 L. Ed. 2d 51 (1992).

To increase accountability for the allocation and use of county road funds, Etowah and Russell Counties, Alabama, passed legislation which altered the decision-making authority of their respective county commissioners.[1] In 1987, Etowah County adopted the Common Fund Resolution which altered the prior practice of providing Etowah County Commissioners full authority to determine how the county road funds allocated to their respective districts would be spent.[2] Russell County adopted the Unit System in 1979 which abolished the Russell County Commissioners' individual road districts and transferred responsibility for all road operations to the county engineer, an appointed official.[3] In 1989, Lawrence C. Presley, Ed Peter Mack, and Na-

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1. *See* Presley v. Etowah County Comm'n, __ U.S. __, __, 112 S. Ct. 820, 825, 117 L. Ed. 2d 51, 59-61 (1992) (describing counties' restructuring of commissioners' responsibilities). In addition to increasing accountability, Russell County implemented the changes in response to the indictment of a commissioner on corruption charges. *See id.* at __, 112 S. Ct. at 826, 117 L. Ed. 2d at 60-61 (describing circumstances preceding Russell County's adoption of Unit System).

2. *Id.* at __, 112 S. Ct. at 826, 117 L. Ed. 2d at 60. The Etowah County Common Fund Resolution, in relevant part, provides:

> [A]ll monies earmarked and budgeted for repair, maintenance and improvement of the streets, roads and public ways of Etowah County [shall] be placed and maintained in common accounts, [shall] not be allocated, budgeted or designated for use in districts, and [shall] be used county-wide in accordance with need, for the repair, maintenance and improvement of all streets, roads and public ways in Etowah County which are under the jurisdiction of the Etowah County Commission.

Id. at __, 112 S. Ct. at 825-26, 117 L. Ed. 2d at 60.

3. *Id.* After the Russell County Commission passed the resolution in 1979 creating the Unit System, the Commission requested that the Alabama Legislature pass implementing legislation, which resulted in the following language:

> Section 1. All functions, duties and responsibilities for the construction, maintenance and repair of public roads, highways, bridges and ferries in Russell County are hereby vested in the county engineer, who shall, insofar as possible, construct and maintain such roads, highways, bridges and ferries on the basis of the county as a whole or as a unit, without regard to district or beat lines.

Id. at __, 112 S. Ct. at 826, 117 L. Ed. 2d at 61. Before *Presley*, Russell County had already

thaniel Gosha, III, newly elected African-American county commissioners, brought suit alleging that Etowah and Russell Counties had violated Section 5 of the Voting Rights Act of 1965 (the Act).[4] The commissioners argued that prior to passing the Common Fund Resolution and the Unit System,

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experienced two decades of litigation regarding the structure of its county commission. *See id.* at __, 112 S. Ct. at 826-27, 117 L. Ed. 2d at 60-61 (describing county's litigation history). A 1972 federal court order required the commission to expand to five members, and after the 1979 adoption of the Unit System, additional litigation resulted in a 1985 consent decree requiring the five-member commission to expand to seven members. *Id.*

4. *Id.* at __, 112 S. Ct. at 827, 117 L. Ed. 2d at 61-62. Russell County Commissioners Mack and Goshea were "Russell County's first black county commissioners in modern times." *Id.* Section 5 of the Voting Rights Act of 1965 provides:

> Whenever a State or political subdivision . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court.

the counties failed to obtain the judicial or administrative preclearance required by the Act.[5]

A three-judge district court for the Middle District of Alabama held that neither the passage of the Etowah County Common Fund Resolution nor the establishment of the Russell County Unit System invoked the preclearance requirement of Section 5 of the Act.[6] The court stated that when modifications in elected officials' duties significantly change the powers employed by governmental representatives elected by or accountable to distinct constituencies of voters, such changes require judicial or administrative preclearance.[7] Applying this reasoning, the court concluded that the Etowah County Common Fund Resolution did not significantly change the commissioners' powers and that the Russell County Unit System did not reallocate authority to officials accountable to different constituencies.[8] The United States Supreme Court granted certiorari to determine whether these changes in the decision-making power of the elected commissioners were voting changes within the context of Section 5 of the Act.[9] Held—*affirmed*.[10] Enactments altering or reallocating elected officials' powers do not

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Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (codified as amended at 42 U.S.C. § 1973c (1988)).

5. *Presley*, __ U.S. at __, 112 S. Ct. at 827, 117 L. Ed. 2d at 61-62. Russell County did submit a 1985 consent decree for preclearance and the Department of Justice approved it without any mention of the Unit System changes. *Id.* at __, 112 S. Ct. at 826-27, 117 L. Ed. 2d at 61-62.

6. *Id.* at __, 112 S. Ct. at 827, 117 L. Ed. 2d at 62. The Voting Rights Act of 1965 requires actions brought under Section 5 to be heard by a three-judge district court. Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (codified as amended at 42 U.S.C. § 1973c (1988)). A three-judge United States District Court may be convened to decide issues as follows:

> (a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

Act of June 25, 1948, ch. 646, § 2284, 62 Stat. 968, 969 (codified as amended at 28 U.S.C. § 2284 (1988)).

7. *Presley*, __ U.S. at __, 112 S. Ct. at 827, 117 L. Ed. 2d at 62.

8. *Id.*

9. *Id.* at __, 112 S. Ct. at 824, 117 L. Ed. 2d at 58. Direct appeals to the United States Supreme Court from decisions of three-judge courts are allowed as follows:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

28 U.S.C. § 1253 (1988).

10. *Presley*, __ U.S. at __, 112 S. Ct. at 827, 117 L. Ed. 2d at 62. The decision marked the first time the Supreme Court has rejected the Justice Department's recommendations regarding the scope of Section 5 in over twenty years of interpreting the Voting Rights Act of 1965. *Id.* at __, 112 S. Ct. at 834, 117 L. Ed. 2d at 70 (Stevens, J., dissenting).

directly relate to or affect voting and are therefore not subject to judicial or administrative preclearance under Section 5 of the Voting Rights Act of 1965.[11]

The Fifteenth Amendment provides that "[t]he 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] Despite the Fifteenth Amendment's guarantee that a citizen's right to vote may not be abridged on account of race, subsequent legislation has been necessary to more stringently ensure the voting rights of minority persons.[13] The historically widespread use of discriminatory practices in the South to deny voting rights based on race or color—such as literacy tests, good moral character requirements, poll taxes, and white primaries—created a need for

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11. *Id.* at __, 112 S. Ct. at 830, 117 L. Ed. 2d at 65-67.

12. U.S. CONST. amend. XV, § 1. The Court has held that the Fifteenth Amendment does not grant any voting rights, but rather prevents racially-based discrimination against anyone exercising the right to vote. United States v. Reese, 92 U.S. 214, 217 (1875). In reaching this conclusion, the Court stated, "The Fifteenth Amendment does not confer the right of suffrage upon anyone. It prevents the States or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous condition of servitude." *Id.* The Constitution of the United States granted Congress its original authority to regulate elections, mandating that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of [choosing] Senators." U.S. CONST. art. I, § 4. The Court upheld the constitutional authority of Congress to enact federal legislation concerning the franchise, stating, "The exercise of the right [to vote] . . . is guaranteed by the Constitution, and should be kept free and pure by congressional enactments whenever that is necessary." *Ex parte* Yarbrough, 110 U.S. 651, 665 (1884); *see Ex parte* Seibold, 100 U.S. 371, 383-84 (1880) (upholding federal regulation of elections). One year after *Yarbrough*, the Court described the privilege of voting as "[a] fundamental political right, because it is preservative of all rights." Yick Wo v. Hopkins, 118 U.S. 356, 370 (1885); *see* Emma C. Jordan, *Taking Voting Rights Seriously: Rediscovering the Fifteenth Amendment*, 64 NEB. L. REV. 389, 394-95 (1985) (tracing development of 15th Amendment theory); Jean F. Rydstrom, Annotation, *Racial Discrimination in Voting, and Validity and Construction of Remedial Legislation—Supreme Court Cases*, 27 L. Ed. 2d 885, 892 (1971) (citing constitutional provisions guaranteeing suffrage rights to African-Americans).

13. *See Presley*, __ U.S. at __, 112 S. Ct. at 834-35, 117 L. Ed. 2d at 71 (Stevens, J., dissenting) (relating history of discriminatory devices creating need for more protective voting laws); McCain v. Lybrand, 465 U.S. 236, 243-44 (1984) (noting inception of Act in response to continuous and ingenious defiance of 15th Amendment); South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966) (noting Act's creation of stringent new remedies designed to banish racial discrimination in voting); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 254 (2d ed. 1991) (noting Act's central purpose to end racially-motivated voting discrimination); L. Thorne McCarty & Russell B. Stevenson, Comment, *The Voting Rights Act of 1965: An Evaluation*, 3 HARV. C.R.-C.L. L. REV. 357, 358 (1968) (outlining voting laws enacted prior to 1965).

greater protection of minority voting rights.[14] Accordingly, since the inception of the Fifteenth Amendment, Congress repeatedly has taken additional legislative measures to ensure the right to vote.[15] Finding case-by-case liti-

14. *See* Rogers v. Lodge, 458 U.S. 613, 624 (1982) (noting past denial of political process to minorities by means of literacy tests, poll taxes, and white primaries); City of Richmond v. United States, 422 U.S. 358, 380 n.3 (1975) (Brennan, J., dissenting) (noting congressional restriction of more typical discriminatory devices such as literacy tests and "good moral character" requirements); *Katzenbach*, 383 U.S. at 328-29 (noting repeated use of obstructionist tactics in South to deny or abridge voting rights); H.R. REP. No. 439, 89th Cong., 1st Sess. 6 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2437 (citing discriminatory measures creating need for remedial legislation to ensure voting rights of minorities); Emma C. Jordan, *Taking Voting Rights Seriously: Rediscovering the Fifteenth Amendment*, 64 NEB. L. REV. 389, 437 (1985) (noting congressional conclusion that sterner measures necessary to ensure voting rights).

15. *See Katzenbach*, 383 U.S. at 310 (relating history of legislation enacted to cease voting discrimination). Early efforts to ensure the operation of the Fifteenth Amendment resulted in the passage of the Enforcement Act of 1870. *See* L. Thorne McCarty & Russell B. Stevenson, Comment, *The Voting Rights Act of 1965: An Evaluation*, 3 HARV. C.R.-C.L. L. REV. 357, 358 (1968) (outlining voting laws enacted prior to 1965); *see also* Act of May 31, 1870, ch. 114, § 2, 16 Stat. 140, 140-41 (repealed 1894) (criminalizing obstruction by public officers and private persons of right to vote). The statute was amended one year later to establish detailed federal supervision of the electoral process extending from voter registration to certification of election returns. *See Katzenbach*, 383 U.S. at 310 (reviewing early measures taken to ensure voting rights); Emma C. Jordan, *Taking Voting Rights Seriously: Rediscovering the Fifteenth Amendment*, 64 NEB. L. REV. 389, 437-38 (1985) (noting congressional scope of authority under 15th Amendment). *See generally* Act of Apr. 20, 1871, ch. 22, § 2, 17 Stat. 13, 13-14 (repealed 1894) (designating conspiracy to prevent right to vote by force, intimidation, or threat as high crime punishable by fine, imprisonment with hard labor, or both); Act of Feb. 28, 1871, ch. 99, § 1, 16 Stat. 433, 433 (repealed 1894) (providing criminal penalties for unlawful acts affecting election proceedings and registration). The Enforcement Act of 1870, however, was soon invalidated in 1875. *See Reese*, 92 U.S. at 217 (holding that 15th Amendment does not grant suffrage rights to anyone but rather prevents states from giving preference to one citizen over another because of race). Congress repealed most of the remaining statutes regarding the voting process in 1894. *See* Act of June 10, 1872, ch. 415, 17 Stat. 347, 348-49, *repealed by* Act of Feb. 8, 1894, ch. 25, § 1, 28 Stat. 36-37; Act of Feb. 28, 1871, ch. 99, §§ 1-5, 8, 9, 11-14, 16, 16 Stat. 433-34, 436-38, *repealed by* Act of Feb. 28, 1894, ch. 25, § 1, 28 Stat. 36-37; Act of May 31, 1870, ch. 114, §§ 2-4, 20-21, 23, 16 Stat. 140, 140-41, 145-46, *repealed by* Act of Feb. 8, 1894, ch. 25, § 1, 28 Stat. 36-37; Act of Feb. 25, 1865, ch. 52, § 1, 13 Stat. 437, 437, *repealed by* Act of Feb. 8, 1894, ch. 25, § 1, 28 Stat. 36-37. Following this repeal, only five valid voting provisions existed without any modifications for over fifty years. *See* L. Thorne McCarty & Russell B. Stevenson, Comment, *The Voting Rights Act of 1965: An Evaluation*, 3 HARV. C.R.-C.L. L. REV. 357, 358 n.4 (1968) (noting virtual absence of congressional activity regarding voting rights prior to 1964). The five remaining provisions governing voting rights were relatively basic statements declaring the right to vote and the penalties for interfering with that right. *See* 18 U.S.C. §§ 241-242 (1988) (original version at ch. 114, §§ 6-7, 16 Stat. 140 (1870)) (imposing criminal sanctions for interfering with right to vote); 42 U.S.C. § 1971(a)(1) (1988) (original version at ch. 140, § 1, 16 Stat. 140 (1870)) (providing statutory declaration of right to vote); 42 U.S.C. § 1983 (1988) (original version at ch. 22, § 1, 17 Stat. 13 (1871)) (imposing civil liability for interfering with right and privileges granted by Constitu-

gation inadequate to eradicate such widespread and persistent racially discriminatory voting practices, Congress exercised its authority granted by Section 2 of the Fifteenth Amendment to pass the Voting Rights Act of 1965.[16] Congress enacted this legislation primarily to enforce Section 1 of

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tion); 42 U.S.C. § 1985(3) (1988) (original version at ch. 22, § 2, 17 Stat. 13 (1871)) (imposing civil liability for conspiracy to interfere with constitutional rights).

16. *See Presley*, __ U.S. at __, 112 S. Ct. at 835, 117 L. Ed. 2d at 71 (Stevens, J., dissenting) (relating history and purpose behind passage of Voting Rights Act); Allen v. State Bd. of Elections, 393 U.S. 544, 556 (1969) (noting inadequacy of pre-Voting Rights Act remedies in guaranteeing suffrage rights); *Katzenbach*, 383 U.S. at 327-28 (explaining congressional motivation for passing Act); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 254 (2d ed. 1991) (describing congressional power to provide remedies for infringements of rights that courts would nonetheless find protected by Constitution). Discriminatory measures cited as creating the need for the remedial legislation included the "use of literacy and other tests and devices in areas where there is reason to believe that such tests and devices have been and are being used to deny the right to vote on account of race or color. . . ." H.R. REP. NO. 439, 89th Cong., 1st Sess. 6 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2437. The Voting Rights Act defines "test or device" as:

> [A]ny requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(c), 79 Stat. 437, 438-39 (codified as amended at 42 U.S.C. § 1973b(c) (1988)). The Act applies special remedies to areas—"covered jurisdictions"—with a history of discrimination. *See* James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 VA. L. REV. 633, 678 (1983) (noting rationale and interpretation of Act). Beginning in 1890, the southern states of Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia established tests specifically intended to prevent African-Americans from voting. *Katzenbach*, 383 U.S. at 310. The House Judiciary Committee, as part of its recommendation for passage of the Voting Rights Acts of 1965, compiled the following list of voting discrimination tests and devices which most of the states with large African-American populations used:

> 1. Reading and/or writing: Mississippi (1890), South Carolina (1900), Alabama (1901), Virginia (1902), Georgia (1908), Louisiana (1921), Oklahoma (1910).
> 2. Completion of an application form: Louisiana (1898), Virginia (1902), Louisiana (1921), Mississippi (1954).
> 3. Oral constitutional "understanding" and "interpretation" tests: Mississippi (1890), South Carolina (1895), Virginia (1902), Louisiana (1921).
> 4. Understanding of the duties and obligations of citizenship: Alabama (1901), Georgia (1908), Louisiana (1921), Mississippi (1954).
> 5. Good moral character requirement (other than nonconviction of a crime): Alabama (1901), Georgia (1908), Louisiana (1921), Mississippi (1960).

H.R. REP. NO. 439, 89th Cong., 1st Sess. 12 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2443. The House and Senate Judiciary Committees each held hearings for nine days and received testimony from sixty-seven witnesses regarding the states' discriminatory voting practices. *Katzenbach*, 383 U.S. at 308-09. The House conducted floor discussions of the bill for more than three days, and the Senate debated the bill for twenty-six days. *Id.* at 309. Con-

the Fifteenth Amendment by abolishing prerequisites to and abridgements of minority persons' right to vote.[17] Section 5 of the Act provides that any state or political subdivision enacting or seeking to administer any standard, practice, procedure, voting qualification, or prerequisite unlike that in effect "with respect to voting," must obtain judicial or administrative preclearance or advanced approval prior to implementing the change.[18] The United States Attorney General is empowered to give prior approval to such a

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gress overwhelmingly approved the bill at the end of these deliberations by a vote of 328 to 74 in the House and 79 to 18 in the Senate. *Id.*; *see generally* H.R. REP. NO. 439, 89th Cong., 1st Sess. 6-13 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2437-44 (discussing reasons for establishing Voting Rights Act); S. REP. NO. 162, pt. 3, 89th Cong., 1st Sess. 2-16 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2508, 2540-54 (describing purpose of establishing Voting Rights Act). In 1965, President Johnson robustly demanded the "goddamnedest, toughest, voting rights act" Congress could provide. *See* HOWELL RAINES, MY SOUL IS RESTED: MOVEMENT DAYS IN THE DEEP SOUTH REMEMBERED 337 (1978) (relating interview with Nicholas Katzenbach, Attorney General to President Johnson).

17. *See* H.R. REP. NO. 439, 89th Cong., 1st Sess. 6 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2437 (stating purpose of legislation); *see also Katzenbach*, 383 U.S. at 308, 315 (noting congressional assumption of power to enforce 15th Amendment and stating that basic purpose of Voting Rights Act was to end racial discrimination in voting). *Compare* Beer v. United States, 425 U.S. 130, 141 (1976) (stating that purpose of § 5 has been to prevent changes in voting procedure that diminish racial minorities' standing to effectively use their electoral franchise) *with* City of Rome v. United States, 446 U.S. 156, 185 (1980) (changing *Beer*'s language to state that purpose of § 5 has been to prevent changes in voting procedure that diminish racial minorities' standing effectively to use electoral process). *See generally* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 254 (2d ed. 1991) (noting congressional enforcement of constitutional provisions by remedial measures); James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 VA. L. REV. 633, 677 (1983) (explaining Act's remedial purpose of overcoming historical resistance to enfranchisement of African-Americans). The six states originally subject to full operation of the Voting Rights Act were Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia. *See* Vernon E. Jordan, Jr., *The Black Vote in Danger*, 2 CIV. RTS. DIG. 1, 2 (1969) (reporting dramatic increase in African-American voter registration in jurisdictions covered by Act since its inception). President Lyndon Johnson reportedly said to Hubert Humphrey during the legislative battle to pass the 1964 Civil Rights Act, "Yes, yes, Hubert, I want all those other things—buses, restaurants, all of that—but the right to vote with no ifs, ands, or buts, that's the key. When the Negroes get that, they'll have every politician, north and south, east and west, kissing their ass, begging for their support." Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1092 n.69 (1991); *see* MERLE MILLER, LYNDON: AN ORAL BIOGRAPHY 371 (1980) (quoting President Johnson's statement to Hubert Humphrey).

18. Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (codified as amended at 42 U.S.C. § 1973c (1988)); *see Presley*, __ U.S. at __, 112 S. Ct. at 824, 117 L. Ed. 2d at 58 (stating statutory language controlling changes in voting standards, practices, and procedures); *City of Rome*, 446 U.S. at 160-61 (stating relevant provisions of statute regarding changes in voting standards, practices, and procedures); *see also* Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1348-49 (1983) (recounting history of passage of Act); William C.

change.[19] Preclearance is granted only if the proposed action has neither the purpose nor the effect of precluding or abridging voting rights because of race or color.[20]

The United States Supreme Court first encountered the Act in *South Carolina v. Katzenbach*.[21] South Carolina sought a declaration that certain provisions of the Act violated the United States Constitution and requested an injunction against the enforcement of the allegedly unconstitutional provisions.[22] Although the Court considered suspension of new voting rules

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Keady & George C. Cochran, *Section Five of the Voting Rights Act: A Time for Revision*, 69 KY. L.J. 741, 743 (1981) (noting operation and impact of § 5).

19. Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (codified as amended at 42 U.S.C. § 1973c (1988)); *see Presley*, __ U.S. at __, 112 S. Ct. at 824, 117 L. Ed. 2d at 58 (stating statutory provision requiring submission of change to Attorney General); *City of Rome*, 446 U.S. at 160-61 (stating preclearance requirement). The original legislation of the Voting Rights Act was supplemented with the alternative measure of obtaining preclearance from the Attorney General rather than from the District Court for the District of Columbia as a means of providing the states covered by the Act a speedy alternative method of compliance. *See, e.g.*, NAACP v. Hampton County Election Comm'n, 470 U.S. 166, 168 n.1 (1985) (noting alternative method of obtaining preclearance of voting changes by petitioning Attorney General); *McCain*, 465 U.S. at 246 (stating methods of obtaining preclearance of changes in election practices); Morris v. Gressette, 432 U.S. 491, 503 (1977) (noting indications in legislative materials of congressional intent to expedite preclearance proceedings); *see also* 2 JESSE CHOPER ET AL., THE SUPREME COURT: TRENDS AND DEVELOPMENTS, 1979-1980 30 (Dorothy Opperman ed., 1981) (commenting on congressional power to enforce 15th Amendment); John J. Roman, *Section 5 of the Voting Rights Act: The Formation of an Extraordinary Federal Remedy*, 22 AM. U. L. REV. 111, 124 (1972) (recounting history of administrative review of voting changes).

20. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (codified as amended at 42 U.S.C. § 1973c (1988)) (describing conditions necessary to gain preclearance); *Presley*, __ U.S. at __, 112 S. Ct. at 824, 117 L. Ed. 2d at 58 (stating provisions of statute controlling changes in voting standards, practices, and procedures); *City of Rome*, 446 U.S. at 160-61 (setting out statutory language governing any change in voting standards, practices, and procedures); Alan Howard & Bruce Howard, *The Dilemma of the Voting Rights Act—Recognizing the Emerging Political Equality Norm*, 83 COLUM. L. REV. 1615, 1616 n.4 (1983) (noting Act's preclusion of any voting changes which may adversely affect racial minorities' exercise of electoral franchise); William C. Keady & George C. Cochran, *Section Five of the Voting Rights Act: A Time for Revision*, 69 KY. L.J. 741, 744 (1981) (noting irrelevant purpose for enacting voting changes because mere potential for discrimination subjects voting changes to § 5 scrutiny).

21. *See* South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966) (declaring Act's constitutionality); *see also* Georgia v. United States, 411 U.S. 526, 531-32 (1973) (acknowledging Court's affirmation of constitutionality of Act); Allen v. State Bd. of Elections, 393 U.S. 544, 548 (1969) (noting Court's declaration of Act's constitutionality); Dwight Aarons, *Nationwide Preclearance of Section Five of the 1965 Voting Rights Act: Implementing the Fifteenth Amendment*, 11 NAT'L BLACK L.J. 93, 97 (1989) (stating Court's reasons for upholding Act); Emma C. Jordan, *Taking Voting Rights Seriously: Rediscovering the Fifteenth Amendment*, 64 NEB. L. REV. 389, 436 (1985) (recounting South Carolina's challenge to constitutionality of Act).

22. *See* Presley v. Etowah County Comm'n, __ U.S. __, __, 112 S. Ct. 820, 827, 117 L.

pending preclearance to be an extraordinary variance from the usual course of dealings between the states and the federal government, the Court upheld the Act as a permissible exercise of congressional power under Section 2 of the Fifteenth Amendment.[23]

However, the substance of the Fifteenth Amendment's guarantee of the

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Ed. 2d 51, 62 (noting genesis of Supreme Court's consideration of Voting Rights Act cases); *Katzenbach*, 383 U.S. at 307-08 (stating reasons why appeal to Supreme Court was urgent); Dwight Aarons, *Nationwide Preclearance of Section Five of the 1965 Voting Rights Act: Implementing the Fifteenth Amendment*, 11 NAT'L BLACK L.J. 93, 97 (1989) (noting Court's broad interpretation of § 5); Emma C. Jordan, *Taking Voting Rights Seriously: Rediscovering the Fifteenth Amendment*, 64 NEB. L. REV. 389, 436 (1985) (referring to *Katzenbach* as providing most comprehensive analysis of language and purpose of 15th Amendment). States supporting South Carolina in its complaint included Alabama, Georgia, Louisiana, Mississippi, and Virginia, while states supporting the Attorney General in defense of the Act included California, Hawaii, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Michigan, Montana, New Hampshire, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Vermont, West Virginia, and Wisconsin. *Katzenbach*, 383 U.S. at 307-08 n.2. South Carolina has a history of being a leader in the broad movement to disenfranchise African-Americans. *See id.* at 310 n.9 (explaining South Carolina's history of preventing African-American enfranchisement through political means); V.O. KEY, JR., SOUTHERN POLITICS: IN STATE AND NATION 538 (1950) (describing South Carolina's "contribution" of finding new ways to disenfranchise African-Americans). At the South Carolina Constitutional Convention of 1895, Senator Ben Tillman, the dominant political figure at the convention, proudly and candidly explained to the state delegates the objective of a new literacy test: "[T]he only thing we can do as patriots and as statesmen is to take from [the 'ignorant blacks'] every ballot that we can under the laws of our national government." *Katzenbach*, 383 U.S. at 310 n.9. *But see* Gaston County v. United States, 395 U.S. 285, 291 (1969) (noting irony of allowing states or counties to disenfranchise for inability to pass literacy tests when such inability caused by other discriminatory state action).

23. *See Presley*, __ U.S. at __, 112 S. Ct. at 827, 117 L. Ed. 2d at 62 (recounting Court's initial declaration of constitutionality of Voting Rights Act); *Katzenbach*, 383 U.S. at 334-37 (recognizing exceptional conditions provide justification for legislative measures not otherwise appropriate); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 254 (2d ed. 1991) (noting power of Congress to enforce Constitution). Writing for the majority in *Katzenbach*, Chief Justice Warren stated, "Hopefully, millions of non-white Americans will now be able to participate for the first time on an equal basis in the government under which they live." *Katzenbach*, 383 U.S. at 337; *see also* L. Thorne McCarty & Russell B. Stevenson, Comment, *The Voting Rights Act of 1965: An Evaluation*, 3 HARV. C.R.-C.L. L. REV. 357, 357 (1968) (quoting Court's opinion in *Katzenbach*). Chief Justice Warren stated that the basic test used to determine congressional authority to enforce the Fifteenth Amendment was provided by Chief Justice John Marshall fifty years prior to the ratification of the Fifteenth Amendment. *See Katzenbach*, 383 U.S. at 326 (explaining Act's constitutionality); John J. Roman, *Section 5 of the Voting Rights Act: The Formation of an Extraordinary Federal Remedy*, 22 AM. U. L. REV. 111, 115-16 (1972) (noting Court's concern for practicalities of enforcing § 5). Chief Justice Marshall recognized the authority of Congress to enforce legislation as follows:

> Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

right to vote is not confined to the elimination of the crude discriminatory tactics considered in early voting rights cases.[24] Congress enacted the Voting Rights Act of 1965 to preclude state regulations directly or indirectly having the effect or purpose of denying citizens the right to vote based on race.[25] Congress meant to subject any state enactment altering an election law, even in a minor way, to preclearance requirements.[26]

Since first upholding the constitutionality of the Act, the United States Supreme Court has focused primarily on indirect racially-motivated limita-

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24. *See* Rogers v. Lodge, 458 U.S. 613, 624 (1982) (noting past denial of political process to African-Americans by means of literacy tests, poll taxes, and white primaries); City of Richmond v. United States, 422 U.S. 358, 380 n.3 (1975) (Brennan, J., dissenting) (noting congressional restriction of more familiar discriminatory devices such as literacy tests, voucher requirements, and "good moral character" qualifications); White v. Regester, 412 U.S. 755, 766-67 (1973) (referring to Texas history of official racial discrimination whereby "place" rules limited candidates from multi-member districts to specified places on ballots); *see also* Emma C. Jordan, *Taking Voting Rights Seriously: Rediscovering the Fifteenth Amendment*, 64 NEB. L. REV. 389, 440 (1985) (discussing 15th Amendment's protection of voting rights of African-Americans). In 1882, South Carolina undertook purposeful acts to discourage African-American voting, making the election process more difficult by enacting the "Eight Box Law." *See* Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 534 (1973) (describing methods used to keep African-Americans from voting). Under this rule, the state provided separate ballot boxes for each elective office. *Id.* Ballots had to be cast in the proper box to be counted; whites were assisted in casting their ballots but African-Americans were not. *Id.*

25. *See Presley*, __ U.S. __, 112 S. Ct. at 827, 117 L. Ed. 2d at 62 (acknowledging Act's objective to preclude subtle as well as obvious state regulations denying or abridging voting based on race); Perkins v. Matthews, 400 U.S. 379, 385 (1971) (stating that purpose of enacting § 5 was to prevent implementation of changes that abridged voting rights); *Allen*, 393 U.S. at 565 (stating Act's aim to preclude subtle and obvious state regulations that deny or abridge voting based on race); Dwight Aarons, *Nationwide Preclearance of Section Five of the 1965 Voting Rights Act: Implementing the Fifteenth Amendment*, 11 NAT'L BLACK L.J. 93, 97 (1989) (noting congressional adoption of Act to combat incessant and ingenious defiance of Constitution); William C. Keady & George C. Cochran, *Section Five of the Voting Rights Act: A Time for Revision*, 69 KY. L.J. 741, 749 (1981) (reporting success of preclearance mechanisms in identifying and forestalling obvious and subtle efforts to prevent minorities from voting).

26. *See* Presley, __ U.S. at __, 112 S. Ct. at 827-28, 117 L. Ed. 2d at 62 (noting reasons for broad construction of § 5); NAACP v. Hampton County Election Comm'n, 470 U.S. 166, 176 (1985) (recognizing refusal of Congress to exempt minor alterations in voting procedures from scope of § 5); *Perkins*, 400 U.S. at 387 (noting significance of congressional inclusion of minor exceptions in voting changes within § 5); *Allen*, 393 U.S. at 568 (referring to extensive hearings and debates marking congressional refusal to allow even minor exceptions to broad scope of coverage of § 5); James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 VA. L. REV. 633, 681 (1983) (noting Court's extension of preclearance procedures to encompass entire electoral process); Emma C. Jordan, *Taking Voting Rights Seriously: Rediscovering the Fifteenth Amendment*, 64 NEB. L. REV. 389, 431 (1985) (noting extension of § 5 to include vote-dilution devices).

tions on voting privileges, establishing four categories of state actions requiring preclearance.[27] In *Allen v. State Board of Elections*,[28] the Supreme Court considered four separate cases in one opinion and held that Section 5 has a broad range of operation and is not limited to state rules regarding voter-registration eligibility.[29] The four categories held to be "with respect to voting" and thus subject to preclearance include (1) changes in the manner of voting,[30] (2) changes in candidacy requirements and qualifica-

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27. *See Presley*, __ U.S. at __, 112 S. Ct at 827-28, 117 L. Ed. 2d at 62-63 (rejecting argument that absence of de minimis exception to § 5 subjects reallocations of elected officials' authority to preclearance); *Allen*, 393 U.S. at 569-72 (citing legislative history of Act as justification for broad appliation of § 5); Jean F. Rydstrom, Annotation, *Racial Discrimination in Voting, and Validity and Construction of Remedial Legislation—Supreme Court Cases*, 27 L. Ed. 2d 885, 892 (1971) (noting Court's concern with statutes establishing indirect methods of discrimination). *See generally Hampton County*, 470 U.S. at 178 (changing candidacy requirements and qualifications); *McCain*, 465 U.S. at 239 (effecting creation or abolition of elective office); *Perkins*, 400 U.S. at 387, 394 (changing composition of electorate and manner of voting); William C. Keady & George C. Cochran, *Section Five of the Voting Rights Act: A Time for Revision*, 69 KY. L.J. 741, 744-45 (1981) (providing laundry list of state actions that § 5 proscribes). The Court further expanded the interpretation of the Act, stating that the form of a voting procedure change does not determine whether the change itself falls within the scope of Section 5. *See Hampton County*, 470 U.S. at 166 (holding that § 5 applies to informal as well as formal changes in voting). The Court warned that refusing to apply Section 5 to informal changes would allow states to avoid preclearance requirements by implementing voting changes in an informal manner. *See id.* at 182 (noting that even bulletins changing election dates require preclearance).

28. 393 U.S. 544 (1969).

29. *See Presley*, __ U.S. at __, 112 S. Ct. at 827, 117 L. Ed. 2d at 62-63 (noting prior holding in *Allen* that § 5 applies to state rules relating to candidate qualifications and designation of elective offices); *Perkins*, 400 U.S. at 387 (stipulating that changes which may not be voting qualifications or prerequisites to voting could still be considered standards, practices, or procedures regarding voting); *Allen*, 393 U.S. at 565 (rejecting narrow construction of § 5 as covering only state enactments prescribing who may register to vote). The Court in *Allen* stated that the possibility that future administrative problems might arise as a result of preclearance requirements does not establish a congressional intent that Section 5 have a narrow scope of coverage. *See id.* at 569 (noting no excuses for failing to submit changes for preclearance). *But see id.* at 585-86 (Harlan, J., dissenting) (complaining that Court vastly increased extent of federal intervention under § 5, shifting Act's focus away from voting registration barriers in order to allow restructuring of state governments). In *Allen*, the Supreme Court commenced a judicial transformation of Section 5's coverage which the Court has since expanded to guarantee a certain level of electoral success for minority groups. *See* John J. Roman, *Section 5 of the Voting Rights Act: The Formation of an Extraordinary Federal Remedy*, 22 AM. U. L. REV. 111, 118 (1972) (noting Court's liberal construction of scope of § 5 without setting precise boundaries of such coverage); *see also* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL, REDEFINING DISCRIMINATION: "DISPARATE IMPACT" AND THE INSTITUTIONALIZATION OF AFFIRMATIVE ACTION 148 (1987) (describing effectiveness of Act).

30. *See, e.g., Presley*, __ U.S. at __, 112 S. Ct. at 828, 117 L. Ed. 2d at 63 (stating four main contexts consistently recognized as pertaining to voting); *Perkins*, 400 U.S. at 387-88 (stating main contexts as (1) changing from paper ballots to voting machines, (2) changing

tions,[31] (3) changes in the geographical character of the electorate qualified to vote for certain offices,[32] and (4) changes effecting the abolition or creation of elective offices.[33] Any doubts regarding the extent of Section 5's coverage are traditionally resolved by the Attorney General, who is entitled to

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location of polling places, (3) placing voting locations at remote places away from African-American communities or at places calculated to intimidate African-Americans from entering, or (4) failing adequately to publicize changes); *Allen*, 393 U.S. at 570-71 (changing procedures for casting write-in ballots and changing from paper ballots to voting machines constitute changes in voting); James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 VA. L. REV. 633, 681 (1983) (noting Court's extension in *Allen* of preclearance requirement beyond registration and voting process to encompass every aspect of electoral process); Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1362 (1983) (describing chilling effect on African-American voter participation by placing polls in business establishments owned by whites and in remote locations).

31. *See Presley*, __ U.S. at __, 112 S. Ct. at 828, 117 L. Ed. 2d at 63 (listing four main contexts pertaining to voting); *Hampton County*, 470 U.S. at 182-83 (changing filing deadlines for independent candidates in general elections); Dougherty County Bd. of Educ. v. White, 439 U.S. 32, 42-43 (1978) (requiring board of education members to take leaves of absence without pay while campaigning for election to public office); Hadnott v. Amos, 394 U.S. 358, 365-66 (1969) (changing filing deadlines); James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 VA. L. REV. 633, 681 (1981) (noting application of § 5 to changes in qualifications required of independent candidates); John J. Roman, *Section 5 of the Voting Rights Act: The Formation of an Extraordinary Federal Remedy*, 22 AM. U. L. REV. 111, 118 (1972) (noting Court's extending coverage of § 5 to "changes not so intimately related to voting process").

32. *See Presley*, __ U.S. at __, 112 S. Ct. at 828, 117 L. Ed. 2d at 63 (naming four main contexts pertaining to voting); *City of Richmond*, 422 U.S. at 362-64 (changing boundary lines of city by annexation that substantially increased proportion of whites and decreased proportion of African-Americans in voting districts); *Perkins*, 400 U.S. at 393-94 (changing boundary lines of municipality through annexations that enlarged number of eligible voters). *But see* United Jewish Org. v. Carey, 430 U.S. 144, 161 (1977) (holding that Constitution does not preclude states from purposely creating or maintaining African-American majorities in certain districts to ensure reapportionment plan complies with § 5); Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1354 (1983) (noting absence of affirmative language in Act requiring jurisdictions to review and discard potentially discriminatory practices); John J. Roman, *Section 5 of the Voting Rights Act: The Formation of an Extraordinary Federal Remedy*, 22 AM. U. L. REV. 111, 123 (1972) (noting that changes involving composition of electorate are subject to § 5 preclearance).

33. *See Presley*, __ U.S. at __, 112 S. Ct. at 828, 117 L. Ed. 2d at 63-64 (listing main contexts pertaining to voting); *McCain*, 465 U.S. at 239-40 (changing boundaries of voting districts); Lockhart v. United States, 460 U.S. 125, 127-28 (1983) (increasing number of city council members); *Allen*, 393 U.S. at 551 (mandating that educational superintendent positions, formerly elected or appointed according to voter preference, be elective offices only); James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 VA. L. REV. 633, 681 (1983) (noting application of § 5 to changes from elective to appointive offices); John J. Roman, *Section 5 of the Voting Rights Act: The Formation of an Extraordinary Federal Remedy*, 22 AM. U. L. REV.

considerable deference in interpreting the Act.[34]

Changes in the electorate, such as replacing single-district elections with at-large voting or revising boundary lines, are also considered to be changes with respect to voting.[35] Changes from single-district elections to at-large voting can lead to racial discrimination because diluting a vote's power affects voting rights just as profoundly as prohibiting the vote.[36] Revising

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111, 118 (1972) (noting extension of coverage of § 5 to appointive offices that were previously elective offices).

34. *See Hampton County*, 470 U.S. at 178-79 (noting Justice Department's regulation that even minor or indirect changes affecting voting must meet § 5 preclearance requirements). The Court recommended that such deference be accorded the Attorney General's construction of Section 5 because of the Attorney General's extensive role in drafting the Voting Rights Act and explaining its operation to Congress. *Id.* at 179 n.29; *see also* United States v. Sheffield Bd. of Comm'rs, 435 U.S. 110, 131 (1978) (noting Attorney General's extensive involvement in drafting and interpreting Act); *Perkins*, 400 U.S. at 391-92 (following Attorney General's interpretation of scope of Act to include relocations of polling places and annexations of territories); Udall v. Tallman, 380 U.S. 1, 16 (1965) (acknowledging Court's great deference for interpretations of Act given by officers or agency responsible for its administration); James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 VA. L. REV. 633, 682 (1983) (noting Attorney General's power to object to changes on ground of suspected discrimination); Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 581 (1973) (noting Justice Department's expertise in judging discriminatory nature of voting changes). *See generally* Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984) (recognizing considerable weight accorded executive department's construction of statutory scheme it administers); United States v. Shimer, 367 U.S. 374, 383 (1961) (noting that Court should not disturb construction of statute by agency charged with implementation unless legislative history or statutes show agency's interpretation differs from congressional intent).

35. *See Regester*, 412 U.S. at 766 (stating that at-large elections give minorities fewer opportunities to participate in political process and elect representatives of choice); *Georgia*, 411 U.S. at 534 (holding that reapportionment plans are subject to preclearance requirements of § 5); *Perkins*, 400 U.S. at 388-90 (stating that both changing to at-large elections and revising boundary lines dilute voting power and are within scope of § 5); Katherine I. Butler, *Constitutional and Statutory Challenges to Election Structures: Dilution and the Value of the Vote*, 42 LA. L. REV. 851, 862 (1982) (noting application of § 5 to redistricting); *The Supreme Court—1979 Term*, 94 HARV. L. REV. 75, 138 (1980) (recognizing connection between at-large electoral schemes and vote-dilution).

36. *See, e.g., City of Richmond*, 422 U.S. at 381 (Brennan, J., dissenting) (noting Court's application of § 5 to legislative reapportionments, annexations, and other enactments potentially abridging or diluting voting rights); *Perkins*, 400 U.S. at 390 (affirming application of § 5 to annexations); Reynolds v. Sims, 377 U.S. 533, 555 (1964) (stating that any restriction on right to vote strikes at heart of representative government). Chief Justice Warren observed, "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.* at 555; *see also* 2 JESSE CHOPER ET AL., THE SUPREME COURT: TRENDS AND DEVELOPMENTS, 1979-1980 31 (Dorothy Opperman ed., 1981) (stating that bringing more voters into electoral boundaries may dilute impact of African-Americans' voting strength). The concept of "dilution" may be traced back to early federal oversight of the voting process. *See* Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VA. L.

boundary lines affects voting by excluding some voters outside the boundaries and including other voters within the boundaries, by determining who may or may not be eligible to vote in certain elections, and by diluting the weight of votes cast by citizens residing within the original boundary lines prior to annexations.[37] These vote-dilution devices that reduce or nullify the strength of a constituency violate the Act's provision that the term "voting" includes any action required to ensure a vote's effectiveness.[38]

REV. 1, 7 n.22 (1991) (noting Court's protection of functional integrity of African-American votes by nullifying election systems that dilute collective powers of African-American voters); *see also* United States v. Saylor, 322 U.S. 385, 389 (1944) (holding that bribery of voters distorts results of elections and effectively denies voters free and fair choice); United States v. Classic, 313 U.S. 299, 321-22 (1941) (holding that conspiracy to prevent official count of citizen's ballot is conspiracy to oppress and injure citizen's right to vote); United States v. Mosely, 238 U.S. 383, 386 (1915) (arguing that right to have vote counted merits as much protection as right to put ballot in box).

37. *See Perkins*, 400 U.S. at 388 (explaining why revising boundary lines constitutes change of voting standards, practices, or procedures); Emma C. Jordan, *Taking Voting Rights Seriously: Rediscovering the Fifteenth Amendment*, 64 NEB. L. REV. 389, 395 (1985) (tracing expansion of judicial function of invalidating discriminatory state practices); Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VA. L. REV. 1, 7-8 (1991) (describing Court's objective of striking down election practices that reduce collective power of African-American voters). *Compare Reynolds*, 377 U.S. at 555 (stating that suffrage rights denied by debasement or dilution of citizens' votes denies voting rights just as effectively as by completely prohibiting vote) *with* Gomillion v. Lightfoot, 364 U.S. 339, 346 (1960) (holding that city's revision of boundary lines deprived citizens of right to vote rather than simply diluted strength of their votes).

38. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, § 14(c)(1), 79 Stat. 437, 445 (codified as amended at 42 U.S.C. § 1973c (1) (1988) (stating actions included in terms "vote" or "voting"). The Voting Rights Act provides in pertinent part:

> The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this subchapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

Id.; *see City of Rome*, 446 U.S. at 187 (concluding that annexations diluting African-American voting strength violate § 5); *Allen*, 393 U.S. at 565-66 (holding that § 5 is applicable to reapportionment plans); *id.* at 588 (Harlan, J., dissenting in part and concurring in part) (describing Court's holding as based on conclusion that Congress intended to protect African-Americans from dilution of voting power); 2 JESSE CHOPER ET AL., THE SUPREME COURT: TRENDS AND DEVELOPMENTS, 1979-1980 32 (Dorothy Opperman ed., 1981) (analyzing Court's decision in *City of Rome*). Three years prior to the inception of the Voting Rights Act, Justice Frankfurter contended that "[o]ne cannot speak of 'debasement' or 'dilution' of the value of a vote, until there is first defined a standard of reference as to what a vote should be worth." Baker v. Carr, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting); *see also* James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 VA. L. REV. 633, 654 (1983) (recounting progression of Court's review of apportionment schemes).

Changes effecting the abolition or creation of elective offices, such as replacing elected officials with appointed officials or creating new elective positions, are also changes with respect to voting.[39] Because citizens are no longer able to elect officials who were previously subject to their approval, the power of their votes is affected; thus, such changes are subject to preclearance.[40]

In *Presley v. Etowah County Commission*, the Court addressed the issue of whether modifications in the decision-making authority and responsibilities of elected officials are voting changes within the context of Section 5 of the Voting Rights Act of 1965.[41] The Court held in *Presley* that enactments altering or reallocating the distribution of power among elected officials do not directly relate to or affect voting and are therefore not subject to judicial or administrative preclearance under Section 5 of the Act.[42] Justice Kennedy, writing for the majority, stated that the Etowah County Commission's Common Fund Resolution had no effect or impact on the substance of voting rights because it did not increase or decrease the number of representatives voters could elect.[43] The Court recognized that the Russell County Commission's Unit System, which delegated authority to an appointed official, was similar to an enactment replacing elective officials with appointive ones.[44] However, the Court concluded that the Unit System did not preclude voters from electing a representative who had been previously subject

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39. *See Presley*, __ U.S. at __, 112 S. Ct. at 828, 117 L. Ed. 2d at 63-64 (denoting main contexts recognized as pertaining to voting); *McCain*, 465 U.S. at 239 (changing boundaries of voting districts); *Lockhart*, 460 U.S. at 127-28 (increasing number of city council members); James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives of the Purpose vs. Results Approach from the Voting Rights Act*, 69 VA. L. REV. 633, 681 (1983) (noting application of § 5 to changes from elective offices to appointive offices); John J. Roman, *Section 5 of the Voting Rights Act: The Formation of an Extraordinary Federal Remedy*, 22 AM. U. L. REV. 111, 118 (1972) (noting Court's extending coverage of § 5 to include changing elective office to appointive office).

40. *See Presley*, __ U.S. at __, 112 S. Ct. at 830, 117 L. Ed. 2d at 65-66 (explaining why changing elective offices to appointive offices is subject to preclearance requirements); *Lockhart*, 460 U.S. at 131 (holding that creating new elective posts alters character of original elective posts); *Allen*, 393 U.S. at 569-70 (providing rationale for subjecting to preclearance any enactments affecting right to vote for elective offices); Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 555 n.131 (1973) (observing that shifting from appointive offices to elective offices may be more discriminatory than making elective offices appointive); John J. Roman, *Section 5 of the Voting Rights Act: The Formation of an Extraordinary Federal Remedy*, 22 AM. U. L. REV. 111, 118 (1972) (noting that changing elective offices to appointive offices is not intimately related to voting but still subject to § 5 preclearance requirement).

41. Presley v. Etowah County Comm'n, __ U.S. __, __, 112 S. Ct. 820, 824, 117 L. Ed. 2d 51, 58 (1992).

42. *Id.* at __, 112 S. Ct. at 830, 117 L. Ed. 2d at 65-66.

43. *Id.* at __, 112 S. Ct. at 829, 117 L. Ed. 2d at 64.

44. *Id.* at __, 112 S. Ct. at 830, 117 L. Ed. 2d at 66.

to the voters' approval.[45] Thus, the system was not subject to Section 5.[46]

The Court acknowledged that the creation or elimination of an appointive post often results in a decrease or increase in the powers of officials responsible to the electorate, but stated that such changes are not subject to the strictures of Section 5.[47] The Court rejected the argument that enactments transferring elected officials' authority lessen their individual power and diminish the value of their constituents' votes.[48] Instead, the Court reasoned that acceptance of such an argument would cause an unconstrained expansion of the coverage of Section 5 because countless state and local enactments affect the authority of elected officials without having any direct relation to voting.[49]

The Court held that Section 5 unambiguously applies only to modifications of voting rules, concluding that changes in elected officials' decision-making authority are routine matters of governance outside the scope of Section 5 operations.[50] The Court stated that expanding the scope of Section 5 to include enactments transferring elected officials' authority over their respective budgets would expand Section 5 coverage far beyond the Act's statutory language and congressional intent.[51]

The Court refused to defer to the Attorney General's broad interpretation of the Act.[52] Stating that "[d]eference does not mean acquiescence," the Court explained that its policy of deferring to administrative interpretations of statutes is effective only if no expression of legislative intent exists and the administrative interpretation is reasonable.[53] Moreover, the Court declared that Congress never intended the Voting Rights Act to subject to federal supervision every governmental decision, or even most of them, in covered jurisdictions.[54] The Court further stipulated that the "Voting Rights Act is not an all-purpose antidiscrimination statute" and that the decision-making changes at issue may be actionable under different remedial measures which Congress had implemented to fight discrimination.[55]

Writing for the dissent, Justice Stevens argued that requiring judicial or administrative preclearance for changes in elected officials' duties would not

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45. *Presley*, __ U.S. at __, 112 S. Ct. at 830, 117 L. Ed. 2d at 66.
46. *Id.*
47. *Id.* at __, 112 S. Ct. at 831, 117 L. Ed. 2d at 66.
48. *Id.* at __, 112 S. Ct. at 829, 117 L. Ed. 2d at 64.
49. *Presley*, __ U.S. at __, 112 S. Ct. at 829, 117 L. Ed. 2d at 64.
50. *Id.* at __, 112 S. Ct. at 831-32, 117 L. Ed. 2d at 66-67.
51. *Id.* at __, 112 S. Ct. at 830, 117 L. Ed. 2d at 65.
52. *Id.* at __, 112 S. Ct. at 831-32, 117 L. Ed. 2d at 67.
53. *Presley*, __ U.S. at __, 112 S. Ct. at 831, 117 L. Ed. 2d at 67.
54. *Id.* at __, 112 S. Ct. at 829, 117 L. Ed. 2d at 64.
55. *Id.* at __, 112 S. Ct. at 832, 117 L. Ed. 2d at 68.

impose any significant burdens on jurisdictions subject to Section 5.[56] Additionally, Justice Stevens strongly disagreed with the majority's assertion that the Court's task is to formulate workable rules confining the coverage of Section 5 to its legitimate sphere of voting.[57] Justice Stevens attacked the majority's narrow interpretation of Section 5, citing the statutory definition of voting as including "all action necessary to make a vote effective."[58]

Justice Stevens further supported his argument by referring to the decision in *Allen* which held that Section 5 is applicable to all discriminatory changes, even if not described literally in the text of the Act.[59] Justice Stevens reminded the Court of its assertion in *Allen* that Section 5 coverage should encompass the broadest possible scope.[60] To support this expansive reading, Justice Stevens cited subsequent Court decisions reaffirming the broad coverage of Section 5 and the three congressional reenactments of Section 5.[61] Justice Stevens argued that transferring elected officials' decision-making power to appointed officials or to a body of elected officials ruled by the majority transforms such elected officials into mere figureheads.[62]

Finally, in discussing the situation in *Presley*, Justice Stevens analogized to one in which an elective office held by a minority candidate is replaced with an appointive office.[63] Such a situation, Justice Stevens argued, represents another method of maintaining the political power of the white majority which Congress intended Section 5 to forestall.[64]

In *Presley*, the Court limited the coverage of Section 5 by holding that enactments reallocating elected officials' decision-making authority do not require judicial or administrative preclearance because these enactments do not bear a direct relation to or have a definite impact upon voting itself.[65] In

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56. *Id.* at __, 112 S. Ct. at 833, 117 L. Ed. 2d at 69 (Stevens, J., dissenting). Justices White and Blackmun joined Justice Stevens in the dissent. *Id.*

57. *Presley*, __ U.S. at __, 112 S. Ct. at 834, 117 L. Ed. 2d at 70-71 (Stevens, J., dissenting).

58. *Id.* at __, 112 S. Ct. at 835, 117 L. Ed. 2d at 72 (Stevens, J., dissenting).

59. *Id.* at __, 112 S. Ct. at 835-36, 117 L. Ed. 2d at 72 (Stevens, J., dissenting).

60. *Id.* at __, 112 S. Ct. at 836, 117 L. Ed. 2d at 72-73 (Stevens, J., dissenting).

61. *Presley*, __ U.S. at __, 112 S. Ct. at 834-37, 117 L. Ed. 2d at 71-74 (Stevens, J., dissenting).

62. *Id.* at __, 112 S. Ct. at 838, 117 L. Ed. 2d at 75 (Stevens, J., dissenting).

63. *Id.*

64. *Id.*

65. *See* Presley v. Etowah County Comm'n, __ U.S. __, __, 112 S. Ct. 820, 832, 117 L. Ed. 2d 51, 68 (1992) (holding that changes must bear direct relation to or have definite impact on voting). *But see* Dougherty County Bd. of Educ. v. White, 439 U.S. 32, 37-38 (1978) (noting Act's application to subtle as well as obvious changes having effect on voting due to racial discrimination); Allen v. State Bd. of Elections, 393 U.S. 544, 565 (1969) (stating that Act applies to subtle as well as obvious changes having effect on voting); John J. Roman, *Section 5 of the Voting Rights Act: The Formation of an Extraordinary Federal Remedy*, 22 AM. U. L. REV. 111, 118 (1972) (noting Court's extension of § 5 coverage to changes not so intimately

setting this limit, the Court relied on a literal interpretation of Section 5 and a strict adherence to precedent that designated certain modifications as changes to the rules governing voting.[66] The Court's holding in *Presley*, that the changes at issue must directly relate to voting, contradicts the Court's earlier holdings that indirect or minor changes affecting voting must meet Section 5 preclearance requirements.[67] Although the Court correctly concluded that deference is not synonymous with acquiescence, the Court's re-

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related to voting process); Jean F. Rydstrom, Annotation, *Racial Discrimination in Voting, and Validity and Construction of Remedial Legislation—Supreme Court Cases*, 27 L. Ed. 2d 885, 892 (1971) (noting Court's concern with statutes establishing indirect methods of discrimination). The Court's conclusion, that requiring preclearance for reallocations of elected officials' powers needlessly subjects state and local governments to federal supervision, is inconsistent with its prior holdings. *See Allen*, 393 U.S. at 569 (refusing to accept argument that § 5 requires narrow reading because of mere possibility of administrative conflicts). The Court had previously stated that the possibility that preclearance requirements might create future administrative problems is no excuse for not requiring minor changes in voting to obtain preclearance. *See* City of Richmond v. United States, 422 U.S. 358, 387 (1975) (Brennan, J., dissenting) (noting declaration of Congress that need to provide effective protection for African-Americans' voting rights outweighs hardships § 5 imposes on state and local governments); *Allen*, 393 U.S. at 569 (rejecting argument that § 5 should not apply to changes from district to at-large voting because of administrative conflicts). At oral argument for the Mississippi cases considered in *Allen*, Assistant Attorney General Pollak declared that the Justice Department received 251 submissions from the states for preclearance under Section 5 but that the Department withheld consent in only one instance, and in that case the change violated a prior court ruling on the same issue. *See id.* at 549 n.5 (illustrating virtual absence of administrative problems in obtaining preclearance from Attorney General).

66. *See Presley*, __ U.S. at __, 112 S. Ct. at 829, 117 L. Ed. 2d at 64 (stating reasons for holding that reallocations of elected officials' powers are not subject to § 5 preclearance); Perkins v. Matthews, 400 U.S. 379, 387-89 (1971) (affirming *Allen*'s expansion of scope of § 5); *Allen*, 393 U.S. at 569-70 (establishing four categories of changes pertaining to voting); James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 VA. L. REV. 633, 681 (1983) (commenting on expanded coverage of § 5). The Court's exclusive focus on the statutory language guaranteeing the opportunity of minorities to elect representatives results in the Court's ignoring already existing statutory language requiring equal participation in the political process. *See* Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1093 (1991) (noting Court's belief that African-American voters' electoral control over their elected representatives satisfies Act's conception of representation). Justice O'Connor observed, "[E]lectoral success has now emerged, under the Court's standard, as the linchpin of vote dilution claims." Thornburg v. Gingles, 478 U.S. 30, 93 (1986) (O'Connor, J., concurring).

67. *See Presley*, __ U.S. at __, 112 S. Ct. at 830, 117 L. Ed. 2d at 65-66 (stating that reallocations of elected officials' powers are not directly related to voting and are thus not subject to preclearance); *but see* NAACP v. Hampton County Election Comm'n, 470 U.S. 166, 178-79 (1985) (noting Justice Department's regulation that even minor or indirect changes affecting voting require preclearance). The procedures required for administering Section 5 are as follows:

> Any change affecting voting, even though it appears to be minor or indirect, returns to a prior practice or procedure, ostensibly expands voting rights, or is designed to remove the

fusal to rely on the Attorney General's interpretation of the scope of Section 5 greatly departs from the Court's tradition of allowing the Attorney General the authority to resolve any conflicts as to the coverage of Section 5.[68] Although the Court held in *Allen* that the categories recognized as changes "with respect to voting" were not exhaustive or complete,[69] the *Presley* Court circumvented the Act's purpose by refusing to extend Section 5 coverage to include extensive reallocations of elected officials' decision-making authority.[70]

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elements that caused objection by the Attorney General to a prior submitted change, must meet the section 5 preclearance requirement.

28 C.F.R. § 51.12 (1991). *See also* Katherine I. Butler, *Constitutional and Statutory Challenges to Election Structures: Dilution and the Value of the Vote*, 42 LA. L. REV. 851, 862 (1982) (noting application of § 5 to every change affecting voting); Jean F. Rydstrom, Annotation, *Racial Discrimination in Voting, and Validity and Construction of Remedial Legislation—Supreme Court Cases*, 27 L. Ed. 2d 885, 892 (1971) (noting Court's concern with indirect methods of discrimination).

68. *See* Pleasant Grove v. United States, 479 U.S. 462, 468 (1987) (noting that Attorney General's interpretation of Act warrants considerable deference); *Hampton County*, 470 U.S. at 178-79 (stating that Attorney General resolves doubt as to which changes are subject to § 5 preclearance); United States v. Sheffield Bd. of Comm'rs, 435 U.S. 110, 131 (1978) (noting Attorney General's considerable involvement in drafting and interpreting Act); *Perkins*, 400 U.S. at 391 (following Justice Department's interpretation of Act's coverage); Texas v. United States, 785 F. Supp. 201, 205 n.3 (D.D.C. 1992) (noting deference given to Justice Department's interpretation of Act); James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 VA. L. REV. 633, 682 (1983) (noting Attorney General's power to object to changes on basis of suspected discrimination); Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 581 (1973) (noting Justice Department's expertise in judging discriminatory nature of voting changes). *See generally* Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984) (recognizing considerable weight accorded executive department's construction of statutory scheme it administers); United States v. Shimer, 367 U.S. 374, 382-83 (1961) (holding that Court should not disturb agency's construction of statute unless legislative history of statute shows agency's interpretation did not follow congressional intent).

69. *See Presley*, __ U.S. at __, 112 S. Ct. at 828, 117 L. Ed. 2d at 63 (noting categories of changes pertaining to voting established in *Allen*); *Perkins*, 400 U.S. at 388-89 (noting purpose of § 5 to cover changes potentially discriminatory on basis of race); *Allen*, 393 U.S. at 569-70 (expanding scope of coverage of § 5); OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REDEFINING DISCRIMINATION: "DISPARATE IMPACT" AND THE INSTITUTIONALIZATION OF AFFIRMATIVE ACTION 147 (1987) (noting expansion of § 5 since *Allen*); James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 VA. L. REV. 633, 681 (1983) (noting Court's extension of preclearance procedure in *Allen* to encompass entire electoral process).

70. *See Presley*, __ U.S. at __, 112 S. Ct. at 838, 117 L. Ed. 2d at 75 (Stevens, J., dissenting) (stating that reallocations of decision-making authority represent another method of sustaining political power of white majority § 5 was meant to forestall); *Allen*, 393 U.S. at 565-66 (noting Court's view that voting includes all action necessary to ensure vote's effectiveness); Lane v. Wilson, 307 U.S. 268, 275 (1939) (recognizing that Constitution nullifies sophisticated and simplistic modes of discrimination); John F. Banzhaf, III, *Multi-member Districts—Do*

In *Presley*, the Court failed to recognize that reallocations of elected officials' powers are simply a previously unrecognized category of changes that affect voting.[71] The requirement of preclearance for changes in the electorate and abolition or creation of elective offices provides the rationale for declaring that enactments altering elected officials' decision-making powers must likewise be subject to preclearance.[72] A reallocation of elected officials'

They Violate the "One Man, One Vote" Principle, 75 YALE L.J. 1309, 1309 (1966) (noting that complicated or sophisticated apportionment schemes cannot result in significant undervaluation of citizens' votes); *cf.* Georgia v. United States, 411 U.S. 526, 531 (1973) (observing that § 5 concerns actual effect of changed voting practices on African-American voters rather than simple inventory of voting procedures). In *Allen,* the Court related the Senate Judiciary Committee's hearings on the proposed voting rights legislation. *Allen*, 393 U.S. at 566 n.31. The Court also quoted Attorney General Katzenbach's description of the purpose for expanding the language of the Voting Rights Act to give the Act the most extensive possible scope:

"Senator Fong. You would have no objection to expanding the word 'procedure'?

Attorney General Katzenbach. No; it was intended to be all-inclusive of any kind of practice." *Id.* Congress, however, may invalidate governmental actions that the Supreme Court has already upheld if Congress perceives that the action lacks the compelling basis upon which the Court relied. Jesse Choper, *Congressional Power to Expand Judicial Definitions of the Substantive Terms of the Civil War Amendments*, 67 MINN. L. REV. 299, 308-09 (1982); *see also* GEOFFREY R. STONE, ET AL., CONSTITUTIONAL LAW 256 (2d ed. 1991) (explaining power of Congress to provide remedies for infringement of rights arguably safeguarded by Constitution).

71. *See Presley*, __ U.S. at __, 112 S. Ct. at 828, 117 L. Ed. 2d at 63 (stating that categories of changes pertaining to voting established in *Allen* are not exhaustive); *Gingles*, 478 U.S. at 76 (noting that electoral success of African-American candidates is not dispositive of claims of discrimination in voting process); City of Mobile v. Bolden, 446 U.S. 55, 111 n.7 (1980) (Marshall, J., dissenting) (requiring proof beyond minorities' lack of success at polls). In *City of Mobile*, the Court noted that the standard for unconstitutional vote dilution looks only to the discriminatory effects of electoral structure and social and historical factors combined. *See id.*, 446 U.S. at 111 n.7 (discussing appropriate vote-dilution standard); *see also* Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1093 (1991) (commenting on Court's failure to measure African-American political representation by such factors as voter participation, policy responsiveness, and effective representation). A meaningful vote is one that is "undiluted by discriminatory, though facially neutral election schemes." *Id.* at 1094 n.78. *See also* Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 552-53 (1973) (noting shift of focus of discrimination from precluding minorities from voting to finding ways to prevent them from winning).

72. *See Presley*, __ U.S. at __, 112 S. Ct. at 832, 117 L. Ed. 2d at 68 (stating that reallocations of elected officials' power not directly related to voting); *Hampton County*, 470 U.S. at 178 (stating form of voting procedure change does not determine whether change falls within purview of § 5); *Allen*, 393 U.S. at 569-70 (explaining how at-large voting dilutes constituency's voting power and how transforming elective office into appointive office prohibits voters from electing officer formerly subject to their approval); James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 VA. L. REV. 633, 687 n.269 (1983) (noting Court's transformation of focus of § 5); Abigail Thernstrom, *The Odd Evolution of the Voting Rights Act*, PUB. INTEREST, Spring 1979, at 49, 59-60 (noting that disenfranchisement test is not whether citizen's vote is valued

powers is a hybrid voting change including elements of both vote-dilution devices and abolition or creation of elective offices.[73]

The Court conceded that the abolition or creation of appointive posts often results in decreases or increases in elected officials' powers.[74] Such fluctuations in elected officials' authority could create racial discrimination because decreasing elected officials' powers dilutes the weight and effectiveness of the votes cast by the electorate.[75] Reducing an elected official's pow-

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more than another's, but whether group to which citizen belongs is "underrepresented" in system).

73. *See* McCain v. Lybrand, 465 U.S. 236, 239 (1984) (replacing elective offices with appointive offices is subject to § 5 preclearance); *City of Richmond*, 422 U.S. at 381 (Brennan, J., dissenting) (noting Court's broad application of § 5 to enactments potentially abridging or diluting voting rights); *Allen*, 393 U.S. at 569-70 (reasoning that making offices appointive instead of elective prohibits voters from electing representatives formerly subject to their approval); James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 VA. L. REV. 633, 681 (1983) (noting application of § 5 to changes from elective offices to appointive offices); John J. Roman, *Section 5 of the Voting Rights Act: The Formation of an Extraordinary Federal Remedy*, 22 AM. U. L. REV. 111, 123 (1972) (noting that changes involving composition of electorate are subject to § 5 preclearance); *see also* Abigail Thernstrom, *The Odd Evolution of the Voting Rights Act*, PUB. INTEREST, Spring 1979, at 49, 60 (commenting that when perceived reduction in potential power of racial group is called disenfranchisement, proportional representation becomes standard measurement of political effectiveness); Mary J. Kosterlitz, Note, Thornburg v. Gingles: *The Supreme Court's New Test for Analyzing Minority Vote Dilution*, 36 CATH. U. L. REV. 531, 531 n.6 (1987) (commenting on diminution of minority voting strength due to implementation of certain electoral practices).

74. *See Presley*, __ U.S. at __, 112 S. Ct. at 831, 117 L. Ed. 2d at 66 (noting that creation or abolition of appointive posts often results in erosion or accretion of powers of some officials responsible to electorate); *Hampton County*, 470 U.S. at 170-71 (noting that replacement of appointed offices with elective offices requires § 5 preclearance). *But see* Lockhart v. United States, 460 U.S. 125, 131 (1983) (observing that addition of two new elective seats would decrease each elected official's powers); Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 555 n.131 (1973) (describing discriminatory effect of changing appointive positions to elective positions because African-Americans had better chance of being appointed than being elected); Dale Krane, *Implementation of the Voting Rights Act: Enforcement by the Department of Justice*, *in* THE VOTING RIGHTS ACT: CONSEQUENCES AND IMPLICATIONS 123, 130 (Lorn S. Foster ed., 1985) (listing abolishing offices and substituting appointments for elections as obstacles to African-American participation in electoral and political processes).

75. *See Presley*, __ U.S. at __, 112 S. Ct. at 831, 117 L. Ed. 2d at 67 (recognizing different effects of intraconstituency and interconstituency modifications). In *Presley*, the Court reasoned that intraconstituency modifications may have considerable indirect effect on voters while interconstituency modifications may have limited indirect effect on voters, but the Court nevertheless refused to find that either case caused a change in voting. *Id. But see McCain*, 465 U.S. at 256 (noting that adoption of new election practices after effective date of Act raises inference that practices were adopted for discriminatory purposes or may have discriminatory effects); *Lockhart*, 460 U.S. at 131 (noting possible discriminatory purpose or effect resulting from changing nature of elected position by adding two new elective positions to governing body); *Allen*, 393 U.S. at 569-70 (noting that changing appointive offices to elective offices

ers by transferring decision-making power to an appointed official can constructively abolish the elective office by diminishing the responsibilities of the office until it becomes merely a token position.[76] Nevertheless, when

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affects citizens' votes even if made without discriminatory purpose or effect and such changes are subject to § 5 scrutiny); Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 555-58 (1973) (reasoning that limiting responsibilities of elective offices likely to be filled by African-Americans acts as discriminatory barrier to gaining public office); John J. Roman, *Section 5 of the Voting Rights Act: The Formation of an Extraordinary Federal Remedy*, 22 AM. U. L. REV. 111, 121 (1972) (noting potentially discriminatory nature of changes in electorate due to dilution of minorities' voting power); *see also City of Mobile*, 446 U.S. at 74 (stating that election features cancelling out African-American votes naturally tend to disadvantage any voting minority); Hadnott v. Amos, 394 U.S. 358, 364 (1969) (holding that citizens have right to cast effective votes); *Allen*, 393 U.S. at 565-66 (rejecting narrow construction of § 5 on grounds that Act's broad interpretation of right to vote includes action necessary to guarantee vote's effectiveness); Terry v. Adams, 345 U.S. 461, 467-68 (1953) (holding that right to vote equals right to make effective contribution in governmental decision-making process); Zimmer v. McKeithen, 485 F.2d 1297, 1307 (5th Cir. 1973) (refusing to adopt view that African-American candidates' success at polls completely precludes potential for diluting African-American vote); John F. Banzhaf, III, *Multi-member Electoral Districts—Do They Violate the "One Man, One Vote" Principle*, 75 YALE L.J. 1309, 1318-19 n.23 (1966) (noting that legislator's voting power is important only to extent it affects constituents); Katherine I. Butler, *Constitutional and Statutory Challenges to Election Structures: Dilution and the Value of the Right to Vote*, 42 LA. L. REV. 851, 914-15 (1982) (agreeing with Court's opinion in *City of Mobile* regarding potential of elections to cancel out African-American vote); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1092 (1991) (noting Act's passage and amendment to promote African-American political representation); Mary J. Kosterlitz, Note, Thornburg v. Gingles: *The Supreme Court's New Test for Analyzing Minority Vote Dilution*, 36 CATH. U. L. REV. 531, 547 (1987) (noting necessity of invalidating election practices denying minorities equal access to political process).

76. *See Presley*, __ U.S. at __, 112 S. Ct. at 828, 117 L. Ed. 2d at 63 (noting that amount of funds available to elected officials profoundly affects power exercised but refusing to extend § 5 to include budgetary changes of elective offices). *But see id.* at __, 112 S. Ct. at 838, 117 L. Ed. 2d at 75 (Stevens, J., dissenting) (arguing that transferring elected officials' decision-making power to appointed officials transforms elected officials into mere figureheads); *City of Richmond*, 422 U.S. at 388 (Brennan, J., dissenting) (stating that minorities should have opportunity to elect responsive officials and enjoy meaningful participation in conduct of governmental affairs); *Allen*, 393 U.S. at 569-70 (holding that at-large voting dilutes voting power and right to vote just as complete prohibition of casting ballot does). The effect of limited African-American voting power is seen in the example of Leake County, Mississippi, where two justices of the peace had responsibility for the same area and usually shared cases. *See* Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 555 n.133 (1973) (noting obstructions to gaining public office). However, once an African-American justice was elected, his caseload decreased considerably because law officers making arrests only brought defendants before the white justice. *Id.* This example demonstrates the importance of effective representation, the right to which has been called "the ultimate instrument of reform." *See* Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1092-93 (1991) (equating right to vote with right to effective representation); Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices*

confronted with such reductions in the power of elected officials, the Court erroneously refused to analogize to changes involving vote-dilution devices or the abolition or creation of elective offices.[77] Thus, by failing to require preclearance in *Presley*, the Court ignored its prior holdings requiring preclearance for changes that could be racially discriminatory.[78]

The Court's holding that the abolition or creation of appointive posts is not subject to preclearance could create problems for the lower courts' future interpretations of the Act.[79] Though the Court stated in *Presley* that

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and the Voting Rights Act, 77 VA. L. REV. 1, 43 (1991) (acknowledging powerful tangible benefits of African-American presence through African-American elected officials). As President Johnson signed the historic 1965 Act he declared, "But only the individual Negro, and all others who have been denied the right to vote, can really walk through those doors, and can use that right, and can transform the vote into an instrument of justice and fulfillment." 111 CONG. REC. 19,650 (1965).

77. *See City of Richmond*, 422 U.S. at 381 (noting Court's application of § 5 to enactments potentially abridging or diluting voting rights); *Perkins*, 400 U.S. at 390 (stating that all vote-dilution devices are in derogation of Act for failing to ensure vote's effectiveness); Reynolds v. Sims, 377 U.S. 533, 555 (1964) (observing that debasement and dilution of citizen's vote deny suffrage as effectively as complete prohibition); John F. Banzhaf, III, *Multi-member Electoral Districts—Do They Violate the "One Man, One Vote" Principle*, 75 YALE L.J. 1309, 1314 (1966) (noting that ability to cast votes is not always accompanied by meaningful voting power); James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach From the Voting Rights Act*, 69 VA. L. REV. 633, 681 (1983) (noting application of § 5 to changes from elective offices to appointive offices). Newer and more sophisticated means of indirectly implementing discriminatory voting changes have been referred to as "the use of the back door once the front one was blocked." *See* ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 20 (1987) (asserting that unambiguous and limited aim of § 5 is to preclude renewed disenfranchisement).

78. *See Hampton County*, 470 U.S. at 176 (recognizing congressional refusal to exempt even minor alterations in voting procedures from scope of § 5); *Dougherty County*, 439 U.S. at 42 (subjecting every enactment with potential for discrimination to preclearance requirement); *Perkins*, 400 U.S. at 388-89 (holding that § 5 is designed to apply to changes affecting voting that potentially discriminate); *Allen*, 393 U.S. at 568 (referring to extensive hearings and debates illustrating congressional refusal to allow even minor exceptions to broad scope of § 5); Emma C. Jordan, *Taking Voting Rights Seriously: Rediscovering the Fifteenth Amendment*, 64 NEB. L. REV. 389, 431 (1985) (noting extension of types of changes covered by § 5 to include vote-dilution devices); Jean F. Rydstrom, Annotation, *Racial Discrimination in Voting, and Validity and Construction of Remedial Legislation—Supreme Court Cases*, 27 L. Ed. 2d 885, 892 (1971) (noting Court's concern with statutes establishing indirect methods of discrimination); *see also* L. Thorne McCarty & Russell B. Stevenson, *The Voting Rights Act of 1965: An Evaluation*, 3 HARV. C.R.-C.L. L. REV. 357, 373 (1968) (stating that franchise is mere tool whose possession is meaningless unless capable of being used to cause change).

79. *Compare Presley*, __ U.S. at __, 112 S. Ct. at 830, 117 L. Ed. 2d at 65-66 (holding that abolition or creation of appointive posts not subject to preclearance) *with* Brooks v. Georgia State Bd. of Elections, 790 F. Supp. 1156, 1160-61 (S.D. Ga. 1992) (rejecting argument that voting rights would not be affected if no elections were even held for positions). In *Brooks*, the Governor of Georgia appointed interim judges to newly-created judgeships which had not

countless state and local enactments can affect the power of elected officials but not affect voting power, lower courts have consistently reached an opposite conclusion.[80] This conflict stems from the uncertainty as to what changes affect voting *enough* to require preclearance.[81] If the Court had

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received preclearance and for which no election was held. *Id.* at 1157-58. The court mistakenly analogized the judicial appointments to the abolition or creation of elective offices rather than of appointive offices and, relying on the decision in *Presley*, found that the change altered state election law. *See id.* at 1160 (stating that absence of elections and fact that voters not denied right to elect representatives previously subject to their approval did not make appointments less discriminatory). *But see Allen*, 393 U.S. at 569-70 (citing denial of right to elect representative previously subject to voters' approval as rationale for requiring preclearance). However, the judicial appointments allowed the interim judges to decide cases which would otherwise be heard by the elected judges, thus reallocating the decision-making authority of the elected judges. *See Brooks*, 790 F. Supp. at 1160 (noting appointment of judgeships to help alleviate burden of increasing caseloads). Therefore, a correct application of Section 5 coverage under *Presley* should have resulted in the approval of the appointed judicial positions. *See Presley*, __ U.S. at __, 112 S. Ct. at 830, 117 L. Ed. 2d at 65-66 (holding that reallocating elected officials' authority does not require preclearance). The *Brooks* court's apparent confusion as to whether the appointed judgeships were the creation of an appointive office (requiring no preclearance) or the abolition of an elective office (requiring preclearance), but finding the action to be discriminatory either way, demonstrates the uncertainty surrounding the issue. *See id.* at __, 112 S. Ct. at 831, 117 L. Ed. 2d at 66 (holding that creation of appointive offices does not require preclearance); *Brooks*, 790 F. Supp. at 1158 (following Attorney General's conclusion that creation of new judgeships was discriminatory); *see also Lockhart*, 460 U.S. at 131 (reasoning that creating new elective posts alters character of original elective posts); Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 555 n.131 (1973) (arguing that shifting from appointive offices to elective offices may be more discriminatory than making elective offices appointive); Abigail Thernstrom, *The Odd Evolution of the Voting Rights Act*, PUB. INTEREST, Spring 1979, at 49, 52 (noting that § 5 became instrument by which courts were made to alter definition of enfranchisement).

80. *See Brooks*, 790 F. Supp. at 1160-61 (determining that appointing judges requires preclearance); Hardy v. Wallace, 603 F. Supp. 174, 179 (N.D. Ala. 1985) (holding that transferring appointive authority over local racing commission to Governor from local legislative delegation required § 5 preclearance); County Council of Sumpter County v. United States, 555 F. Supp. 694, 701 (D.D.C. 1983) (ruling that eliminating Governor and General Assembly's legal authority over local affairs while vesting it in county board elected at-large by county voters was subject to § 5 preclearance); John F. Banzhaf, III, *Multi-member Electoral Districts—Do They Violate the "One Man, One Vote" Principle*, 75 YALE L.J. 1300, 1318-19 n.23 (1966) (noting that legislator's voting power important only to extent it affects constituents and recognizing that constitutional issues resolved only by extending analysis to actual voters); Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 555 n.133 (1973) (citing limits imposed on responsibilities of elective offices likely to be filled by African-Americans as discriminatory barrier to gaining public office). *Compare Presley*, __ U.S. at __, 112 S. Ct. at 830, 117 L. Ed. 2d at 60 (finding transfer of authority over road districts from elected county commissioners to appointed county engineer exempt from preclearance requirement) *with* Robinson v. Alabama State Dep't of Educ., 652 F. Supp. 484, 485 (M.D. Ala. 1987) (finding requirement transferring authority from elected board of education members to appointed board of education members subject to preclearance).

81. *See Presley*, __ U.S. at __, 112 S. Ct. at 832, 117 L. Ed. 2d at 68 (holding that changes

followed its twenty-year practice of deferring to the Attorney General's interpretation of the Act and allowing Section 5 the "broadest possible scope" of coverage, the Court could easily have avoided the inevitable confusion which will result from *Presley* as to which voting changes require preclearance.[82]

Reallocating elected officials' decision-making authority could serve as a sophisticated device for abridging voting rights based on race or color. A direct limitation of minorities' voting rights would be obviously discriminatory. However, rendering minorities' votes ineffective by reducing the power of their elected representatives gives state and local governments a back door by which they may unconstitutionally deny or abridge the right to vote based on race, color, or previous condition of servitude. By refusing to recognize reallocations of elected officials' decision-making authority as changes "with respect to voting," the Court has established a standard upon which

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must bear direct relation to or have definite impact on voting to be subject to preclearance). *But see Hampton County*, 470 U.S. at 178-79 (noting that even minor or indirect changes affecting voting require preclearance); *Allen*, 393 U.S. at 565 (stating that Act applies to subtle as well as obvious changes affecting voting); Katherine I. Butler, *Constitutional and Statutory Challenges to Electoral Structures: Dilution and the Value of the Vote*, 42 LA. L. REV. 851, 862 (1982) (noting application of § 5 to every change affecting voting); Jean F. Rydstrom, Annotation, *Racial Discrimination in Voting, and Validity and Construction of Remedial Legislation—Supreme Court Cases*, 27 L. Ed. 2d 885, 892 (1971) (noting Court's concern with indirect methods of discrimination).

82. *See Presley*, __ U.S. at __, 112 S. Ct. at 834, 117 L. Ed. 2d at 70 (Stevens, J., dissenting) (stating that *Presley* marked first time in over 20 years Court rejected Justice Department's recommendation regarding scope of § 5); *Pleasant Grove*, 479 U.S. at 468 (noting that Attorney General's interpretation of Act warrants considerable deference); *Allen*, 393 U.S. at 566-67 (noting congressional intent to give Act broadest scope of coverage); James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 VA. L. REV. 633, 681 (1983) (noting Court's extension of preclearance procedures to encompass entire electoral process). The Senate Judiciary Committee Report recommending the renewal of the Voting Rights Act in 1982 stated that "the legislative history of Section Five, as well as the careful and persuasive analysis of the history which the Supreme Court has made, fully refutes [the] suggestion" that judicial applications of Section 5's preclearance requirements have improperly strayed from the original intent of Congress. S. REP. NO. 417, 97th Cong., 2d Sess. 7 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 183. Congress continues to revisit the Voting Rights Act to ensure its effectiveness in remedying racially discriminatory voting practices. *See* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, 133 (1982) (codified as amended at 42 U.S.C. § 1973b(a)(7)-(8) (1988)) (extending provisions of Voting Rights Act for 25 years and requiring Congress to reconsider Act in 15 years); Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat. 400, 400 (extending provisions of Voting Rights Act for seven years); Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314, 314-15 (1970) (extending provisions of Voting Rights Act for five years).

state and local governments can constitutionally diminish the political effectiveness of officials representing minorities.

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