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Notes

Can a Change in Decision-Making Authority Be a Change With Respect to Voting?

Presley v. Etowah County Commission
and
Mack v. Russell County Commission

I. INTRODUCTION

The Voting Rights Act of 1965 triggered profound changes in southern politics, providing the impetus for a revolution in minority voting rights. Despite the passage of the Fifteenth Amendment almost a hundred years before, African-Americans in most southern states could not effectively exercise the right to vote. Congress acted in response to this "long and sorry history" by passing the Voting Rights Act. Section 5, a key provision of the Act, targets particular southern states for federal scrutiny of their electoral practices. Section 5 requires these jurisdictions to obtain judicial or administrative preclearance before enforcing any "voting qualification or


The most important provisions of the Voting Rights Act are Sections 2, 4, and 5. Section 2, 42 U.S.C. § 1973 (1988), establishes that a violation of the right of any citizen to vote occurs if "it is shown that the political processes leading to nomination or election in the state or political subdivision are not equally open to participation" by members of a protected class of citizens. Section 4, 42 U.S.C. § 1973b(c) (1988), defines the "tests or devices" which are prohibited electoral procedures. For § 5, 42 U.S.C. § 1973c (1982), see infra note 7 and accompanying text.

3. The Fifteenth Amendment states that "[t]he right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV.
4. See generally VALDIMER O. KEY, JR., SOUTHERN POLITICS IN STATE AND NATION (1950).
prerequisite to voting, or standard, practice, or procedure with respect to
taking.\textsuperscript{8}

The Supreme Court recently decided two consolidated cases involving the
Voting Rights Act of 1965, \textit{Presley v. Etiwah County Commission} and \textit{Mack v. Russell County Commission}.\textsuperscript{9} These cases illuminate the controversy that
surrounds the interpretation of the Voting Rights Act. Few commentators and
critics dispute the impressive early achievements of the Voting Rights Act and
its important role in the civil rights movement, but there is a great deal of
disagreement among scholars as to exactly what Section 5 was intended to
protect and what kinds of electoral practices come within its scope. Conservatives assert that judicial decisions and administrative authorities have
impermissibly reshaped the original Act.\textsuperscript{10} They endorse the extraordinary
measures taken by the federal government in 1965 to provide access to the
ballot, but they argue that the courts, Congress, and the Justice Department
have shifted to more slippery terrain by extending the scope of Section 5 to
such changes in public voting as annexations and redistricting.\textsuperscript{11} Civil rights
activists, on the other hand, often feel frustrated by the "foot-dragging" of
administrative authorities as well as by inconsistent and narrowing construc-
tions employed by the federal judiciary in voting rights cases.\textsuperscript{12} Some
political observers in the middle focus on the interactions among the varied
players involved with voting rights (civil rights activists, local and federal
government officials, federal judges, and attorneys in the Civil Rights Division
of the Justice Department).\textsuperscript{13} Interactions among these players often result in
a "compromised compliance" that provides functional, if not ideal solutions to
problems with the Voting Rights legislation.\textsuperscript{14}

In \textit{Presley}, the Court considered whether seemingly routine administrative
decisions that resulted in a dilution of the authority and powers of elected
officials were subject to Section 5 scrutiny.\textsuperscript{15} This Note explores the recent
opinion in light of the background of Section 5, the types of cases to which
it has been applied, and the interactions among the different players in the
voting rights arena. Part II of this Note gives the facts and holding of the
instant decision; Part III(A) provides a background and description of key
provisions of Section 5; Part III(B) traces the main categories of cases to

\begin{footnotes}
\item 10. See \textsc{Abigail M. Thernstrom}, \textit{Whose Votes Count} (1987), for a detailed analysis
of the Voting Rights Act from a conservative perspective.
\item 11. \textit{Id.} at 137-57.
\item 12. See, \textit{e.g.}, Lani Guinier, \textit{Keeping the Faith: Black Voters in the Post-Reagan Era}, 24
\item 13. See \textit{generally Howard Ball et al., Compromised Compliance: Implementation of
the 1965 Voting Rights Act} (1982).
\item 14. \textit{Id.} at 13-29, 193-208. "Examining the impact of the Voting Rights Act on the South
since 1965, we believe that 'compromised compliance,' while not good enough, has moved the
affected groups — blacks, other minorities, and whites — along the road to an open society." \textit{Id.}
at 207.
\item 15. \textit{Presley}, 112 S. Ct. at 824-32.
\end{footnotes}
which Section 5 has been applied; Part III(C) describes the controversy among
the commentators; and Part IV considers the Presley and Mack cases in light
of this controversy. This Note argues that the Court pays insufficient attention
to the history and development of voting rights legislation. Implementation
of the Voting Rights Act has been most successful when the statute has been
adapted to respond to new and unanticipated situations. In an increasingly
complex racial environment, courts and administrative authorities must have
the flexibility to respond to discrimination in its many guises.

II. FACTS

A. Presley v. Etowah County Commission

On August 25, 1987, the Etowah County Commission of Alabama passed
the Road Supervision Resolution and the Common Fund Resolution. These
resolutions were passed soon after the election of two new county commis-
mers, one of whom, Lawrence Presley, was the first African-American
commissioner in Etowah County in "recent history." The Road Supervision
Resolution allowed each "holdover" commissioner to retain control of his road
shop, with full responsibilities over workers and operations in his individual
road district. At the same time, the resolution, by making the holdover
commissioners responsible for all roads in Etowah County, gave them joint
responsibility for the repair, maintenance, and improvement of roads in the
districts represented by the new commissioners. Commissioner Presley and
Commissioner Williams were to oversee maintenance of the county
courthouse and the engineering department, but were given little scope for
excercising authority over roads in their districts. The two new commissioners
voted against the resolution, but the resolution was passed by a 4-2 margin.

The Common Fund Resolution stipulated that "all monies earmarked and
budgeted for repair, maintenance and improvement of the streets, roads and

16. Justice Stevens, in his opinion in Presley, urges this viewpoint. He refers to the
observation of one Congressman:

When I voted for the Voting Rights Act of 1965, I hoped that 5 years would be
ample time. But resistance to progress has been more subtle and more effective than
I thought possible. A whole arsenal of racist weapons has been perfected. Boundary
lines have been gerrymandered, elections have been switched to an at-large basis,
counties have been consolidated, elective offices have been abolished where blacks
had a chance of winning ... .

Id. at 837 (citing Perkins v. Matthews, 400 U.S. 379, 389 n.8 (1971)).

17. Id.
18. Id. at 832.
19. Id. at 825.
20. Id.
21. Commissioners Presley and Williams were the two new commissioners elected pursuant
to a 1986 consent decree. Commissioner Williams was white, while Commissioner Presley was
African-American. Id.
22. Id.
public ways of Etowah County [shall] be placed and maintained in common accounts."23 Prior to the resolution, each individual commissioner had discretion in spending funds in his own district.24 Presley challenged the county’s adoption of these resolutions in federal court, arguing that these resolutions violated Section 5 of the Voting Rights Act because the county had not sought administrative or judicial preclearance in accordance with that statute.25

B. Russell County Commission v. Mack

In May 1979, the Russell County Commission of Alabama moved to adopt a "unit system" for its road works: Whereas in the past, individual commissioners had been in charge of road repair and maintenance work in their respective districts, now the county engineer was authorized to make all decisions concerning "road construction, maintenance, personnel, and inventory."26 The county adopted this resolution, allegedly because one commissioner had been indicted on charges of corruption.27 The county subsequently petitioned the state legislature to pass legislation and the legislature complied.28 In May 1986, following the redrawing of district lines in Russell County, two new African-American commissioners, Ed Peter Mack and Nathaniel Gosha, were elected to the Russell County Commission, and they brought a Section 5 challenge against the county.29

C. Electoral Backdrop: Consent Decrees

The actions of the county commissions in both Etowah County and Russell County must be understood in the context of electoral changes in Alabama. Presley was elected to the county commission following important litigation in which African-American voters brought successful challenges to electoral procedures used by nine counties in Alabama.30 This litigation in Dillard v. Crenshaw County31 led to a consent decree, and Presley was elected pursuant to changes conforming to this consent decree.32 Similar

23. Id.
24. Id. at 826.
25. Id. at 827.
26. Id. at 826.
27. Id.
29. Presley, 112 S. Ct. at 827.
31. 649 F. Supp. 289 (M.D. Ala. 1986). A federal district court granted injunctive relief declaring that the state legislature was "racially inspired" in its adoption of at-large elections. The plaintiffs amended their complaints to add other cities and counties, and all but seven jurisdictions entered into a consent decree agreeing to a resolution of the plaintiffs' claims. Etowah County was one of the counties that entered into the consent decree. Id. at 292 n.4.
32. Presley, 112 S. Ct. at 825.
litigation involving the Russell County Commission led to a 1985 consent decree in Sumbry v. Russell County.33 Appellants Mack and Gosha were elected as a result of changes implemented after the consent decree.34

D. District Court Proceedings and Supreme Court Holding

Presley and Mack both raise the question whether the county resolutions were changes subject to the preclearance requirement of Section 5.35 The appellants in both Presley and Mack filed a joint complaint in the Federal District Court for the Middle District of Alabama, "alleging racial discrimination in the operation of the Etowah and Russell County Commissions in violation of prior court orders, the Constitution, Title VI of the Civil Rights Act of 1964 . . . and Section 2 of the Voting Rights Act."36 They later amended their complaints to add Section 5 claims.37

A three-judge district court heard the appellants' Section 5 claims while the other claims were still pending in the district court.38 The district court held that changes in the responsibilities of elected officials were subject to preclearance when they "effect[ed] a significant relative change in the powers exercised by governmental officials elected by, or responsible to, substantially different constituencies of voters."39 According to this standard, the Road Supervision Resolution of Etowah County was subject to preclearance, but the Unit System and Common Fund Resolution of Russell County were not. The Road Supervision Resolution was a "significant" change because it involved a transfer of authority among officials responsible to different constituencies.40

Petitioners Presley and Mack appealed the district court rulings on their joint complaint to the United States Supreme Court.41 They challenged the adverse rulings with respect to the Unit System and Common Fund Resolution. The Etowah County Commission did not appeal the ruling on the Road Supervision Resolution. The Supreme Court affirmed the rulings of the district court. Justice Kennedy, writing for the Court, held that the preclearance requirement of Section 5 did not apply to the adoption of the

33. Presley, 112 S. Ct. at 826 (citing Sumbry v. Russell County, No. 84-T-1386-E (M.D. Ala. 1985)). The county commission was enlarged to seven members and the at-large election system was replaced with elections on a district-by-district basis.
34. Id. at 827.
35. For a more detailed discussion of § 5, see infra notes 51-65 and accompanying text.
36. Presley, 112 S. Ct. at 827.
37. Id.
38. Id. Section 5 of the Voting Rights Act provides that "[a]ny action under this section shall be heard and determined by a court of three judges in accordance with § 2284 of title 28 and any appeal shall lie to the Supreme Court." 42 U.S.C. § 1973c (1988).
40. Id.
41. Section 4 of the Voting Rights Act provides that § 5 claims can be appealed directly from the federal district court to the United States Supreme Court. 42 U.S.C. § 1973b(a)(5) (1988).
Unit System or to the Common Fund Resolution. Justice Kennedy adopted a different analysis from the district court. According to him, the significant issue was not whether these resolutions "effect[ed] a significant relative change in the powers exercised by governmental officials elected by, or responsible to, substantially different constituencies of voters." Instead, the correct inquiry was whether the present case fell into the categories of cases to which Section 5 had been applied in the past. He determined that it did not. The Unit System and the Common Fund Resolution concerned only changes in the internal administrative operations of a county commission and such changes in the past had not been subject to Section 5 analysis.

Justice Kennedy was joined in his opinion by Chief Justice Rehnquist, and Justices O'Connor, Scalia, Souter, and Thomas. Justice Stevens wrote a dissenting opinion in which Justices White and Blackmun joined.

III. LEGAL BACKGROUND

A. Section 5 of the Voting Rights Act: Background and Provisions

The Voting Rights Act of 1965 was an historic measure designed to correct a flagrant wrong. Despite the passage of the Fifteenth Amendment almost a hundred years earlier, African-Americans in southern states had few civil rights and were usually ineligible to vote because of stringent, racially-motivated laws enacted by southern legislatures. Property qualifications, literacy tests, comprehension tests, poll taxes, and impracticable registration procedures were some of the many ways in which African-American voting rights were curtailed. Congress concluded that case-by-case litigation was ineffective because such litigation gave southern states plenty of time to develop new subterfuges to resist application of the Fifteenth Amendment.

The Voting Rights Act has had dramatic results. Whereas in 1965 there were less than one hundred African-American elected officials in southern states originally targeted by the Voting Rights Act, by 1987 there were almost

42. Presley, 112 S. Ct. at 827-29.
43. Id. at 827.
44. Id. at 828-32.
45. Id. at 832.
46. Id. at 829-30.
47. Id. at 824.
48. See generally KEY, supra note 4.
49. Section 4 of the Voting Rights Act was designed to eliminate these kind of tests and devices. The phrase "test or device" is defined as any 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.
50. See THERNSTROM, supra note 10, at 11-20.
3000. It has been estimated that the number of African-American registered voters in the southern states originally targeted by the Voting Rights Act rose from 994,000 in 1965 to 3.5 million in 1986. Section 5 is perhaps the most important provision of the Voting Rights Act. It requires covered jurisdictions (originally seven southern states) to submit any new "standard, practice, or procedure with respect to voting different from that in force and effect on November 1, 1964, or . . . on November 1, 1968, or . . . November 1, 1972 to the Attorney General or to a three-judge panel of the United States District Court for the District of Columbia for a determination that the proposed change does not have the "purpose or effect" of "abridging the right to vote on account of race or color." The covered jurisdiction bears the burden of proof to show that a change does not have a discriminatory purpose or effect. Because it would be expensive and cumbersome to seek a declaratory judgment in the district court, most jurisdictions submit proposed changes to the Attorney General. If the Attorney General does not issue an objection letter within sixty days, then the jurisdiction may implement the change. If an objection is made, then the political subdivision may seek a declaratory judgment in the district court or redraft the objectionable change. Most submissions receive preclearance, but the provision has teeth, and objections have prevented local officials from implementing significant electoral changes that would have disfavored minorities.

51. McDonald, supra note 7, at 1252.
52. Id. at 1253 nn.13-14.
53. See, e.g., BALL ET AL., supra note 13, at 17-18.
The inclusion of § 5 in the Voting Rights Act was based on two basic assumptions: First, local jurisdictions bent on preventing blacks from voting can be, and in the past have been, rather ingenious in devising new tests and devices to replace old ones that have been declared illegal; second, the limited resources of the Department of Justice make it nearly impossible to investigate independently, on the Department's own initiative, changes with respect to voting enacted by states and local jurisdictions covered by the Act.

Id. at 17.
54. The Voting Rights Act initially went into effect for five years. The Act was extended for a further five years in 1970, 1975, and again in 1982. See infra note 64 and accompanying text.
56. Section 5 states:
  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 . . .

Id.
57. Id.
59. See infra part III.
The Voting Rights Act was initially passed for a five-year period. But in 1970, 1975, and again in 1982, Congress renewed the Act, strengthening and extending its provisions. The Voting Rights Act for now seems a permanent fixture in the "legislative firmament."\textsuperscript{62}

\textbf{B. The Judicial Decisions}

The federal courts have played an active and important role in shaping the Voting Rights Act. Federal judges have not confined themselves to implementation of voting rights policy. They have also helped to shape and influence the Act and Congressional amendments to it.\textsuperscript{63} There are six general categories of Section 5 cases that have come before the courts.\textsuperscript{64} They involve (1) changes with respect to access to the ballot, such as changes in registration requirements, polling, and precinct changes; (2) changes in the qualifications of candidates and candidacy requirements; (3) changes from single districts to at-large multimember districts; (4) annexations; (5) redistricting changes; and (6) the creation and abolition of elective office. A further category of changes involves transfers of authority among elected officials. There is little case law for this category, but jurisdictions have sought preclearance from the Justice Department for such transfers of authority.\textsuperscript{65}

A key judicial ruling in 1969, \textit{Allen v. State Board of Elections},\textsuperscript{66} anticipated the issues raised in many of these categories. In \textit{Allen}, which was actually a consolidation of four cases, the Court considered the scope of the preclearance requirement.\textsuperscript{67} The most important of the consolidated cases, \textit{Fairley v. Patterson},\textsuperscript{68} involved a proposed change from single-district voting to at-large voting.\textsuperscript{70} Chief Justice Warren, writing for the majority, held the change fell within the scope of the Act.\textsuperscript{71} His opinion charted important new territory: "The Voting Rights Act was aimed at the subtle, as


\textsuperscript{62} THERNSTROM, supra note 10, at 31.

\textsuperscript{63} \textit{See generally} BALL ET AL., supra note 13; NANCY MAVETY, REPRESENTATION RIGHTS AND THE BURGER YEARS (1991); THERNSTROM, supra note 10.

\textsuperscript{64} \textit{See infra} notes 80-139 and accompanying text; \textit{see also} Presley, 112 S. Ct. at 827-29 for a discussion of some of these categories.

\textsuperscript{65} In \textit{Presley}, the brief submitted by the Solicitor General sets out instances where the Department of Justice objected to transfers of authority. \textit{Presley}, 112 S. Ct. at 833 n.3.


\textsuperscript{67} \textit{Id.} at 550-54.

\textsuperscript{68} \textit{Id.} at 550. The court considered the States’ new laws or regulations and found that, "The central issue is whether these provisions fall within the prohibition of § 5 . . . ." \textit{Id.}

\textsuperscript{69} \textit{Id.}

\textsuperscript{70} \textit{Id.}

\textsuperscript{71} \textit{Id.} at 565-66.
well as the obvious, state regulations which have the effect of denying citizens their right to vote because of race.\textsuperscript{72} He argued that the "right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot."\textsuperscript{73}

In his dissent, Justice Harlan made objections that would be taken up by the dissent in many Section 5 cases.\textsuperscript{74} For Justice Harlan, Section 5 could not be torn from its moorings in Section 4, which dealt with the elimination of literacy tests, comprehension tests, and poll taxes.\textsuperscript{75} Preclearance was designed not "to implement new substantive policies but ... to assure the effectiveness of the dramatic step that Congress had taken in Section 4."\textsuperscript{76}

\textit{Allen} set the stage for later Section 5 cases. As racial dynamics became more complex, the forms of discrimination grew more sophisticated.\textsuperscript{77} Thus while the early cases involved interference with the individual ballot, the later cases have dealt more with "vote dilution"—where bloc voting by one group is manipulated to dilute the voting strength of another group.\textsuperscript{78}

Some of the important cases in each of the categories described above will be briefly discussed.\textsuperscript{79} The aim is chiefly to describe the kinds of changes that have been found to be changes with respect to voting. Some cases falling within these categories are briefly described to give a flavor of the kind of controversies that have surrounded important Section 5 litigation.

1. Access to the Ballot

Changes in registration and changes in polling and precinct places do not involve the complex analysis characteristic of vote dilution cases. However, such changes are highly important. As one commentator noted, "[p]olitical participation assumes the individual vote; unless the vote is cast, it is pointless

\begin{itemize}
\item \textsuperscript{72} \textit{Id.} at 565.
\item \textsuperscript{73} \textit{Id.} at 569.
\item \textsuperscript{74} There are echoes of these arguments in the majority opinion in \textit{Presley}, 112 S. Ct. at 832. The opinion states, "The Voting Rights Act is not an all-purpose antidiscrimination statute. The fact that the intrusive mechanisms of the Act do not apply to other forms of pernicious discrimination does not undermine its utility in combating the specific evils it was designed to address." \textit{Id.}
\item \textsuperscript{75} \textit{See supra} note 52.
\item \textsuperscript{76} \textit{Allen}, 393 U.S. at 584 (Harlan, J., dissenting).
\item \textsuperscript{77} \textit{See}, e.g., \textit{Presley}, 112 S. Ct. at 837 n.20 (citing S. Rep. No. 417, 97th Cong., 2d Sess. 10 (1982), reprinted in 1982 U.S.C.C.A.N. 177,187). Following the dramatic rise in registration, a broad array of dilution schemes were employed to cancel the impact of the new black vote. Elective posts were made appointive; election boundaries were gerrymandered; majority runoffs were instituted to prevent victories under a prior plurality system . . . The ingenuity of such schemes seems endless . . . Their common purpose and effect has been to offset the gains made at the ballot box under the Act. \textit{Id.}
\item \textsuperscript{78} \textit{McDonald}, supra note 7, at 1256.
\item \textsuperscript{79} \textit{See infra} notes 80-141 and accompanying text.
\end{itemize}
to consider more complex questions..." Allen itself concerned a change in the procedures for the casting of write-in ballots. In Perkins v. Matthews, a 1971 case, the United States Supreme Court held that Section 5 covered changes in the location of polling places. Legislatures, counties, and cities could not locate polling places in inconvenient or intimidating places to discourage minorities from voting. Changes in registration procedures obviously affect the individual ballot and covered jurisdictions have been required to show that changes in registration do not have a disparate impact on African-Americans. For example, registration procedures which require "proper" identification or reregistration methods that serve to undermine costly registration campaigns will be closely scrutinized.

2. Candidacy Requirements

Some of the Section 5 cases have dealt with cases where qualifications of candidates or candidacy requirements have been changed. In Dougherty County Board of Education v. White, a county instituted a new rule requiring board of education members to take unpaid leaves of absence while campaigning for office. The United States Supreme Court held that the rule operated like a filing fee and imposed "substantial economic disincentives" on employees running for public office. Because of its potential for discrimination, the rule was subject to Section 5 preclearance. In NAACP v. Hampton County Election Commission, two civil rights organizations and some residents of Hampton County sought to enjoin an election scheduled to be held four months after the date approved by the Attorney General. The Court ruled that these changes could not be simply characterized as "ministerial" and may have acted to discourage latecomers from entering the race.

80. Motomura, supra note 58, at 198.
81. Allen, 393 U.S. at 552.
82. 400 U.S. 379 (1971).
83. Id. at 388.
84. Id.
85. See, e.g., Motomura, supra note 58, at 198-201.
86. Id. at 199 n.63. Jurisdictions may require burdensome proofs of identity for registration, or find pretexts to purge voter lists, thus necessitating less effective reregistration campaigns. Such practices will be closely scrutinized under Section 5.
87. Id. at 199 n.57 (citing the Attorney General's Objection letter to Jasper County, Miss. (June 8, 1971)).
89. Id. at 34.
90. Id. at 40.
91. Id. at 43, 47.
93. Id. at 170, 173.
94. Id. at 175, 178. See also Hadnott v. Amos, 394 U.S. 358 (1969) (dealing with a change
The next three categories of cases to be considered deal with "vote dilution." Some of the more complex and interesting Section 5 cases deal with vote dilution where access is not restricted to the ballot but votes are made less "meaningful" using a variety of tactics. One authority describes vote dilution as "a process whereby election laws or practices, either singly or in concert, combine with systematic bloc voting among an identifiable group to diminish the voting strength of at least one other group." Vote dilution cases have come up in a variety of contexts, including "reapportionment plans that unnecessarily fragment or concentrate black population, numbered posts, staggered terms, majority vote requirements, and discriminatory annexations."

3. At-large Voting

Changes from single-member to at-large voting, or multimember districting, may often result in vote dilution. It has been observed that

[a] minority population often has enough voting strength as a group to elect one or more members of a city or county governing body in elections that are conducted by single-member districts. If the election is at-large, however, all seats are elected from throughout the jurisdiction, and in many cases white majorities have maintained total or nearly total control.

In Fairley v. Patterson, which involved the election of local commissioners, the Supreme Court held that the preclearance requirement applied to a change from district to at-large voting. Similarly, in Perkins v. Matthews, the Court held that Section 5 required preclearance of a change from ward to at-large election of aldermen.

95. See infra notes 101-139 and accompanying text.
97. McDonald, supra note 7, at 1256 n.26 (quoting MINORITY VOTE DILUTION 4 (Chandler Davidson ed., 1984)).
98. Id. at 1256 nn.27-31.
99. Motomura, supra note 58, at 206.
100. 393 U.S. 544 (1969).
101. Motomura, supra note 58, at 206.
102. 400 U.S. 379 (1971).
103. Id. at 394.
4. Annexations

Annexations have fueled some important Section 5 litigation. By "annexing" or enlarging the boundaries of a city or municipality, local authorities may change the racial balance of the electorate. Annexations are most controversial when the minority population and the white population are roughly equivalent in size and the effect of netting additional white votes through an annexation would be to destroy the "fragile victory margins that minority candidates had enjoyed." In 1971, in Perkins v. Matthews, the United States Supreme Court held that annexations were not exempt from Section 5 preclearance. In City of Petersburg v. United States, the district court conditionally approved a proposed annexation: the city would first have to "neutralize... any adverse effect upon the political participation of black voters." This requirement meant the city had to switch from at-large elections to ward elections for council members. The Supreme Court affirmed this decision. In City of Richmond v. United States, the Supreme Court held that a reduction in the percentage of the minority population did not necessarily indicate a Section 5 violation. A court was to consider whether there were sound economic and demographic factors that justified an annexation. It would also have to find election plans that "afford[ed] [minorities] representation reasonably equivalent to their political strength in the enlarged community." In City of Pleasant Grove v. United States, the Court considered a city's decision not to annex an area populated by African-Americans while annexing a neighboring, thinly populated white area. The Court affirmed a district court ruling that such a change was subject to Section 5 preclearance.

105. Motomura, supra note 58, at 223.
106. Perkins, 400 U.S. at 388-89.
108. Id. at 1031.
109. Id.
111. 422 U.S. 358 (1975).
112. Id. at 371.
113. Id. at 375.
114. Id. at 370.
116. Id. at 464-68.
117. Id. at 472.
5. Redistricting

Whereas annexations enlarge the boundary lines of a municipality, redistricting redraws voting districts within a locality. Redistricting plans may be suspect when they contain overpopulated minority districts, causing the minority voters in these districts to be poorly represented.\textsuperscript{118} The Supreme Court decisions in redistricting cases have been criticized as inconsistent with its decisions in annexation cases.\textsuperscript{119} In annexation cases, the Court has considered the totality of circumstances and has weighed such factors as "racially polarized voting, a persistent history of racial discrimination in civil rights, and chronic failure of minority candidates to win elections."\textsuperscript{120} The Supreme Court has adopted a different approach in its redistricting cases, however. In \textit{Beer v. United States},\textsuperscript{121} a case involving the redistricting of the New Orleans City Council, the Court instituted a "retrogression" test.\textsuperscript{122} Under this test, a change would only be considered to have a discriminatory effect if minorities were worse off after a change than before it.\textsuperscript{123} Thus, even if the balance between minority population and its representation remained unfavorable, voting discrimination would not be held to exist so long as the change was not "regressive."\textsuperscript{124} \textit{Beer} and a subsequent decision, \textit{Lockhart v. United States},\textsuperscript{125} have both been sharply criticized by civil rights activists.\textsuperscript{126}

6. Creation or Abolition of Elective Office

Another line of cases involves the replacement of elected officials by appointed ones. In \textit{Hardy v. Wallace},\textsuperscript{127} African-American citizens brought a class action challenging an Alabama statute which permitted the governor to appoint members of a county racing commission.\textsuperscript{128} Previously, the legislative delegation representing the county had chosen the members of the

\textsuperscript{118} See Motomura, \textit{supra} note 58, at 233.
\textsuperscript{120} Motomura, \textit{supra} note 58, at 197.
\textsuperscript{121} 425 U.S. 130 (1976).
\textsuperscript{122} \textit{Id.} at 139-42.
\textsuperscript{123} \textit{Id.} at 141.
\textsuperscript{124} \textit{Id.}
\textsuperscript{125} 460 U.S. 125 (1983).
\textsuperscript{126} One commentator has argued that the "retrogression test smacks of a logic that two wrongs make a right: It allows abridgement of a fundamental right simply because the abridgement created by the new law is no worse than the abridgement which previously existed." Mark E. Haddad, Note, \textit{Getting Results Under Section 5 of the Voting Rights Act}, 94 YALE L.J. 139, 161 (1984).
\textsuperscript{127} 603 F. Supp. 174 (N.D. Ala. 1985).
\textsuperscript{128} \textit{Id.} at 175.
commission.\textsuperscript{129} The United States District Court for the Northern District of Alabama ruled that the change clearly had a potential for discrimination and was thus subject to Section 5.\textsuperscript{130} In \textit{Horry County v. United States},\textsuperscript{131} the South Carolina state legislature passed a statute that provided for the election of county council members.\textsuperscript{132} They were formerly appointed by the governor. The United States District Court for the District of Columbia held that this change was a change with respect to voting and was subject to Section 5 preclearance.\textsuperscript{133} In \textit{County Council v. United States},\textsuperscript{134} the United States District Court for the District of Columbia held that a South Carolina law which shifted authority over local affairs from the governor and general assembly to a county council elected at large could be considered a change with respect to voting.\textsuperscript{135} In \textit{Robinson v. Alabama State Department of Education},\textsuperscript{136} there was a change from county-wide election of members of the board of education to appointment of these members by the city council.\textsuperscript{137} This change was held to be subject to Section 5 preclearance.\textsuperscript{138}

7. Transfers of Authority of Elected Officials

There are few judicial decisions involving transfers of authority among elected officials. But the United States Attorney General has on numerous occasions objected to transfers of authority. The Justice Department in its brief in the instant decision offered the following examples:

(1) Mobile, Alabama, March 2, 1976, involving a transfer of administrative duties from the entire commission to individual commissioners; (2) Charleston, South Carolina, June 14, 1977, involving a transfer of taxing authority from the legislative delegation to the county council; . . . (5) Brunswick and Blynn County, Georgia, August 16, 1982, involving the abolition of separate city and county commissions and the transfer of their powers to a consolidated commission; (6) Hillsborough County, Florida, August 29, 1984, involving a transfer of power over municipalities from the legislative delegation to the county commission . . . (7) Waycross, Georgia, February 16, 1988, involving a change in the duties of the mayor; and (8) San Patricio, Texas, May 7, 1990, involving a transfer of voter registration duties from the county clerk to the county tax assessor.\textsuperscript{139}

\textsuperscript{129} \textit{Id.}
\textsuperscript{130} \textit{Id.} at 179.
\textsuperscript{132} \textit{Id.} at 994.
\textsuperscript{133} \textit{Id.} at 996.
\textsuperscript{134} 555 F. Supp. 694 (D.D.C. 1983).
\textsuperscript{135} \textit{Id.} at 702.
\textsuperscript{136} 652 F. Supp. 484 (M.D. Ala. 1987).
\textsuperscript{137} \textit{Id.} at 485.
\textsuperscript{138} \textit{Id.} at 486.
\textsuperscript{139} \textit{Id.}
C. The Controversy Among the Commentators

Some recurrent controversies center around the Voting Rights Act. Many conservatives will concede that the passage of the Voting Rights Act was timely and necessary in the face of the long resistance to the Fifteenth Amendment. They are unhappy, however, about the expansive scope federal courts have given to the Act. Some themes that persist in the debate between conservatives and liberals are as follows.

1. Federalism

Conservatives argue that the key provisions of the Voting Rights Act were intended to be temporary and that the Act gained its permanent character because administrative authorities and federal courts reshaped and altered the original Act. Congress extended and amended the Act without sufficiently considering the extraordinary implications of continued federal interference in local affairs. Southern electoral tactics needed scrutiny when access to the ballot was denied, but African-Americans can now freely exercise the right to vote. Conservatives charge that too often the judiciary and federal administrative authorities run roughshod over important policy objectives of local authorities in their efforts to implement Section 5. Thus, sound economic motives may prompt annexations, they argue, but these motives are ignored if they have the incidental effect of altering minority voting strength. A related charge is that lawyers in the Voting Section of the Justice Department play on stereotypes of a racist South when in fact the racial landscape has changed a great deal.

Liberals argue that the broad language of the Voting Rights Act shows that it was intended to be open-ended. The Act has to be fine-tuned to meet the challenges of new and varied strains of discrimination. Liberals defend the necessity for federal scrutiny: to suggest that electoral politics in the South no longer needs policing is to have much too optimistic a view of the problems of racism. The sway of a David Duke in Louisiana shows that gains made by minorities are fragile. It is important to keep the
channels for political participation open for minorities at a time when racially-loaded appeals to the electorate have proved effective.\textsuperscript{150}

2. "Affirmative Action"

Some critics are concerned about the way in which affirmative action has been introduced into the voting rights arena.\textsuperscript{151} They object strongly to the notion that minorities are "entitled" to representatives in proportion to their population and argue that special protection of racial groups is inappropriate in an electoral setting. Representatives should represent all citizens, not interest groups.\textsuperscript{152} "The myth of moral simplicity," writes Abigail Thernstrom, "has largely insulated the voting rights issue from debate, yet perhaps no other affirmative action question is more significant."\textsuperscript{153}

Liberals argue that if the Fifteenth Amendment is to be more than empty rhetoric, then courts must confront the multitude of ways in which voting rights can be diluted.\textsuperscript{154} If political power is a vital good, then there has to be an uncompromising commitment on the part of civil rights activists to ensure that minorities share in the exercise of this political power,\textsuperscript{155} and courts must come up with creative solutions to discourage racial vote dilution.\textsuperscript{156}

3. The Role of the Courts and the Justice Department

Critics at both ends of the spectrum disagree about the effectiveness of the federal courts and the Justice Department in implementing voting rights policy. Conservatives argue that the original Act was amended by judicial and administrative interpretation and then Congress inattentively put a stamp of approval on these interpretations.\textsuperscript{157} According to this view, the judicial decisions highlight the Court's inability to deal with complex constitutional issues and its refusal to confront the basic question of what it means to exercise the right to vote.\textsuperscript{158} They charge that the lawyers in the Civil Rights Division respond eagerly to pressures from civil rights groups and crowd out

\textsuperscript{150} Jesse Helms' successful 1990 Senate race in North Carolina against Harvey Gantt provides an example of this.


\textsuperscript{152} Id. at 663 (citing Reynolds v. Sims, 377 U.S. 533, 565 (1964)).

\textsuperscript{153} See THERNSTROM, supra note 10, at 6.

\textsuperscript{154} Guinier, supra note 12, at 412-13.


\textsuperscript{156} Id. at 248.

\textsuperscript{157} See, e.g., THERNSTROM, supra note 10, at 235.

\textsuperscript{158} See, e.g., Butler, supra note 140, at 96-97.
crowd out other important policy considerations in their haste to find discriminatory intent in local political arenas.159 Opponents argue that lawyers in the Justice Department have been too willing to seek compromises with local jurisdictions in implementing the Voting Rights Act. They acknowledge the difficulty facing agency officials: "If the DOJ [Department of Justice] vigorously enforced both the spirit and the letter of Section 5, there would surely be evasion, avoidance, and delay by . . . white powerholders."160 Liberals urge agency officials, nevertheless, to move beyond a "shared enforcement philosophy."161 Congress laid down broad guidelines and fully expected that the Justice Department and the courts would adapt the Voting Rights Act as a flexible tool to respond to new transmutations of an old phenomenon, namely racial prejudice.162

IV. THE INSTANT DECISION

Some of the currents of this debate are reflected in the instant decision. While the majority in Presley and Mack acknowledged that the Voting Rights Act was intended to have a broad and expansive scope, it nevertheless interpreted "change with respect to voting" narrowly.163 In Presley, the controversy revolved around the Common Fund Resolution.164 At issue was the transfer of authority over road funds of individual districts from individual commissioners to the county commission as a whole.165 The transfer of authority occurred less than nine months after an African-American commissioner was elected for the first time.166 In Mack, the appellant challenged the county’s adoption of a "unit system."167 The commission abolished individual road districts and delegated control for all road operations to the county engineer.168 Were both these changes subject to the preclearance requirement?

A. Majority Opinion

Justice Kennedy, in the majority opinion, advanced several reasons for rejecting the claim that these changes needed preclearance.169 Allen and later opinions established that "[t]he Voting Rights Act was aimed at the

159. THERNSTROM, supra note 10, at 163.
160. BALL ET AL., supra note 13, at 196.
162. Id. at 412-13.
163. Presley, 112 S. Ct. at 827-32.
164. Id. at 826.
165. Id. at 825-26.
166. Id. at 838.
167. Id. at 827.
168. Id. at 826.
169. Id. at 824-32.
subtle, as well as the obvious, state regulations that ha[d] the effect of denying citizens the right to vote."\textsuperscript{170}

Nevertheless, the present changes did not fall into the category of changes to which the preclearance requirement had previously been applied\textsuperscript{171} because these changes were not directly connected to voting. Justice Kennedy listed four categories of cases to which Section 5 had been applied: 1) changes that affected the manner of voting; 2) changes in candidate qualifications and candidacy requirements; 3) changes involving the racial make-up of the electorate (such changes as at-large elections, annexations, and redistrictings); 4) changes from elective to appointive office, or vice versa.\textsuperscript{172}

To accept the resolutions as changes with respect to voting would be to "work an unconstrained expansion" of Section 5.\textsuperscript{173} Justice Kennedy argued that neither the appellants nor the United States (which submitted an amicus curiae brief) "provide[d] a[ny] workable standards" for "distinguishing between changes in rules governing voting and changes in the routine organization and functioning of government."\textsuperscript{174}

The Court dismissed the Attorney General’s suggestion that a distinction could be made between budgetary changes and other changes and that budgetary decisions need not be scrutinized under Section 5.\textsuperscript{175} Justice Kennedy pointed out that budgetary decisions could affect a shift of power—"a vote for an ill-funded official is less valuable than a vote for a well-funded one"—but it was inappropriate to bring Section 5 analysis to such changes.\textsuperscript{176} The Court stated, "The all but limitless minor changes in the allocation of power among officials and the constant adjustments required for the efficient governance of every covered State illustrate the necessity for us to formulate workable rules. . . ."\textsuperscript{177} As for the Russell County Commission, Justice Kennedy challenged the view that the delegation of authority to the engineer was analogous to replacing an elected official with an appointed one.\textsuperscript{178} This argument was without merit, according to Justice Kennedy, because what was involved in prior cases was a change from elected to appointed office, not a relative shift in power among different governmental officials.\textsuperscript{179} Even though each commissioner exercised less direct authority over road operations as a result of the unit system, the engineer (to whom the authority was delegated) was still responsible to the county commission.\textsuperscript{180} The commission had the power to dismiss him.

\textsuperscript{170} Id. at 827 (citing Allen v. State Bd. of Elections, 393 U.S. 544, 565 (1969)).
\textsuperscript{171} Id. at 829.
\textsuperscript{172} Id. at 828.
\textsuperscript{173} Id. at 829.
\textsuperscript{174} Id.
\textsuperscript{175} Id. at 829-30.
\textsuperscript{176} Id. at 829.
\textsuperscript{177} Id. at 830.
\textsuperscript{178} Id. at 830-31.
\textsuperscript{179} Id.
\textsuperscript{180} Id.
Justice Kennedy then went on to examine the district court's analysis in *Presley* and *Mack*. According to the district court, if the Unit System and Common Fund Resolution had involved inter-constituency transfers of authority, then there would have been a change with respect to voting.\(^\text{181}\) Justice Kennedy rejected this reasoning because it began "from the faulty premise that reallocations of authority within government [could] constitute voting changes."\(^\text{182}\)

Justice Kennedy directed his final salvo at the argument, made by the appellants and the United States, that the Court should defer to the administrative construction of the provision.\(^\text{183}\) In *Chevron v. Natural Resources Defense Council*,\(^\text{184}\) the Court held that the judiciary owed deference to the administrative interpretation of a statute if the interpretation was reasonable.\(^\text{185}\) Justice Kennedy found the contention that a transfer of authority was a change with respect to voting without merit. There was no ambiguity in the statute as to whether Section 5 extended to changes other than "changes in rules governing voting."\(^\text{186}\) It did not. Therefore, no deference could be accorded to the Justice Department.\(^\text{187}\)

### B. Dissent

Justice Stevens, writing for the dissent, urged the majority to consider the Voting Rights Act in its historical context. According to Justice Stevens, "[t]his is a case in which a few pages of history are far more illuminating than volumes of logic and hours of speculation about hypothetical line-drawing problems."\(^\text{188}\) He argued that if the Court truly accepted the expansive nature of Section 5, then it would understand that the provision was intended to be adapted to changing conditions.\(^\text{189}\) *Allen* made clear that "voting" was to be defined as "all action necessary to make a vote effective."\(^\text{190}\) Neither *Allen* nor later decisions had defined exhaustive categories of changes and Section 5 was intended to be flexible.\(^\text{191}\)

Justice Stevens rejected the argument that there were no workable standards.\(^\text{192}\) He pointed out that there had been several instances where the Attorney General had considered such delegations of authority and raised

\(^{181}\) *Id.* at 831.

\(^{182}\) *Id.*

\(^{183}\) *Id.* at 831-32.


\(^{185}\) *Id.* at 842-45.

\(^{186}\) *Presley*, 112 S. Ct. at 832.

\(^{187}\) *Id.* at 832. As Justice Stevens points out in the dissent, this is the first time that the Court has disputed the Attorney General's interpretation of the Voting Rights Act. *Id.* at 833 (Stevens, J., dissenting).

\(^{188}\) *Id.* at 832-33 (Stevens, J., dissenting).

\(^{189}\) *Id.* at 836.

\(^{190}\) *Id.* at 835 (citing *Allen v. State Bd. of Elections* 393 U.S. 544, 565-66 (1969)).

\(^{191}\) *Id.* at 830.

\(^{192}\) *Id.* at 833-38.
objections. Justice Stevens noted that "[p]rior to these cases, federal courts had uniformly agreed with the Attorney General's interpretation that Section 5 covered transfers of decisionmaking power that had a potential for discrimination against minority voters." He disagreed with Justice Kennedy that the practice imposed an unfair burden on covered jurisdictions.

Justice Stevens then went on to give a brief overview of the kinds of changes that had been recognized as changes relating to voting, and argued that cases involving transfers of authority fall squarely within the scope of Section 5. Such transfers of authority had the effect of making an elected official a mere "figurehead" by "transferring his decisionmaking authority to an appointed official, or to a group of elected officials controlled by the majority." Turning to the cases themselves, Justice Stevens argued that it was wrong for the district court to divorce an analysis of the Road Supervision Resolution from the Common Fund Resolution. According to Justice Stevens, it was inconsistent for the district court to characterize the Road Supervision Resolution as a change with a potential for discrimination, but not reach this conclusion as to the Common Fund Resolution. The majority should have focused on the totality of circumstances: The Common Fund Resolution was passed on the same day as the Road Resolution; both resolutions were passed soon after the election of an African-American official; and both resolutions were passed pursuant to a consent decree. This situation should have alerted the Court that the Common Fund Resolution was a change deserving scrutiny. Justice Stevens suggested that the above circumstances provided the "workable standards" for determining whether the change was subject to preclearance. As for the Mack case, Justice Stevens argued that the jurisprudential history provided ample evidence for bringing this case under the Section 5 preclearance requirement. Together with gerrymandering and other vote dilution cases, this case shared "the characteristic of enhancing the power of the majority over a segment of the political community that might otherwise be adequately represented."

193. Id. at 833 nn.2-9.
194. Id. at 833.
195. Id. at 837-38.
196. Id. at 838.
197. Id. at 838-39. The Road Supervision Resolution prevented new commissioners on the Russell County Commission from exercising authority over roads in their districts. The Common Fund Resolution provided for all funds for the repair, maintenance, and improvement of roads to be pooled in common accounts. This changed the prior practice of allowing each commissioner full control of funds in his own district. Id. at 825-26.
198. Id. at 839.
199. Id. at 838-39.
200. Id. at 839.
201. Id. at 840.
202. Id.
V. COMMENT

Justice Stevens' dissent is more persuasive than Justice Kennedy's majority opinion. This section challenges some of the arguments of the majority and explores the implications of the Court's decision.

A. Is a Transfer of Authority Among Elected Officials a Change with Respect to Voting?

The majority concludes that it is not. It is true that in a strict procedural sense, such a transfer does not interfere with the exercise of a right to vote. But contrary to the majority's assertion, a transfer of authority among elected officials does have a bearing on the substance of voting power. If an elected official is stripped of her capacity to represent her constituents, then such an action bears a "direct relation to voting and the election process." In *Presley*, there are clear indications that the county commission intended to dilute the authority of the newly-elected African-American commissioner: the Common Fund Resolution was passed soon after Presley's election and on the same day as the Road Supervision Resolution, which the district court found to have a potential for discrimination. The Common Fund Resolution gave Presley little discretion to control the road operations of the district he represented. Surely, this has a bearing on the voting power of his constituents. It is likely that the four holdover commissioners in Etowah County passed the Road Supervision Resolution because they knew that this measure would frustrate Presley's ability to represent his constituents in road matters. In *Mack*, the Russell County Commission may have transferred authority to the county engineer due to legitimate fears of corruption among county commissioners. This action, however, could have been prompted by the knowledge of a changing electoral landscape and the expectation that minority commissioners would soon hold office. It is important to bring such changes in the transfer of authority under the Section 5 preclearance requirement because they have the potential of subverting an important aim of the Voting Rights Act. They may block the channels of effective minority participation in the electoral process.

In its zeal to defend the principles of federalism, the majority ignores this aim. By arguing that the present case does not fall into the category of cases that the Court has previously recognized for Section 5 purposes, the Court ignores the consistent philosophy behind judicial interpretation of the Voting Rights Act. The Supreme Court recognized the importance of ensuring effective minority participation in the electoral process. The majority's failure to recognize this is a significant flaw in its analysis.

203. *Id.* at 832.
204. *Id.* at 829.
205. *Id.* at 825.
206. See *supra* notes 27-28 and accompanying text.
207. See *supra* note 29 and accompanying text.
208. Russell County was a party to litigation involving its electoral practices. A 1972 court order, *Anthony v. Russell County*, No. 961-E (M.D. Ala. 1972), ordered the commission to expand to five members. It is conceivable that the county’s 1979 resolution may have anticipated changes in the commission, including the election of black commissioners.
Rights Act. The statute is intentionally broad, and Congress fully expected the Court and administrative authorities to fine-tune the provisions so as to fashion remedies to respond to new forms of discrimination. The majority treats the statute as one where some bright line tests are self-evident. This viewpoint echoes Justice Harlan's dissent in Allen, and the history of voting rights has shown how wrong he was. If his views had prevailed then, much of the progress in minority voting rights would not have been achieved.

B. The Search for "Workable Standards"

Justice Kennedy suggests that while the transfer of authority among elected officials may bear an indirect relation to voting, it would be impractical to require preclearance for this kind of change. Delay, expense, and bureaucratic red tape, as well as unfettered federal intrusion in local affairs, make such a scenario highly unacceptable. But, as the dissent points out, this is hardly uncharted territory. Some jurisdictions have submitted such resolutions for preclearance, and courts have affirmed objections made by the Attorney General to these transfers of authority. Moreover, many resolutions considered by local government officials are not passed overnight. They often go through several stages of drafting, redrafting, negotiations, and consultations with lawyers and constituents; it is hard to see how an application for preclearance, which normally takes sixty days, imposes a substantial added burden. There may be the rare emergency occasion when a jurisdiction has to swiftly pass and immediately effect a resolution. In such a case, a jurisdiction may be served by the provision in Section 5.

209. As the Court noted in South Carolina v. Katzenbach, 383 U.S. 301, 334-35 (1966), [t]he rationale of this "uncommon exercise of congressional power" which sustained its constitutional validity was a presumption that jurisdictions which had "resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees" would be likely to engage in "similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself."

210. See supra part III (discussing voting rights cases from Allen to City of Richmond v. United States).

211. See, e.g., Presley, 112 S. Ct. at 828-32.


213. Presley, 112 S. Ct. at 829, 832.

214. Id. at 829.

215. Id. at 833-34 nn.2-3. Justice Stevens points out in his dissent that "there is no evidence that the prevailing practice imposed any special burden on covered jurisdictions. For example, in this fiscal year the Attorney General has processed over 17,000 preclearance requests, and has approved over 99 percent of them without any undue delay." Id. at 833.

216. Id. at 833-34 nn. 2-3.

217. Section 5 of the Voting Rights Act provides: "If the Attorney General has not interposed an objection within sixty days after such submission . . . the Attorney General has affirmatively indicated that such objection will not be made." 42 U.S.C. § 1973e (1988).
which provides for an expedited review "upon good cause shown."\textsuperscript{218} It may even be possible to carve out a very narrow alternative clearance arrangement. If the jurisdiction can show that there was a compelling interest for not waiting to seek preclearance and this compelling interest can survive strict federal scrutiny, then in the rare case it may be possible to validate the resolution after the fact. Contrary to the majority's assertion, it is possible to be creative and to find workable standards if there is a will to do so.

\section*{C. Affirmative Action in Voting Rights?}

Underlying the Court's position may be a fear that federal scrutiny will mean that minority candidates will be "entitled" to powerful positions in an elected body. The Court appears to be rejecting this kind of "affirmative action" in electoral politics.\textsuperscript{219} Under this view, any action that results in incidentally diluting the power of a minority representative may be found to be discriminatory.\textsuperscript{220} The experience with most Section 5 cases, however, should allay these fears. The majority of submissions made by covered jurisdictions are approved, and when there is litigation, federal courts have been careful, in many cases, to balance factors and employ a "fairness standard."\textsuperscript{221} Thus courts could weigh the same kind of factors as in other Section 5 cases to consider whether a proposed transfer of authority is discriminatory in purpose or effect: racially polarized voting, past attempts to obstruct minority voting rights, the level of minority involvement in politics, and gross economic disparities between minority and white voters.\textsuperscript{222} The combined effect of these factors could be considered and weighed against the sound economic and policy objectives that a jurisdiction may have for particular transfers of authority.

\section*{D. Alternative Solutions to Section 5}

Justice Kennedy suggests that there are more appropriate ways of dealing with facts like those in the instant decision than by analyzing them under Section 5.\textsuperscript{223} Thus, appellants could sue under Title VI of the Civil Rights Act\textsuperscript{224} or litigate violations of their constitutional rights.\textsuperscript{225} But this view ignores the history of the Voting Rights Act. It was precisely the failure of this kind of litigation on a case-by-case basis that necessitated the Voting Rights Act.\textsuperscript{226} Civil rights activists and politicians would not have fought

\begin{footnotesize}
\begin{enumerate}
\item 218. Id.
\item 219. \textit{See supra} notes 151-156 and accompanying text.
\item 220. \textit{See supra} part IV.
\item 221. \textit{See generally} Weed, \textit{supra} note 123.
\item 222. \textit{See Motomura, supra} note 58, at 197.
\item 223. \textit{Presley}, 112 S. Ct. at 832.
\item 225. \textit{See, e.g., U.S. CONST.} amend. XV, \textit{supra} note 2.
\item 226. This point is reiterated by Justice Stevens in the dissent. \textit{Presley}, 112 S. Ct. at 835 (Stevens, J., dissenting) (citing MoCain v. Lybrand, 465 U.S. 236 (1984)).
\end{enumerate}
\end{footnotesize}
so vigorously to pass this very difficult piece of legislation had they not been firmly convinced of the futility of case-by-case litigation. By 1965, federal attorneys knew that

questions of disfranchisement should not be litigated at all; to prove the obvious was both expensive and time-consuming and victories were too often transient and incomplete . . . Unless preventive steps were taken, old methods of disfranchisement might simply be replaced by new ones, and the tedious and prolonged legal process would begin again.\textsuperscript{227}

The preclearance requirement has an important advantage: it helps to modify the behavior of local officials before the harm is done.\textsuperscript{228} Federal attorneys familiar with particular localities can exact grudging compliance from local officials with whom they have dealt in the past, and they can candidly advise local officials when proposed changes are likely to meet objections from the Justice Department.\textsuperscript{229}

\textbf{E. The Purpose or Effects Clause of Section 5}

Section 5 stipulates that a covered jurisdiction must show that a "qualification, prerequisite, standard, practice, or procedure does not have the \textit{purpose} and will not have the \textit{effect} of denying or abridging the right to vote on account of race or color."\textsuperscript{230} Justice Kennedy's opinion reflects a concern that if changes in the decision-making authority of local officials are subjected to Section 5 scrutiny, then legitimate administrative goals of local officials will be frustrated by the federal bureaucracy. He therefore proposes that if such administrative decisions are discriminatory in purpose, they should be challenged through litigation or "alternative remedial schemes" rather than through Section 5.\textsuperscript{231} That this is not a very satisfactory option has already been explored above.\textsuperscript{232} However, there is an added dimension that Justice Kennedy ignores. Section 5 is directed at changes which have both the \textit{purpose} and \textit{effect} of creating a disparate impact on minority voting rights. Justice Kennedy fails to address what remedy is appropriate for minority voters when a transfer of authority made in good faith nevertheless has a significant adverse impact on the ability of a minority representative to represent his constituents. There is no "alternative remedial scheme" under which such a decision could be challenged, and Section 5 would seem to provide minority voters with the best protection in such circumstances.

\begin{itemize}
\item \textsuperscript{227} THERNSTROM, \textit{supra} note 10, at 16.
\item \textsuperscript{228} Id. at 832 ("If federalism is to operate as a practical system of governance and not a mere poetic ideal, the States must be allowed both predictability and efficiency in structuring their governments").
\item \textsuperscript{229} For an interesting discussion of the implementation of the Voting Rights Act, see BALL, ET. AL., \textit{supra} note 13, at 64-91.
\item \textsuperscript{230} 42 U.S.C. § 1973 (emphasis added).
\item \textsuperscript{231} \textit{Presley}, 112 S. Ct. at 831.
\item \textsuperscript{232} \textit{See supra} notes 210-13 and accompanying text.
\end{itemize}
F. Deference to the Justice Department

Justice Kennedy asserts that, in this case, the Justice Department is not entitled to deference in its interpretation of what constitutes a "change with respect to voting" because the Department's interpretation is unreasonable. However, there is some confusion in the logic which Justice Kennedy uses to arrive at this conclusion. He starts by acknowledging that there is ambiguity as to what constitutes a change with respect to voting, and that this requires interpretation to fill in "the gap." He then asserts that Section 5 was not intended to encompass changes that were not changes with respect to voting. Therefore, he concludes, the Justice Department was not entitled to deference, because the Department was preoccupied with a change which was clearly not a change with respect to voting. Justice Kennedy thus disposes of the question of ambiguity with this conclusory statement. Perhaps he intended that the paragraph where he makes this argument should be read in light of the whole opinion. Even so, the opinion nowhere acknowledges that a change in the decision-making authority of elected officials can plausibly be interpreted as a "change with respect to voting" and that the Justice Department is legitimately "filling in the gap" by its construction of the statute.

VI. Conclusion

The Court characterizes the instant decision blandly as one about the level of federal intrusion that can be tolerated in the routine administrative operations of an elected body. But this distorts the importance of the interests at stake. The decisions of local government officials have great impact on the quality of lives of people living in these localities. Such decisions can influence in a very intimate way the educational opportunities a minority child may have, the kind of housing and health care opportunities that minority families may have access to, and the kind of development projects that are brought to neighborhoods. The distribution of public goods turn crucially on decisions at these local levels.

The decision in Presley will embolden local officials in covered jurisdictions to dilute the effects of successful litigation in prior Section 5

233. Presley, 112 S. Ct. at 832.
234. Id. at 831-32.
235. Id. at 831.
236. Id. at 831-32.
237. Id. at 829. According to Justice Kennedy, "[i]numerable state and local enactments having nothing to do with voting affect the power of elected officials. . . . Yet no one would contend that when Congress enacted the Voting Rights Act it meant to subject all or even most decisions of government in covered jurisdictions to federal supervision." Id.
cases. This result is a significant setback for minority voting rights. By focusing on line-drawing problems, the Court ignores the overarching aim of the Voting Rights Act: to give an effective voice to minority voters.

AISHA GINWALLA