THE U.S. JUSTICE DEPARTMENT & THE VOTING RIGHTS ACT OF 1965: PRECLEARANCE AND THE IMPLEMENTATION OF SECTION FIVE

by

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(Under the Direction of Charles S. Bullock, III)

ABSTRACT

Scholars have examined the politics and legal fallout related to redistricting, and over the last decade a great deal of research probing the political, constitutional and legal issues surrounding the creation of new districts has emerged; however, the implementation of the Voting Rights Act, in particular Section Five, remains largely unexplored. Utilizing the redistricting environment, this research examines the Justice Department's review process, focusing specifically on the implementation of Section Five of the Act in nine southern states. Section Five of the Act grants the Justice Department the authority to scrutinize electoral and voting changes made by state and local governments. Preclearance requires "covered" states and local governments to submit any new electoral schemes to the Justice Department or the U.S. District Court of the District of Columbia for approval prior to implementation.

In order to conceptualize the implementation of Section Five, principal-agent theory is used. Principal-agent theory provides a theoretical framework that simplifies the complex interrelationships between the respective institutions involved in the interpretation, execution and implementation of Section Five of the Act, namely the Justice Department, the federal courts, the

Congress and the White House. This institutional perspective is supported by an examination of the legal dimensions under which the Justice Department operates while taking into account congressional amendments to the Act. These frameworks are further explored via a content analysis examining Justice Department preclearance documents. Preclearance letters provide an important resource to investigate preclearance decisions. In order to discover the factors that the Justice Department uses during its review of redistricting plans, each redistricting plan is treated as a single entity. Justice Department preclearance decisions are then examined in order to determine the degree to which these variables influence the Justice Department's preclearance decisions from 1970 to 2000.

INDEX WORDS: The United States Department of Justice (Justice Department, DOJ), The Voting Rights Act of 1965 (VRA), Redistricting, Section Five, Preclearance, United States Supreme Court, Southern Politics, Compliance Letters, Voting Rights Policy, Principal-Agent Theory

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DEDICATION

"If you have a great ambition, take as big a step as possible in the direction of fulfilling it. The step may only be a tiny one, but trust that it may be the largest one possible for now."

~ Mildred McAfee ~

To the Spirit of Eustace Renner:

Who lived by faith and sustained himself on what the land had to offer, asking for no more than what was necessary; who taught me to have the courage to jump into the unknown and fly; who shaped my world in a profound and mystical way; who set in motion a sense of awareness and understanding beyond my immediate surroundings; and who may no longer be with us to witness and enjoy in the fruits of his labour nor view the final creation, but can rest in peace knowing he left his irrefutable mark, as his wisdom and encouragement lives on inside of me.

ACKNOWLEDGEMENTS

Everyone has a story to tell (just ask B.D.K.). Some stories are more interesting than others, but each is unique and distinct. The chronicle that describes the completion of this document is interesting, to say the least, and is a voyage into a strange new world, which I lived from 1996-2004. These years mark a period of incredible intellectual growth and maturity, a transformation no less, and a time in which remarkable changes occurred in my life and my perspective of the world. The journey was not always easy and I did not do it alone, and although it is customary for an author to acknowledge individuals who contributed and offered assistance to their respective projects in this section, appropriately designated as "Acknowledgements," I want to first describe a small portion of the journey that brought me to the point of obtaining a third, but perhaps not final, degree (The one degree that continues to follow me in my dreams is a degree in law).

When I first set out on my journey to earn a Doctorate of Philosophy in Political Science, I imagined it as an adventure of sorts, and I have not been disappointed, because an adventure I have had. My journey into the academy has brought a great deal of excitement and frustration, disappointment and fulfillment, joy and pain, but the wide-range of experiences are invaluable; however, my journey is far from complete, rather, earning my Ph.D. allows my escapade to continue. With Ph.D. in hand, I will travel to new frontiers, visit interesting places, open doors that were previously closed, take advantage of new opportunities, expand my horizons and broaden my wings to soar to new heights. Furthermore, if pushed hard

enough, I am confident that I have the tools, know how and unbreakable spirit to jump off that proverbial cliff and climb further; while I may not always know where I will land, I am secure in the fact that I will land with both feet on solid ground.

My journey into the academy has taught me a great deal about the politics of America, the politics of race and the politics of higher education, but the miles that I have traveled, literally, tells another type of story and offers a different learning experience. My voyage towards earning a doctorate and becoming a college professor began on the North Shore of Vancouver, took me into the heartland of America, then into the Deep South, had me walking the halls of Capitol Hill in Washington, D.C., coming into contact with a number of people that have changed my world in profound and small ways and finally came to a rest back in the Midwest, but that respite was short lived. Before long, I was making plans to pack my bags and move once again, for even prior to this document's completion, my expedition of scholarly pursuits had me eyeing the Big Apple and contemplating a move to New York City.

The travel and moving may never come to an end, as there is still so much more to see in this wonderful world we live in, but writing will always be a very solitary activity, and although this document was written in isolation, I was never alone. The people who most deserve my thanks are my parents, Bob and Marilyn Middlemass, who I extend a heartfelt thank you for their support and encouragement. A thank you is extended to a special group of individuals who were patient and kind enough to act as sounding boards over the years: J. Michael Bitzer, who I have shared a countless number of meals and the ups and downs of doctoral studies; J. Patricia Mitchell, who I have enjoyed great conversations over good food, whose friendship extends beyond academics; Kirk S. Wright, who planted the seed of discontentment, to never be satisfied with average, who demonstrated to me how to reach for higher goals, even when

they seem unattainable and to “stay up” continually; and the Sista Circle, who provided me the encouragement and much needed support and who offered the sustaining power of friendship, which helped me through the tough times while challenging me to go the extra mile. In big and small ways, all of these characters in my life assisted in the completion of this dissertation.

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CHAPTER ONE

INTRODUCTION: PRECLEARING PLANS IN THE SOUTH

The politics of the South revolves around the Negro.

~ V.O. Key, 1949 ~

The accuracy of V.O. Key's (1949) above observation, that the presence of Blacks shapes the politics of the South, cannot be overstated. Laws were written and society was structured to prevent Blacks from participating in the social and political establishments of society. Since the passage of the Voting Rights Act in 1965, the nature of politics has changed considerably in the South, but the difference today is not related to who can enter the voting booth; rather tensions revolve around the interpretation and subsequent implementation of the Voting Rights Act.[1]

In the 1980s and 1990s, there was a flurry of law review articles and social science research dedicated to exploring the effect of the Voting Rights Act on minority representation, electoral politics in the South, racial redistricting and the legal fall out related to these activities. Our comprehension of the political skirmishes and ensuing outcomes are broad and the literature in this area is immense; a result is that we are now intimately familiar with the federal court's constant attempts to define and refine the context in which race can be used in redistricting, and we easily recognize the politics surrounding the drawing of new district lines. While the redistricting literature is important and critical to our understanding of minority politics and the link between race and representation, oftentimes research frames the issues in a political or legal

[1] The Voting Rights Act of 1965, as amended, is oftentimes simply referred to as the Act.

context and treats the implementation of the Voting Rights Act in a cursory manner. This dissertation, on the other hand, places the Act and the Justice Department's implementation of such, front and center. In doing so, this study explores the implementation of the Act from an institutional perspective rather than an electoral or legal one. Furthermore, this research investigates the Justice Department and its role in the redistricting process in the South; there by taking a different approach to analyze redistricting plans.

The Act gives the Justice Department the authority to scrutinize actions made by covered states and local governments in the area of voting and electoral laws. This power is derived from Section Five of the Act, and is commonly referred to as preclearance. Preclearance applies to covered states and other political jurisdictions, which are determined by a formula outlined in the Act. The underlying goal of Section Five is to prevent "backsliding" or the implementation of discriminatory electoral practices and procedures in political jurisdictions that have a history of discrimination against Blacks and/or language minorities. Through the Act, the Justice Department has the discretionary authority to accept (preclear) or reject (deny preclearance) to any proposed changes in district lines, polling places, election rules or procedure related to and affecting registration and voting in local, state and national elections. Section Five of the Act requires covered jurisdictions to obtain federal approval before implementing a change in voting practices or procedures.

The subject matter that garners much of the attention is redistricting. Redistricting is the vehicle through which preclearance is studied, and the goal of this dissertation is to discover, through qualitative methods, the principles that govern the implementation of Section Five of the Act by the Justice Department. This research explores the years immediately after the Act's

passage, 1965, but concentrates on the years 1970 to 2000 due to the availability of preclearance data.

The number of studies about the politics of drawing new district lines, the electoral outcomes and legal decisions have now reached a critical mass; however, there is a lack of connectedness between these three bodies of work. The gap is found between the drawing of new lines and the subsequent outcomes of where those lines are placed. This fissure can be filled by studying the role of the Justice Department and its implementation of Section Five of the Voting Rights Act of 1965. By examining the issues and principles that are raised during the redistricting process, it is possible to determine the conditions under which the Justice Department denies preclearance to redistricting plans submitted by covered jurisdictions in nine southern states.[2] The institutional roles that the Justice Department plays in its implementation of Section Five and preclearing southern redistricting plans are not only affected by the politics of local jurisdictions, but also by congressional amendments to the Act, the federal courts interpretation of the Act and the partisan leanings of the White House. The interactions between these institutions and with the Justice Department are explored utilizing principal-agent theory.

Redistricting in a Federal System: Principal-Agent Theory

Voting rights policy and its implementation involves institutions and political actors whose goals are not necessarily the same. The implementation of voting rights policy relies on federal intervention and state compliance, and while other national policy initiatives within a federal system as large as America's tend more towards policy centralization while relying

[2] The nine states in this study include the original seven states "captured" by the Voting Rights Act of 1965, which includes Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and parts of North Carolina. In addition, Texas and parts of Florida are picked up with the 1975 amendments to the Act, and are also included in this study.

heavily on sub-national governmental implementation (Walker, 1995), the dynamics between the three national institutions has important consequences for the implementation of Section Five by the Justice Department. The Voting Rights Act of 1965 created an odd assortment of institutional actors and hierarchical relationships, including giving the United States District Court of the District of Columbia considerable power. The conundrum of institutions involved with the implementation of the Act raises theoretical questions regarding the Justice Department's ability to implement the Act.

The institutional relationships, within the context of redistricting, can be studied using principal-agent theory. Principal-agent theory provides a theoretical foundation for exploring the institutional relationships between the Justice Department and its three principals: the Congress, the White House and the federal courts. All three are in a position to affect how the Justice Department makes decisions related to preclearance, and yet each of the three principal actors may have conflicting preferences about how the Act should be implemented.

Studying the implementation of Section Five allows for the development of three different sets of principal-agent relationships. First, there is the relationship between a democratically-elected institution (Congress) serving as the principal and delegating power to non-elected bureaucrats (Justice Department). Congress has amended the Act three times, each time changing the Justice Department's scope and responsibilities as it relates to Section Five. The second relationship involves the White House and the Justice Department, as the President has the power to act as a principal over the Justice Department's implementation of the law. The third relationship is between the federal courts (principal) and the Justice Department (agent). The federal courts have the power to influence Justice Department activities through its interpretation of the Act, as well as constitutional principles related to the range of permissible

redistricting actions; therefore, much like the President and Congress, the federal courts have an important say in how voting rights policy is implemented.

Each separate institutional relationship has different and at times substantial ramifications on how the Justice Department implements the Act, and in particular Section Five. The interaction between the three principals and their agent, however, varies over time. Each principal plays a crucial role in directing the Justice Department's activities, but the level of attentiveness of each principal differs and the lead principal can change. The interactions between the Justice Department, Congress, the White House and the federal courts are couched in a principal-agent model to simplify these complex interrelationships.

Why Another Study about the Voting Rights Act?

The passage of the Act is the demarcation date scholars use to explain the context of the creation of new districts, minority representation and the resulting legal decisions. To clarify how the political ramifications are oftentimes a result of institutional interpretation, this study also begins with the Voting Rights Act; yet, in the face of overwhelming research related to the Voting Rights Act and redistricting, what grounds are there for a new perspective and interpretation? One can argue that the current techniques used to study redistricting have serious substantive shortcomings. First, the methods employed tend to only consider the electoral, political or legal ramifications involved with drawing new district lines. Second, the institutional actors are conspicuously absent from most of the redistricting scholarship. Third, when court cases are scrutinized basic questions are likely to arise regarding the role of the Justice Department, but a large number of scholars have simply not followed up to determine the Justice Department's preclearance decisions and how they relate to redistricting plans. Scholars have

failed to analyze methodically Justice Department decisions, determined what factors lead to an objection or the degree to which other institutional actors influence the Justice Department. Fourth, most scholarship simply discusses the 65% rule as truth, thereby marginalizing the Justice Department's concerns about other tactics used in an attempt to discriminate against minority voters. Fifth, this research focuses on a diverse set of institutional actors involved in the preclearance of redistricting plans, and this particular approach exposes the interactions between four institutions in a multiple-principal-one-agent model.

Another reason to study the Voting Rights Act is that one could argue that studies focusing solely on the Justice Department and the implementation of the Voting Rights Act are now dated. The most prominent studies include Ball, Krane and Lauth's (1982) book entitled *Compromised Compliance*; Motomura's (1983) examination of objection letters; McDonald's (1983) historical and evolutionary analysis of Section Five; and although not a direct study of the implementation of Section Five, Parker's (1990) investigation into and about Mississippi's struggle with voting rights, the Act and its implementation. The work of the 1980s lays the foundation for investigating the relationship between the Voting Rights Act, the Justice Department, Congress, the White House and the federal courts; but there is a dearth of evidence related to preclearance patterns. It is yet to be determined, in a systematic fashion, how the Justice Department's behavior changed from 1965 to 2000 and to what degree and how those changes affected the implementation of Section Five. Furthermore, the available studies on the Justice Department fail to incorporate fully Congress' institutional capacity to delegate new responsibilities to the Justice Department via the amendment process, do not relate court decisions to changes in the Justice Department's interpretation and implementation of the Act and rarely consider the role that a president can play in shaping federal voting rights law.

To overcome some of the limitations of previous research, this study differs in at least three important ways from past Section Five research and traditional redistricting scholarship, and thus provides the justification for revisiting the Voting Rights Act and exploring the phenomenon of preclearance. First, the relentless accumulation of empirical evidence linking redistricting to political gains and representation, thus far, has not been accompanied by a systematic analysis of the institutional processes that lead to the political outcomes. Hence, we know a lot about the relationship between redistricting and a variety of electoral outcomes, but we know very little about the process behind why those new district lines are objected to or approved by the Justice Department. Following this same line of inquiry, legal analysis focusing solely on federal court cases tends not to generate a cohesive set of legal interpretations about the Justice Department and its preclearance function.

A second justification for revisiting the Voting Rights Act's Section Five is the absence of theoretical development. The study of redistricting, I believe, needs theoretical approaches that can apply political decisions and administrative behavior to electoral outcomes and legal challenges. A theoretical framework allows scholars to go beyond the political-legal approaches that dominate the discipline and instead conceptualize Justice Department behavior. The approach employed here incorporates various other federal institutions and how they interact with one another during the redistricting process.

A third justification and difference with this study is the inclusion of a large number of units of analysis. The implementation of the preclearance provision of the Act is examined via data collected from Justice Department Section Five files, and analyzes individual preclearance letters directly related to redistricting, which includes a large set of preclearance letters. Preclearance letters, issued by the U.S. Attorney General and sent to covered jurisdictions, are

examined in an attempt to articulate Justice Department's Section Five determinations. The major aim is to build a preclearance framework which describe Justice Department objections.

The data cover three decades and the sheer number of letters used to cull information from provides an opportunity to produce a set of principles. To date, scant numerical data exist investigating the Justice Department's preclearance decisions. To evaluate systematically the implementation of Section Five, one must be able to measure the influence of Justice Department preclearance decisions. A good starting point in this study comes from these preclearance letters. An investigation about Justice Department preclearance decisions is possible via a content analysis of several hundred compliance letters. Therefore, this study offers a gauge on how the Justice Department interprets Section Five, and looks at the following questions:

1. *When does the Justice Department deny preclearance to covered jurisdictions that have submitted a redistricting plan for Section Five review?*

2. *What principles does the Justice Department use to determine if a covered jurisdiction is not in compliance with the Act?*

3. *What techniques and methods do covered jurisdictions engage in to circumvent minorities' ability to elect a candidate of their choice?*

4. *Does the Justice Department deny preclearance to covered jurisdictions that impede minorities' equal electoral opportunities? Or does the Justice Department deny preclearance for other reasons? If so, what are those reasons?*

5. *Does the Justice Department pay attention to federal court decisions? And if so, what influence do the federal courts have on the preclearance process?*

6. *Is there any variation in the implementation of Section Five since the passage of the Act? Have the principles that may lead to a denial of Section Five preclearance changed?*

Organization of the Dissertation

Following the introductory chapter, background information related to redistricting, preclearance and the Voting Rights Act is presented in Chapters Two, Three and Four. In order

to set the context in which preclearance is explored, two sets of scholarship are reviewed, redistricting and preclearance. Chapter Two offers a summary and interpretation of some of the major works in these two areas. The purpose is to demonstrate how the general direction of redistricting scholarship has created a void which this current study can fill. There are hundreds of political science and law review articles associated with and related to the redistricting process and its political and legal repercussions; however, because the main focus of this dissertation is preclearing redistricting plans via the implementation of Section Five of the Voting Rights Act by the Justice Department, the literature review is not all encompassing. Instead, articles are reviewed that illustrate two main foci: incumbent protection and partisan advantage, as well as the racial implications of redistricting in order to describe the vehicle with which preclearance is studied here.

A second set of literature is then reviewed, and a synopsis of literature related to the implementation of the Act is considered. The implementation literature reviewed focuses on how the Justice Department implements the Act, beginning in the 1960s and extending into the early 1990s. By integrating these two viewpoints, this study offers a new perspective of the redistricting process, one that is based on an institutional point of view via the Justice Department rather than an electoral or legal investigation.

Following the evaluation of redistricting literature, as well as literature related to the implementation of the Act, the theoretical foundation upon which this study is based is introduced in Chapter Three. Principal-agent theory is explored in relationship to the Justice Department's implementation of Section Five. The theoretical framework structures the overall study and helps to interpret the Justice Department's preclearance decisions, as well as the consideration of three important institutional actors. Principal-agent theory is used to explore

institutional relationships between the federal courts, White House, Congress and the Justice Department's involvement in preclearing submitted redistricting plans under Section Five of the Act. The Justice Department's principals are co-equal institutions and the proclivity of the Justice Department to react to one principal and not another is assessed via qualitative research methods. The purpose is to understand fully the Justice Department's preclearance decisions via an institutional perspective using principal-agent theory.

Chapter Four introduces the Voting Rights Act of 1965 and its related Amendments, which is the contractual agreement that structures the principal-agent framework. There are seven sections in Chapter Four, beginning with a brief description of the years proceeding 1965, including the 1957, 1960 and 1964 Civil Rights Acts. This is followed by a description of the Voting Rights Act's provisions, purpose and objectives. Section Five is defined, including its overall importance and purpose, as well as an overview of the two preclearance avenues available to covered jurisdictions: administrative preclearance and judicial preclearance. An examination of federal court cases defining the Act's constitutionality and legitimacy precedes the next section, which covers the Act's Amendments in 1970, 1975 and 1982. The Amendments are discussed in terms of how they affect the implementation of Section Five and how it has changed over time. The Justice Department's Civil Rights Division, its Voting Section and related responsibilities, and how they relate to the development of Section Five regulations, are detailed a the conclusion of Chapter Four.

While Chapter Four explores the constitutionality of the Act, Chapter Five discusses the development of the "one-person, one-vote" requirement espoused in the early 1960s and how it affects local, state and national jurisdictions because the "one-person, one vote" set of cases directly influences the drawing of new districts. Chapter Five examines the constitutional and

legal questions raised about the Voting Rights Act of 1965, as amended, and Section Five. This chapter lays the foundation for understanding the legal challenges related to redistricting, Section Five preclearance and its scope, as well as the federal courts' role in defining the range of Section Five and the Voting Rights Act.

Chapter Five also examines court cases that define the span of Section Five and the Act in the 1970s, 1980s and 1990s. The focus is on Supreme Court decisions and relevant decisions by U.S. District Courts, therefore not every U.S. trial court or state court decision associated with redistricting or Section Five preclearance is analyzed. The purpose of Chapter Five is to provide the contextual legal environment surrounding the implementation of Section Five, especially as it relates to redistricting, rather than providing an all encompassing legal analysis of redistricting and Section Five court cases.[3]

From the foundation established in the first five chapters, Chapters Six and Seven focus on the data, preclearance letters. Chapter Six contains a content analysis of the preclearance letters, which includes a description of the nature of the data, the time frame analyzed and the overall scope of the letters used to study the implementation of Section Five. Chapter Six includes a comprehensive study of preclearance and the review process conducted by the Justice Department.

Chapter Seven, on the other hand, looks at a set of preclearance principles, defines them and shows how each relates to the review process and determination of a plan's acceptability. The specific focus is on identifying and developing preclearance principles and concentrating on the factors that lead to an objection of a redistricting plan by the Justice Department. The descriptive and content analysis in Chapters Six and Seven key preclearance observations and

[3] For a comprehensive review of court cases related to redistricting, annexations and vote dilution, contact the National Conference of State Legislatures at www.ncsl.org.

principles back to specific letters to provide a sense of the raw materials with which I worked and on which this study is based. Chapter Seven revisits the research questions and concludes with a discussion about the value of the qualitative data. The concluding chapter, Chapter Eight, comments on the contributions this research makes to the study of preclearance, reviews principal-agent theory and how the traditional principal-agent model is extended to voting rights policy with the creation of a multiple-principal-one-agent model.

The overall purpose of this dissertation is to expand the conceptual framework of principal-agent theory by applying it to the policy area of preclearance, via redistricting, in order to better understand the conditions under which southern redistricting plans are precleared, or rather denied preclearance by the Justice Department. In order to identify the factors involved in preclearing redistricting plans, this dissertation incorporates the three institutional stimuli that the Justice Department reacts to; that stimuli includes congressional amendments, legal decisions and political maneuvering. The content analysis and analytical exploration of Justice Department preclearance letters sheds lights on the redistricting process and broadens our understanding of how the federal courts, the White House and Congress have shaped the Justice Department's role in implementing Section Five of the Voting Rights Act of 1965, as amended.

CHAPTER TWO

RACE & POLITICS: DRAWING DISTRICT LINES & PRECLEARANCE

The optimum gerrymander for a party is the spreading of the opposition party supporters as thinly as possible across many districts where they cannot obtain a majority, with the remainder clustered in one-party districts.

~ Robert Erikson, 1972 ~

The purpose of this dissertation is to explain Justice Department preclearance outcomes, over time, via an institutional perspective. Principal-agent theory is used as the framework to structure this project, but the vehicle through which the institutional relations are analyzed is redistricting. Redistricting scholarship traditionally possesses many of the same principles and concepts that the Justice Department considers when deciding whether or not to preclear a redistricting plan; therefore, the redistricting literature was chosen as one mechanism through which to explore Justice Department preclearance decisions and determine the environment in which new districts are drawn and subsequently reviewed by the Justice Department.

A review of the scholarship related to redistricting displays a wide array of research incorporating different methodologies and perspectives designed to answer an assortment of questions associated with the electoral, political, legal, constitutional and racial consequences of redistricting and the Act. Much of the redistricting scholarship that shapes the voting rights field asks questions related to where district lines are drawn and the subsequent power these lines have on representation and minority office holding. The literature also examines the increased

role of the judiciary in the redistricting process. The study of Section Five and its implementation, however, is largely ignored within redistricting scholarship.

Section Five encompasses preclearing a broad range of electoral changes and pertains to a variety of electoral changes, including any change in the boundaries of voting precincts due to redistricting, annexation, incorporation, reapportionment or changes in electoral systems.[4] Broadly construed, preclearance is the process of covered jurisdictions obtaining permission from the Justice Department or the U.S. District Court of the District of Columbia before changing their electoral laws. When a covered jurisdiction wants to change the electoral qualifications, eligibility or registration requirements to vote or change the eligibility and qualification procedures for independent candidates, they must obtain federal approval prior to implementing that change. However, instead of taking a standard approach to examine a wide variety of electoral changes necessitated under the requirements of the Act, the focus of this dissertation is the implementation of Section Five and its relationship to the type of electoral change that garners the most attention, namely redistricting. In order to set the context in which Section Five preclearance and the institutions involved in its implementation are explored, two sets of scholarship are linked.

A review of the current redistricting scholarship shows us that some of the major works on redistricting focus, in particular, on the political and racial implications and consequences of redrawing new district lines. An analysis of Section Five literature investigates how the Justice Department implements the Act from the 1960s, extending into the early 1990s. Bringing these two literatures together creates the foundation on which to analyze, empirically and systematically, a series of questions related to the Justice Department and its multiple principals

[4] See Appendix A for a more exhaustive list of electoral changes subject to Section Five preclearance.

and the implementation of Section Five. This two-prong strategy is undertaken for several reasons.

First, scholarship on redistricting has largely ignored the Justice Department and Section Five because it focuses mainly on the partisan consequences of redrawing district lines. The goal here, on the other hand, is to connect them. Second, reviewing redistricting scholarship highlights how the electoral and political foci of redistricting scholarship have ignored the Justice Department, but also demonstrates the multiple perspectives which redistricting can take. The absence of the Justice Department from the electoral and partisan analysis of redistricting creates a void that this current study can fill.

Third, redistricting scholars consider the (outrageous) partisan and/or racial aspects of gerrymandered districts, while the Justice Department is limited to reviewing simply the racial fairness of a plan. The two different perspectives do not always compliment one another, but do display the increasingly complex and interdependent nature of preclearance. Fourth, the redistricting scholarship encompasses key features that the Justice Department considers when reviewing submitted redistricting plans, factors that other scholarship does not consider, and which provides the basis for building a set of preclearance principles via a content analysis, as described in Chapters Six and Seven. Fifth, the redistricting process incorporates some of the same cross-pressures which come to bear on the Justice Department when it is preclearing redistricting plans. The line drawers are put into a position to have to respond to multiple political actors at the local and state levels, and some of these same dynamics play out in the preclearance process.

Lastly, the implementation of Section Five and the consequences of having a plan precleared or not result from where district lines are placed; therefore, for these reasons and to

show the institutional, political and racial links between redistricting and preclearance, both sets of scholarship are reviewed. The examination of both sets of scholarship demonstrates that an exploration of the redistricting literature highlights some of the concerns that politicians face when drawing new district lines, as well as some of the specific principles and variables, such as incumbent protection and percent Black in a district, that the Justice Department considers when preclearing southern redistricting plans. The preclearance literature, on the other hand, demonstrates the convoluted nature of voting rights policy.

In order to demonstrate clearly the linkages between redistricting, Section Five and principal-agent theory, which is explored in detail in the next chapter, this chapter serves a three-fold purpose. First, it provides an overview of the redistricting literature, focusing on three perspectives: incumbent protection, partisan advantages and majority-minority districts. Second, Section Five literature is reviewed, which includes a brief discussion of court decisions that are elaborated on in Chapters Four and Five. This chapter concludes with an explanation of how the redistricting and Section Five literature is related, and how it fits with principal-agent theory.

Redistricting Scholarship[5]

Redistricting scholars attempt to discern the partisan and electoral influence that redistricting has and debate the benefits and consequences of redistricting itself; yet, regardless of the approach taken, the very nature of redistricting: (1) is fraught with political intrigue, as both political parties attempt to increase the number of legislative seats they control; (2) encompasses the law and politics in a manner not duplicated in other policy areas; (3) involves

[5] As mentioned in the introductory chapter, redistricting serves as the point of interest and offers background material, but is not the primary focus; therefore, only a fraction of the known literature is reviewed to provide contextual information.

intense bargaining and compromise, which ultimately determines who is elected and which party controls the legislative agenda from local elected boards to the United States House of Representatives; and (4) is intense and at times exaggerated due to political posturing.[6] In light of the complexities involved with the redistricting process, two important perspectives are considered, incumbency protection and partisan advantage, as well as majority-minority districts. These two perspectives of the redistricting process are considered because they are closely aligned with how district lines are drawn and the types of factors that the Justice Department may consider during preclearance.

Incumbent Protection and Partisan Advantage

Cain (1985) concludes that redistricting matters, and as such, most studies focus on the impact that boundary changes have on seat composition (see Born, 1985). While looking at the effect boundary changes have on the political control of districts, Cain (1985) finds redistricting varies because of the differing strategies and the diverse political context of states during various time periods. This is the case because the placement of boundary lines depends upon the line drawers' strategy, the political nature of the district/state, the partisan and ethnic make-up of the jurisdiction and the state and national legal constraints placed on the drawing process. An actual plan's effect may differ from its original intent, but all redistricting plans are inherently political, regardless of who draws them or how the plan is implemented (see Cain, 1984, 1985). When the Justice Department reviews redistricting plans submitted from covered jurisdictions, it is interested in determining the racial fairness of the plan and what actions elected officials took when constructing the placement of new district lines, regardless of the political consequences.

[6] See Butler and Cain (1992) for a discussion about the bargaining process.

The factors mentioned by Cain, such as the strategy employed by politicians and the ethnic make-up of the jurisdiction, are taken into consideration by the Justice Department, but Cain also discusses the role of the judiciary as an institutional actor that establishes the framework with which the location and placement of district lines are determined. The inclusion of the federal courts in the analysis of redistricting indicates that they have the capacity to influence the actions of other institutions involved with the drawing of redistricting plans, including elected officials and most notably, the Justice Department. The involvement of the federal courts in determining the framework of redistricting implies that they also operate as one of the Justice Department's principals.

Cain goes on to argue that the goal of redistricting is to produce as many efficient districts as possible, or what he calls partisan reconstruction. Partisan reconstruction is the process of taking into consideration the balance of party identifiers in a given district and drawing districts that maximize majority party identifiers, thereby minimizing electorally inefficient districts. Cain does not consider how well the overtly partisan plans perform once they are submitted for preclearance to the Justice Department. His line of reasoning, however, supports two widely-held hypotheses related to redistricting: First, the party in control gains a partisan advantage, and second, redistricting largely serves to protect incumbents (Mayhew, 1971; Ferejohn, 1977; Glazer et al., 1987). Although there is a tremendous amount of evidence supporting these two hypotheses, early studies do not address preclearance in the South, mainly because redistricting in the 1970s and early 1980s focused on political gains and not minority political gains or the legal fallout.[7]

[7] The changing politics and implementation of the Act in the 1980s altered the focus of redistricting scholarship to race politics and the implications of such in the 1990s.

Glazer et al. (1987) test the two rival hypotheses using data from the 1970s congressional redistricting process and end up rejecting both theories, but establish a plausible explanation as to why and how the status quo is largely maintained, via incumbent protection. The hypotheses Glazer et al. test are (1) districting is partisan in nature and favors the candidates (including incumbents) of one party over those of the other and (2) districting is bipartisan in nature and will equally favor incumbents of both parties. They argue that incumbents play a critical role in the shaping and reshaping of new districts, and an incumbent's desire to create safe districts overrides any partisan squabbles or willingness to reduce the percentage of supporters in any particular district. Glazer et al. (1987) also find that partisan gerrymandering in the 1970s is minimal because incumbents never feel safe enough and want to retain existing boundary lines that contain friendly voters, familiar territory, known pitfalls, sources of campaign funding and a knowledge of potential challengers.

In political jurisdictions covered by Section Five of the Act, incumbent protection is a factor in how lines are drawn; however, even if plans are tailored to protect incumbents, they must pass muster with the Justice Department, regardless of the partisan make-up of the new districts or whether or not the districts are politically safe. The Justice Department is interested in whether or not incumbents are protected at the expense of minority voters. When the Justice Department reviews plans, it may not focus on the egregiousness of a gerrymander, but if the racial fairness of the plan is altered in a way that protects incumbents over the rights of minorities, the Justice Department is likely to object to the submitted redistricting plan.

While not refuting the two originally stated redistricting hypotheses, Born (1985) argues that two distinct stages must take place for a party to realize its redistricting goals. First, the party must draft a plan intended to yield a greater haul of seats, and second, voters must then

behave at the polls according to that plan. The second part is vitally important because even when the party controls the redistricting process, the party is not guaranteed partisan gains at the polls. Born argues that controlling the redistricting process at the state level leads to partisan gains in the U.S. House of Representatives, and concludes that the level of success in Washington, D.C., is related to what takes place in state legislatures. Born (1985) briefly discusses the impositions placed on state legislatures by the Supreme Court in the mid- and late 1960s, but does not examine the role of the Justice Department.

An important part of increasing partisan gains, particularly in the South, is whether or not the Justice Department grants preclearance to the new redistricting plan; but this process is noticeably absent from the discussion of incumbent protection and partisan advantage. In fact, the Act and the role that the Justice Department plays in preclearing southern redistricting plans are not addressed in most of these studies, even though the Justice Department has a fairly significant role in implementing related court cases and federal statutes in covered jurisdictions throughout the South. The absence of the Act and Justice Department decisions from the discussion related to incumbent protection, however, is not all that surprising. Most scholars are interested in understanding the immediate political dimensions and legal ramifications of redistricting and not the bureaucratic decision-making of the Justice Department.

Another explanation for the lack of consideration of the Justice Department is because redistricting unfolds in all states, whether via commissions or by legislatures, while Section Five applies only to jurisdictions that fall under Section Four's parameters. Some redistricting scholars look to explain nationwide results and changes, and may not consider trends within a single geographical area like the South. Also, Section Five only indirectly influences the

redistricting process and how lines are re-drawn. Section Five is interested in the racial fairness of a plan, and pays no heed to whether the plan is an outrageous partisan gerrymander or not.[8]

Majority-Minority Districts: Black Democrats, Republicans and Representation

The challenge of studying redistricting is that there are a wide range of approaches and the electoral effects are varied (see Cain, 1985).[9] There are an assortment of different perspectives and foci within the literature, and redistricting scholarship not only analyzes the electoral outcomes, partisan implications, incumbency protection, minority representation and its relationship to where district lines are drawn (*e.g.* Lublin and Voss, 2000; Grofman, 1998; Handley, Grofman and Arden, 1998; Petrocik and Desposato, 1998; Lublin, 1997; Bullock, 1995b; and Hill, 1995), but more recent redistricting studies also consider the racial effects of redistricting. Such questions revolve around issues concerning the creation of majority-minority districts, the role the Republican Party plays in their creation, Black representation and the overall efficacy of majority-minority districts. This sub-section of this chapter reviews some of the major literature which examines redistricting plans in the South, the role the Republican Party plays in the creation of majority-minority districts, the concentration levels of Blacks related to drawing majority-minority districts and the challenges associated with dismantling such districts.

Brace et al. (1987) reviewed eleven proposed redistricting plans for the South Carolina Senate after the 1980 Census. They tested the hypothesis that districts drawn to advantage

[8] Given the loyalty of Black voters to the Democratic Party, a racial gerrymander has direct partisan implications, but this is not recognized until the 1990s.

[9] For state-by-state comparison purposes, Appendix B provides a table outlining the redistricting criteria and principles used by each state in this study during the 1990s round of redistricting.

Blacks provide a boost to Republicans. Finding support for their hypothesis, Brace et al. conclude that electoral geography, such as the concentration of Black Democrats, White Democrats and Republicans in well-defined areas, contributes to the creation of Black Democratic districts, which can then lead to the bleaching of surrounding neighborhoods. Adjacent districts tend to become more Republican as a result; however, two preconditions must be met for Republicans to gain an advantage. First, there must be proximate Republican strength in sufficient numbers and sufficiently compact to benefit from the creation of a Black district and second, Republicans must prevent any creative cartography by Democrats, as it is sometimes possible to draw a majority-minority district in an area that is overwhelmingly Democratic and keep the overall number of Democratic seats the same (see Brace et al., 1987).

Along the same lines, Petrocik and Desposato (1998) demonstrate that the creation of majority-minority districts and the rise of Republicanism is a second-order effect. Following the 1990s round of redistricting, the first effect is that Democratic districts lost a large proportion of Black constituents because of the creation of a few majority-Black districts. The second order effect, however, is that large numbers of new constituents were placed into newly drawn districts as a result of shuffling individuals to create majority-Black districts in the first place (Petrocik and Desposato, 1998). In addition to the changing constituencies, the early 1990s saw a surge of pro-Republican support, which Petrocik and Desposato argue is *the* critical factor in Republicans gaining seats, independent of redistricting.

Bullock (1995a) conducts comparable research, and considers the relationship between the rising fortunes of Blacks and Republicans. Bullock examines the consequences of changing the racial composition of districts on legislative behavior to see if the 1990s round of redistricting had an influence on later roll call voting behavior. Bullock finds that varying the

racial composition of constituencies through redistricting seems not to have had an influence on southerners' voting records in 1993. Bullock concludes that the link between the increase in Black congressional members and Republicans does not occur in every state undergoing racial redistricting. Furthermore, he points out that the creation of Black districts is not necessarily or sufficient for Republican victories next door.

Hill (1995) looks at the relationship between the creation of majority-minority districts and the election of Republicans using electoral and district-level census data for congressional districts in eight southern states, for the years 1990 and 1992. He demonstrates that the Republicans win nine seats; four of these pick-ups are attributed to the creation of majority-minority districts. Hill finds a tenuous link between the fortunes of African Americans and Republicans and concludes there is a relationship between the rising fortunes of African Americans and Republican representatives following the 1992 congressional elections. However, a word of caution, Hill admits the link between Black gains and Republican gains is not always inevitable because of the rise of two-party competition in most southern states and the application of the Voting Rights Act by the Justice Department.

This particular line of redistricting scholarship, again, provides evidence that the Justice Department is largely absent, regardless of the approach or methods utilized; however, that does not mean that the Justice Department does not play a critical role in evaluating redistricting plans. When reviewing redistricting plans, the Justice Department takes into consideration a number of the same variables, ideas and concepts that redistricting scholars consider. For instance, factors such as the percentage of Blacks needed in a district to ensure fair representation and the role of the two political parties play in determining where and how district lines are drawn in relationship to minority populations are considered by the Justice Department.

The creation of majority-minority districts and the increase in the number of Republicans elected to Congress, especially in the South, has been tied to partisan moves by the Justice Department (see Canon, 1999). The creation of majority-minority districts did not occur in a vacuum but took on new meaning in the early 1990s, when the Bush Justice Department wielded considerable power and influence over the implementation of Section Five (Canon, 1999).[10] In addition, during the 1990s round of redistricting an unusual coalition between the Republican National Committee, Black Democrats and Republican elected officials formed to pursue similar agendas to take advantage of the redistricting climate.[11] This strange alliance worked throughout the South, and Canon (1999) describes how the Republican National Committee, with the help of Black legislators, purposely created redistricting plans that were advantageous to all of those involved. A result of the allegiance was the formation of several majority-minority districts, which allowed Republicans *and* Black Democrats to increase their clout across the South.[12]

Canon's (1999) study focuses on a supply-side theory of redistricting and its implications for legislative behavior and includes the Justice Department, but for the most part it is mentioned to showcase the application of the entire Act and not specific actions taken by the Justice Department regarding Section Five. Other scholars, such as Brace et al. (1987), Petrocik and

[10] See Bullock (1983, 1995c) for a discussion of the Reagan Justice Department playing politics with the implementation of the Act.

[11] For an analysis of state level redistricting, related politics and the relationship between Democrats and Republicans, Robert A. Holmes (1998) and Orville V. Burton (1998) provide detailed case studies about Georgia and South Carolina, respectively. Holmes discusses how Black state legislators were intimately involved in Georgia's redistricting process and the low level of cooperation between Black legislators and Republicans. Burton examines the state of South Carolina and how partisanship differences resulted in the federal courts drawing plans, and that Black and White Democrats made a political decision to support marginal gains in Black descriptive representation rather than push for larger increases.

[12] Lublin's (1997) book contains a chapter on redistricting, which reviews a number of estimates related to Republican gains in 1992 and 1994 due to an increase in the number of majority-Black districts.

Desposato (1998), Bullock (1995a) and Hill (1995) investigate the link between the creation of majority-minority districts and the rise of Blacks and Republicans in Congress. Except for Canon (1999), the individual authors concentrate their discussions on electoral outcomes, and in each instance the role of the Justice Department and the preclearance process is conspicuously absent.

Even when one moves away from the electoral consequences of redistricting and the relationship between Black Democrats and the Republican Party, the Justice Department remains in the shadows. Cameron, Epstein and O'Halloran (1996) study the link between the creation of majority-minority districts and substantive representation in Congress following the 1990 Census. Cameron et al. conclude that a trade off exists between descriptive and substantive representation, but that the overall efficacy of majority-minority districts advancing Black interests remains unresolved. Lublin (1997) concludes that the creation of majority-minority districts works at a cross-purpose, and argues that the creation of majority-minority districts increases the responsiveness to Black policy concerns and issues, but decreases the likelihood that those same policies would be adopted by the U.S. House of Representatives.

Through an alternative approach to redistricting, Epstein and O'Halloran (1999a) examine representation by explicitly defining the term "candidate of choice" using categorical estimation methods to examine the influence on substantive representation in South Carolina's state senate. Their purpose is to evaluate, systematically, the competing claims about the necessity of majority-minority districts. They find that the senatorial districts in South Carolina are "overgerrymandered," explaining that districts are drawn in such a way to guarantee minority voters an equal opportunity to elect a candidate of their choice. These actions increase the level

of Black descriptive representation but at the cost of diluting Black substantive representation in the South Carolina Senate.

If majority-minority districts increase Republican office-holders, decrease Black substantive representation but provide descriptive representation, should they remain? And if not, what are the challenges related to dismantling majority-minority districts? Bullock and Dunn (1999) provide a preliminary examination of the consequences of eliminating majority-minority districts and the ramifications of the *Shaw/Miller* line of cases.[13] Several majority-minority districts were dismantled in the mid-1990s after legal challenges, and the courts no longer consider the unusually shaped majority-minority districts drawn in the early 1990s acceptable.

It is believed that if a district is at least 65% Black, these super-majority districts are stacked in favor of electing a Black candidate.[14] Bullock and Dunn demonstrate, however, that if the Black population is reduced to between 45-55%, Black candidates still continue to win elected office to the U.S. House of Representatives.[15] Epstein and O'Halloran (1999a) find very similar results. Epstein and O'Halloran (1999b) support their own initial findings (1999a), and

[13] *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816 (1993); *Johnson v. Miller*, 864 F. Supp. 1354 (S.D. Ga. 1994); *Johnson v. Miller*, 922 F. Supp. 1556 (S.D. Ga. 1995); *Miller v. Johnson*, 115 S. Ct. 2475 (1995), 515 U.S. 900 (1995); *Shaw v. Hunt*, 116 S. Ct. 1894 (1996), 517 U.S. 899 (1996); and *Johnson v. Miller*, 929 F. Supp 1529 (1996).

[14] The 65% Rule emerged from several assumptions: If a candidate, regardless of race, needs 50% of the vote to win in the general election, and if Blacks register at lower rates than Whites (+5%); among registrants, Blacks are less likely to vote than Whites (+5%); and White voters are less likely to vote for a Black candidate (+5%), then it is likely that Black voters need to make up 65% of the district to elect their candidate of choice, creating the basis for the 65% Rule. The Supreme Court adopted the 65% level in 1977 in *UJO v. Carey* (see Bullock and Dunn, 1999).

[15] Some examples include Representatives Julia Carson (IN), Melvin Watt (NC), Bobby Scott (VA) and Maxine Waters (CA).

reiterate that in the South districts with a range of 45-47% Black voting age population maximizes the level of substantive representation of minority interests in Congress.

In response to a critique by Lublin (1999), Epstein and O'Halloran (1999a) argue that their original article demonstrates that Black candidates have a substantial chance of winning elections in districts that are less than 50% Black when they broaden their constituency and make appeals to White liberals, and as such, districts with less than 50% Black can still provide Black constituents with the opportunity to elect a candidate of their choice. However, in districts that are between 30-50% Black, Epstein and O'Halloran (1999b) admit that it is very challenging to theorize and test various hypotheses because most of these districts have been dismantled by state legislatures. Complementary to this research, Cameron, Epstein and O'Halloran (1996) show that for the 103rd Congress 40.40% Black voting age population is the threshold for electoral opportunity to promote Black substantive representation. When the Black voting age population falls below this particular percentage level, one can surmise that Blacks will not be elected in large numbers.[16]

The percentage of minorities needed in a district to provide a reasonable chance to elect a candidate of the same race has been hotly debated. Bullock (1996) presents a longitudinal study of the relationship between varying levels of minority concentration in legislative districts to test the appropriateness of the 65 percent rule for the Georgia General Assembly. Bullock concludes that the most dramatic changes in the relationship between racial composition of districts and the election of Blacks to the Georgia General Assembly occurred following the 1992 round of redistricting. The threshold for Black entry has declined; now Black candidates are winning in

[16] Black candidates in Florida and Indiana were elected to the 103rd Congress, and others were elected from Georgia in the 105th-108th Congresses, all with less than 50% of Black voting age population.

districts with less than 60% Black population. Bullock demonstrates that a 65 percent Black district does not necessarily guarantee that a Black candidate will win a Georgia Senate seat, but it is highly probable that one would win a Georgia House seat. Additional research indicates that a large number of Black incumbents in 1994 were elected from districts that were no more than 55 percent Black, suggesting that once Blacks are elected, they are able to retain their seats.

More recently, Lublin and Voss (2000) use competing logit models to examine the racial composition of districts and which political party represents each district for all state legislative elections held in the South from 1990 to 1998. They argue that the realignment toward the Republican Party played a greater role in Democratic losses than the harm caused by racial redistricting. The continual movement of White voters to the Republican Party makes the issue of polarized voting and vote dilution even more important for the Justice Department to address when it reviews southern redistricting plans for Section Five preclearance. For instance, the election results for Black candidates from the late 1990s may not carry over into the 2000s if districts fall below 50% Black in the South and racially polarized voting continues to occur. In the South, Black voters consistently vote for the Democratic Party as White voters realign to the Republican Party (see Black and Black, 1992). Anecdotal evidence suggests that the percentage of Whites voting for minority candidates in the South continues to decline [see Black and Black (1992); see Bullock and Dunn (1999) for contradictory findings]. Because of the existence of racially polarized voting, minority candidates continue to have a considerably harder time being elected statewide in the South, particularly in jurisdictions with less than 45% Black population.

Bullock and Dunn (1999) argue that the gloomy reports from the defenders of racial gerrymanders are exaggerated, as not one Black member of Congress or the Georgia General Assembly who ran in newly configured districts with less than 50% Black population lost in

1996 or 1998. Bullock and Dunn suggest that this is because there is less of a disparity between Black and White voters in terms of registration and voting. In a general sense, Black turnout still lags behind Whites, but the authors find that when a Black candidate is running, turnout between Blacks and Whites is narrowed tremendously, to approximately five percentage points. Additionally, the authors find that White voters are more willing to vote for a Black candidate than Black voters are willing to crossover and elect a White candidate.

This finding suggests Black candidates no longer need super-majority districts to win political office, at least in districts where Black and White registration rates are roughly equal and White crossover voting continues to increase. Bullock and Dunn's study, however, looks at the performance of incumbents who have several advantages over challenges, which is well documented elsewhere. The incumbents in the Bullock and Dunn (1999) study "attract about one-third of the White general election vote" (1213). Although interesting, these findings are not necessarily generalizable to the entire South and must be carefully weighed against the fact that non-incumbent Black candidates running for office in districts with less than 50% minority voting age population do not have an equal chance of winning office when compared to an incumbent minority office holder. In fact, the frequency with which minorities have won in districts with less than 50% minority voters is low (see Bullock and Dunn, 1999).

The issues addressed above are far from a complete accounting of the many studies focusing on majority-minority districts and their effects, though the absence of the Justice Department is consistent. Although the Justice Department is not the focal point or even integrated into most of these investigations, the noted scholars do provide important information in the pursuit of understanding the political environment surrounding redistricting. The scholarship reviewed illustrates a number of principles that the Justice Department considers

when reviewing redistricting plans submitted for preclearance, which are explored in Chapters Six and Seven.

The Justice Department has the responsibility of determining if plans regressive, if minorities have an equal opportunity if districts fall below a certain level of Black voters and the necessary level of Black voting population needed to elect Black candidates. As demonstrated by the redistricting literature, other variables that the Justice Department may consider during its review of submitted redistricting plans are registration rates in the district, racial voting patterns, and most importantly, the potential racial influence of each new district. For covered jurisdictions, the Justice Department's implementation of the Act and Section Five is an important part of the entire redistricting process, particularly in the South, but studying the Justice Department is not necessarily as glamorous or conflict-ridden as debating the issues enfolding matters related to race, representation and redistricting, and the controversy that surrounds each. As Epstein and O'Halloran (1999b) point out, race and redistricting bring together a number of emotionally laden issues, but the same cannot be said about how the Justice Department reviews a submitted plan for preclearance; yet, the Justice Department has an important role in determining the boundaries in which the hotly debated topics of race and partisan control unfold.

Implementing the Act: Section Five Scholarship

The redistricting scholarship displays an immense amount of information about redistricting and its potential influence on the political arena, but also exhibits many of the same principles that the Justice Department considers when reviewing a plan for preclearance. Redistricting scholarship, however, is distinct and separate from an analysis that focuses on the

Justice Department's implementation of the Act. For instance, the most prominent scholars who examine the coverage and implementation of the Act do not focus on redistricting; instead, they focus solely on the Justice Department. These include Ball, Krane and Lauth's (1982) book entitled *Compromised Compliance*; Motomura's (1983) study examining objection letters; McDonald's (1983) historical and evolutionary analysis of Section Five; and Parker's (1990) study of Mississippi's struggle with voting rights, the Act and its implementation.[17] These studies are beneficial for developing an understanding about the difficulties related to implementing a federal statute that requires the national government to review state and local laws. Furthermore, the exploration of the literature reviewing Justice Department activities related to the implementation of Section Five demonstrates that once the political maneuvering of drawing new district lines concludes, the actions taken by the Justice Department are far from simple and straightforward.

Ball et al. (1982) describe the internal procedures of the Justice Department and in doing so examine the unique nature of voting rights policy. Their book assesses the implementation of the Voting Rights Act in the 1960s and 1970s. *Compromised Compliance* is a study of policy implementation and is a rich qualitative analysis of the Justice Department and the challenges related to implementation.

Ball et al. conclude that a major difference between the Act and other federal laws is related to resources, as the major challenge in implementing the Voting Rights Act is that voting rights policy is fiscally dry. Thus, the Justice Department does not have a "financial carrot" to lure or induce states and local jurisdictions into compliance, and because the Justice Department

[17] For a discussion of Section Five in the early years, from a legal perspective, see Derfner (1973); Halpin and Engstrom (1973); Yoste (1977); Wernz (1975) and Bickerstaff (1980).

must operate within a 60-day time limit, its personnel are limited in what they can do in an abbreviated amount of time. One challenge faced by the Voting Section of the Justice Department is the lack of field operatives available to conduct investigations in covered jurisdictions. Therefore, voting rights lawyers rely heavily on information provided by the very political jurisdictions under investigation.

Focusing on the implementation of a federal statute, Ball, Krane and Lauth's major research aim is to assess the extent to which voting rights policy, as implemented in the years immediately after the Act's passage, is consistent with the voting rights policy mandated by political decision makers. As suggested by the principal-agent model developed in the next chapter, this is not as straightforward and simple as one might imagine: "The radical character of voting rights policy directly contradicted the usual pattern of American federalism" (Ball et al., 1982, 115).

Normally, implementing national policy in a federal system requires the dispersal of power, cooperation, coordination and a framework of communication and common understanding in order to prevail, but the civil rights movement profoundly altered the relationship between the federal government and the states. Implementing and enforcing civil rights laws required the assertion of the federal government, as "[e]fforts to right past wrongs involved increasingly complex intrusion on state and local autonomy" (Rivlin, 1994, 82). In the early years, Congress and the White House were the two main principals involved in the implementation of voting rights law, and brought to bear its federal powers in this policy area.

In particular, the area of voting rights policy saw the national government dramatically assert its interests because of the long history of racial discrimination in the South and the strong political and public disagreements over the legitimacy and the substance of the Act (see Ball et

al., 1982). Because of the politically sensitive environment surrounding the Act and its implementation, the Justice Department and Civil Rights Division attorneys, working as agents of Congress, the federal courts and the White House, tried to marry a set of divergent interests and objectives together in order to prevent racial conflict from overtaking the policy. One goal of *Compromised Compliance* is determining whether or not the Act, and in particular Section Five, fell short of expectations.

Ball, Krane and Lauth (1982) demonstrate that the Act's implementation was successful in many ways. They find that political forces in the late 1960s, under both the Johnson and Nixon Administrations, directed the implementation of the Act, which is demonstrated by the principal-agent model developed in Chapter Three and discussed throughout the subsequent chapters. Political advisors and federal bureaucrats, agents of the three principal institutions, had the discretionary power *not* to perform and implement the Act, which supports the notion that agents are able to shirk, and avoid implementing a principal's goals.

Ball et al. also discover that politically motivated decisions determined which sections of the Act were implemented and which ones the Justice Department avoided implementing. The Justice Department's decision to implement only portions of the Act reveals its ability to shirk. Following the passage of the Act, Section Five was largely ignored by the Justice Department for a variety of reasons, most notably because preclearance and what it meant was undefined by Congress and the federal courts. Ignoring Section Five was also possible, Ball et al. argue, because "nothing short of continual political pressures can get administrators to act in a manner contrary to their desires" (195). These examples lend support for the use of principal-agent theory. Institutional principals, in the form of Congress and the federal courts, gave the Justice Department crucial directions in the early years as to the constitutionality and scope of Section

Five and the Act. But also, since agents can shirk, principals had to maintain a pro-active stance to ensure that their agents perform a set of desired tasks so that programs are implemented in a manner the principal desires. This principal-agent relationship and the notion that an agent waits for its principal to take the lead in defining the policy area are evident in the early years after the passage of the Act.

Prior to 1970, the Justice Department focused on voter registration as it waited for direction from one or more of its principals in determining the scope of Section Five. While the Justice Department received some direction in the form of legal decisions, it was not until the early 1970s, due to a convergence of several organizations and concerned citizens, such as the U.S. Commission on Civil Rights, civil rights organizations, government attorneys, politicians and legislative oversight by Congress, that political pressure was placed on the Justice Department to implement and enforce all sections of the Act, in particular Section Five. In the early 1970s, various entities compelled the Justice Department, as an agent of Congress, the federal courts and the White House, to write regulations spelling out how Section Five was to be administered by the Voting Section. Once it became obvious that it was no longer politically feasible to remain inactive, the Justice Department created a compliance process that reflected the political reality covered jurisdictions (and the Justice Department) found themselves in (Ball et al., 1982).

The political resistance and social turbulence prevailing in covered jurisdictions left the Justice Department with little choice but to implement Section Five, so the Civil Rights Division created a process Ball et al. (1982) call "compromised compliance." Compromised compliance, in broad terms, means a range of possible responses and voting changes submitted by local officials in covered jurisdictions are acceptable and therefore are granted preclearance. The

Justice Department had a "zone of acceptability," which referred to taking into consideration the law, administrative regulations, court decisions and the local jurisdictions' political and social environment, before preclearing or objecting to a plan.

The "zone of acceptability" was vast, and Justice Department regulations afforded substantial leeway with regard to voting changes. Once lawyers on both sides of the issue understood there was an assortment of actions acceptable to the Justice Department, site-specific settlements and agreements were devised in localized areas. A consequence of this was that instead of the Justice Department creating a generalizable list of actions deemed unacceptable, solutions were devised based on individual situations and political circumstances (Ball et al., 1982). Through the inaction of its principals, the Justice Department was able to craft its own "set of rules."

Ball et al. argue that discretion in the hands of federal bureaucrats allowed for a bargaining process to develop that relied on negotiation and compromise to ensure at least partial Section Five compliance. A consequence of negotiations and bargaining, however, was that the factors that established the outer dimensions of the "zone of acceptability" varied across jurisdictions. If the extent of the discrimination in a plan was so blatant as to fall out of the "zone of acceptability," the plan was denied preclearance by the Justice Department. As an agent, the Justice Department had the ability to fashion procedures in order to implement its principal's goals, but this specialization also allowed the Justice Department to ensure some level of compliance with the Act, even though the level of compliance may not have reached the desired level of one of its three principals.

Ball, Krane and Lauth (1982) conclude that if the Voting Section of the Justice Department were to implement Section Five vigorously, there would be evasion, avoidance and

delay by White power-holders. In a federal system, this is possible because power is divided horizontally at the national level and vertically between the national government and state governments, leaving a considerable amount of power in the hands of local officials. The division of power also places the Justice Department in the position of having to implement directives from its national principals in a challenging local environment where officials exploited counter-measures to thwart the Justice Department's enforcement of the Act. Faced with these realities, the Justice Department had to ensure some kind of enforcement because administrative inaction was not a politically viable strategy.

In the early 1970s, non-action was not feasible because Congress expected action, which was supported through the amendment process in 1970 and again in 1975. Furthermore, the involvement of the federal courts handing down decisions directing the Justice Department, by clarifying the Act and the circumstances in which Section Five applied, gave the Justice Department some needed direction to conduct Section Five reviews. Federal principals, their agent and local politicians and politics, thus, contributed to the development of a compliance process that reflected the reality of policymaking and policy implementation in a federal system (Ball et al., 1982).

An important question addressed in *Compromised Compliance* is how the Justice Department was able to obtain compliance without the benefits and incentives commonly tied to federal-based programs. Ball et al. argue that compliance was possible through the practice of knitting together three specific goals. These goals included (1) creating a functioning administrative unit with the lawyers in the Voting Rights Section; (2) focusing only on compliance; and (3) building a sound political base from which the program could draw support. A result of such actions was that compliance became a function of the accommodations made by

the Justice Department in its efforts to operate in a hostile political environment (Ball et al., 1982).

The Justice Department, taking the initiative to establish an administrative unit and focus solely on compliance, provided the necessary foundation with which to bargain and negotiate with covered jurisdictions. In 1970 and 1975, Congress, as the author of the Act, could have intervened as one of the Justice Department's principals, and directed it to implement the Act to achieve compliance in a different manner, but it choose not to do so. Rather, negotiation became one of few viable routes that combined some sense of implementation effectiveness for the Justice Department with the reality of political survival for local officials (Ball et al., 1982).

When a negotiated settlement was not forthcoming, the Justice Department focused on "partial inclusion," which was a technique used to gain control over the massive resistance encountered in the South. Partial inclusion is the process of limiting Section Five to a set of behaviors considered discriminatory so that the Justice Department deliberately narrowed the actions it would try and influence. The goals of the Voting Rights Section were to first prevent the implementation of discriminatory voting changes through the objection process, and second, to make sure all changes were submitted for review. A third goal was to facilitate the implementation of non-discriminatory voting changes (Ball, et al., 1982). By making the first goal prevention, the second goal review and the third goal implementation of non-discriminatory changes, "compliance, … emerges out of the balance between the agency's powers of enforcement and the 'sting' of the techniques of control" (Ball et al., 1982, 200).

Although not studied here, one could plausibly argue that the preclearance process involves a two-tiered hierarchical relationship between the federal government and covered jurisdictions, which operate as an agent of the Justice Department, and between the federal

institutions and the Justice Department. A two-tiered hierarchical principal-agent model would make the Justice Department both an agent and a principal in the context of preclearing redistricting plans; however, this study is interested in the narrow construction of a principal-agent model focusing only on national institutions. Nonetheless, as described in Chapter Three, agents have the ability to shirk. In this case, agents of the Justice Department (covered jurisdictions) are able to implement discriminatory electoral laws. In order to lessen the creation of discriminatory redistricting plans and reduce this type of behavior, the principal (Justice Department) can highlight a set of achievable goals to be accomplished. To determine if these goals are attained, they are measured against a set of markers. The Justice Department, working as an agent of Congress, created a set of guidelines in order to elicit some compliance from covered jurisdictions, which technically operate as a set of agents of the Justice Department.

The exploration of a two-tiered principal-agent model is interesting, but beyond the scope of this proposed research, but it does illustrate that the implementation of the Act involves a complex policy environment, with power shared amongst several institutional actors at the local, state and national levels. The Justice Department's incorporation of a strategy of partial inclusion, in conjunction with the political reality and simple goal setting by the Justice Department, compliance was assured at a level as close as possible to what could be logically achieved. Ball, Krane and Lauth argue the Voting Section's approach to obtaining compliance through negotiation and compromise was the best possible outcome under the political circumstances of working with local government officials and having no coercive sanctions to impose on them. The Justice Department's three principals did not give it the power to force covered jurisdictions to comply with the Act, and Ball, Krane and Lauth concede that 16 years after the passage of the Act the possibility remained that Black votes were still diluted in

southern jurisdictions. Additionally, the excessive commitment of time and resources to negotiated settlements diminished the substance of the voting rights law created in 1965.

Even with these challenges, *Compromised Compliance* demonstrates the complex nature of implementing a federal statue without any coercive instruments, but also reveals that implementation of voting rights policy is a continual process that evolves over time. Ball et al. conclude that the power delegated to the Justice Department to protect Black voting rights accommodates the dynamics of a federal system, and includes national leaders, like the president and congressional leaders on key committees, legal associations, civil rights groups and state and local organizations (see Ball et al., 1982). Given the various forces that influence the implementation of the Act, and the care in explaining the nature and complexities of administrating national voting rights policy, Ball, Krane and Lauth (1982) demonstrate how it is possible to enforce voting rights law in a federal system. The main communication tool in which the Justice Department communicates to covered jurisdictions to ensure some level of compliance with the Act is through preclearance letters.

The transmission of information about Section Five requirements and responses from covered jurisdictions "evolved out of a constant struggle to replace localized procedures with more standard, national ones" (Ball et al., 1982, 117). Because of the lack of Justice Department field operatives that were able to visit covered jurisdictions, a situation was created that necessitated the transfer of information between covered jurisdictions and the Justice Department via preclearance letters. These letters formed the basis of how the Justice Department communicated with covered jurisdictions about their submissions, which included such information as advising local attorneys about Section Five regulations, validating submitted documents and related data and encouraging the timely responses from recalcitrant jurisdictions

(Ball et al., 1982). Motomura (1983) examines a set of these letters, commonly referred to as submission letters, but also called preclearance letters, compliance letters or objection letters.

These letters, written by the U.S. Attorney General and sent to covered jurisdictions seeking preclearance, allows the Justice Department to create a formalized system to process and respond to submissions. Preclearance letters articulate and define the concepts used in Section Five preclearance determinations, and Motomura (1983) attempts to uncover and analyze the principles of law that govern the administration of Section Five by the U.S. Attorney General. Motomura considers Section Five activities from 1965 through August of 1982, but does not attempt a comprehensive discussion of the entire scope of Section Five. Rather, Motomura discusses four basic types of Section Five submissions and the factors that influence preclearing a particular set of submissions.[18]

According to Motomura, Section Five submissions in the mid-to-late-1970s are characterized by a struggle with *Beer v. United States*.[19] *Beer* involves the issue of retrogression and the U.S. Attorney General's determination of the extent to which the retrogression test is applied to a covered jurisdiction's submission. *Beer* was the only major Supreme Court case at the time of Motomura's article, and Motomura argues *Beer* provides the starting point for an investigation, but little more.[20] The Voting Section of the Justice Department relies on indicators of vote dilution developed in constitutional law rather than federal regulations and views the entire submission instead of one aspect of it. Motomura found that the *Beer* decision had some

[18] Motomura (1983) discusses Section Five submissions concerning (1) voter registration procedures, polling place changes and other changes affecting the individual vote; (2) vote dilution; (3) annexation or consolidation changes; and (4) redistricting.

[19] 425 U.S. 130 (1976).

[20] The *Beer* decision and its influence in the 1980s and 1990s are discussed in Chapter Five.

influence on the Justice Department's implementation of Section Five, but that objection letters did not change greatly from pre-*Beer* to post-*Beer*, in his estimation.

Motomura outlines several other factors that the Justice Department uses in the 1970s and early 1980s to determine whether or not to preclear a submitted change. These factors include: (1) changes hindering access to registering to vote; (2) moving polling places to a location which is intimidating or inconvenient for minority voters; (3) changes which are retrogressive,[21] (4) majority vote requirement or full slate requirement in at-large elections; (5) at-large elections in jurisdictions with polarized voting; (6) sufficiently large and concentrated minority population so that minorities could elect a candidate of their choice; (7) annexations and consolidations which decrease a locality's minority population percentage; and (8) redistricting plans with overpopulated or under-populated minority districts. The Justice Department, with the help of one of its principals, the District Court of the District of Columbia, devised guidelines to determine if the above changes were discriminatory in nature.

Motomura concludes there are specific patterns of changes that the Justice Department will object to under Section Five, and these objections are based on a combination of constitutional cases, related litigation, statutory shift in the burden of proof to the submitting jurisdiction and Justice Department regulations. More specifically, according to Motomura, the following conditions generate an automatic objection by the Justice Department: changes that hinder registration of minority voters,[22] polling place changes,[23] retrogressive changes, at-large

[21] This can include a reduction in the number of polling places or a lack of information for language minorities.

[22] Practices generally fall into three categories: (1) dual registration – having to register twice, once for county, state and federal elections and a second time for municipal elections; (2) re-registration – purging voter lists, thus requiring re-registration; and (3) registration methods – such as furnishing "proper identification" or hidden literacy tests requiring potential voters to provide a written and signed statement.

elections,[24] multi-member elections, annexations and consolidations[25] and redistricting plans.[26] Motomura attempts to place over eight hundred objections interposed by the Justice Department into an orderly framework to study, and succeeds, revealing that Section Five preclearance relies heavily on indicators of vote dilution. Yet, Motomura admits that studying preclearance letters brings with it significant risk because of the variations found within each covered jurisdiction; however, such an analysis does indicate that the legal principles developed via constitutional case law, as well as declaratory judgments provide an opportunity with which to examine the essence of the law of Section Five, and may be the only way to measure the substance of Section Five. Motomura's employment of preclearance letters is utilized in this study, but goes further by incorporating the key institutions, which operate as the Justice Department's principals, and the development of Section Five enforcement.

In terms of the nature of Section Five and preclearance, McDonald (1983) examines Section Five in the context of its historical background and events that influenced its

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[23] The placement of polling places may have a discriminatory effect if they are placed in intimidating or inconvenient locations for minority voters, such as all-White clubs or academies. If there is inadequate notice of the change, this can also have a discriminatory effect.

[24] At-large elections can contain schemes that dilute the voting strength of minorities. Such schemes involve "majority vote requirement," "full-slate requirement" or "numbered posts."

[25] Annexations and consolidations may be discriminatory if they decrease the percentage of minorities in the district. However, the Justice Department has recognized that Section Five was not meant to lock jurisdictions permanently into their existing boundaries. However, jurisdictions must meet two criteria before preclearance is granted: (1) the jurisdiction can show that the annexation does not reduce appreciably the minority population and (2) the jurisdiction can show that the expanded city's minority population still will enjoy representation that is "reasonably commensurate with its voting strength" (see *City of Rome*, 472 F. Supp. at 246).

[26] Redistricting plans will prompt an objection when packing of minorities or minority under-representation is evident, the overall number of minority-controlled districts is minimized, minorities are submerged in multi-member districts, availability of alternative plans that could have avoided the objectionable features and a lack of minority participation in the redistricting process.

development. McDonald (1983) discusses the evolution of Section Five, explores its substantive provisions, details the chronic problem of non-submissions and looks at the importance of the 1970 and 1975 extensions of the Act, but also includes a discussion about the significance of the 1982 Amendments. McDonald argues that in the early 1980s minorities had made electoral and political progress but that the advancement of minority rights was incomplete and fragile. It was fragile because widespread resistance to equal political participation remained throughout particular regions of the country, particularly in the South.

It is believed that progress in the area of Black civil rights and voting participation was obtained due to modern voting rights laws and litigation forcing covered jurisdictions to comply with the Act. This is the case because there is no direct evidence suggesting that covered jurisdictions voluntarily eliminated discriminatory election procedures and practices (McDonald, 1983; see Ball et al., 1982). McDonald further argues that covered jurisdictions failed to comply with Section Five, most of the time, and that the Justice Department's enforcement of preclearance is commendable, in individual cases, but in general has been ad hoc and episodic.

As envisioned by the principal-agent model developed in the next chapter, the Act is implemented by the Justice Department in accordance to its three main principals; a possible reason behind the inconsistency in the Justice Department's implementation of Section Five could be because of the multiple principals directing the Justice Department's implementation of the Act. Multiple principals have the tendency to create an environment in which communication between the various institutions is incoherent (see Wood and Waterman, 1994). For instance, a lax or hostile presidential administration towards the Act's implementation could influence how Section Five is implemented: Ball et al. (1982) document that the Nixon Administration, in 1969, placed a moratorium on the Act's implementation.

In the early years, certain areas of the South were not targeted by the Justice Department, such as Sunflower County, Mississippi, the home of a powerful U.S. Senator, James Eastland (Ball et al., 1982), an additional instance of one of the Justice Department's principals directing its actions (or inaction) with regards to how to implement the Act. Another issue that could potentially be related to the failure of the Justice Department to implement the Act in a consistent manner was its inability to devise and implement a system of monitoring and follow-up. The Justice Department would send a compliance letter to the covered jurisdiction and expect the jurisdiction to respond by changing the discriminatory electoral procedure or rule; however, in the early years there was no way to ensure this actually took place. In the later years, active citizens would bring non-compliant actions to the Justice Department's attention, but this took several years to develop into a comprehensive and reliable system. The Justice Department's inconsistent implementation of the Act is related to the fact that the Justice Department receives direction from the White House, Congress and the federal courts.

McDonald's (1983) analysis of enforcing compliance with Section Five also reveals how fluid the policy environment and political circumstances are, but also how two of the Justice Department's principals, the federal courts and Congress, can alter, in subtle and obvious ways, the Justice Department's actions. The federal courts and Congress are able to alter the focus of Section Five through court decisions and legislative action. McDonald indicates that Section Five was successful in blocking hundreds of discriminatory changes and acted as a deterrent to many further changes, but that more work was required, basically because of the fluid and ever-changing circumstances of Section Five. McDonald urges the U.S. Attorney General to do more in the area of implementation and compliance. McDonald wanted the Justice Department to introduce new procedures designed to monitor covered states and local jurisdictions. It is

believed that adequate monitoring measures would ensure prompt submission and review of all proposed electoral changes.

Although the three previous studies were published in the early 1980s, the actual decade of the 1980s continued to encounter some of the difficulties with regard to the implementation of the Act. Parker (1990) provides a perspective of the political struggles that Black citizens had in Mississippi. Parker's study makes obvious for the continued need for Section Five and preclearance. Parker describes the dramatic increase in Black registration in Mississippi but also the influence that the state's massive resistance campaign had on state politics, and in turn, national policies. Although Parker's work mainly focuses on overcoming barriers to registration and voting, it also details the emergence of crucial legal decisions and how they affected national policies related to the implementation of the Act. Parker demonstrates that the story of Mississippi's voting rights history is the story of voting rights policy in the United States. Mississippi's story is important because its politics and policies generated key wins for the continuation of voting rights policy, and supported by the national government, influenced how the Act was implemented in later years.

According to Parker, Mississippi was critical in three key areas. First, Mississippi's actions toward Black citizens helped secure extensions of the Act. In January 1966, the Mississippi state legislature convened to direct a "massive resistance" legislative session and agenda. In the wake of the passage of the Act and its implications for Mississippi politics, a battle ensued over maintaining the status quo. The goal of the 1966 legislative session was to nullify the Act's influence in Mississippi and ensure newly gained Black political power was cancelled or diminished greatly. Parker (1990) estimates that thirty bills addressing elections and

the political process were introduced in early January, signifying that the bills were drafted prior to the start of the legislative session.

Before the session was over, the all-White legislature enacted thirteen of the 30 proposed bills. The thirteen laws radically altered Mississippi's election laws, making it more difficult for Blacks to elect candidates of their choice.[27] Although the bills were created to nullify Black votes, none of the bills directly denied the right to vote or violated the Act.[28] The actions carried out by Mississippi lawmakers were blatantly discriminatory, and attracted the attention of numerous lawsuits and the federal government. These lawsuits brought the massive resistance plan supported by White Mississippians to the attention of the federal government.

The Justice Department's principals played a role in how the national government responded to Mississippi's obvious efforts to derail minority political participation. The Nixon Administration attempted to slow down the execution of the Act by the Justice Department, but the involvement of the federal courts prevented the White House from exerting any long-term pressure and the involvement of the federal courts ensured that the White House did not stop the Justice Department's implementation of the Act. In the face of direct opposition by the Nixon Administration, the federal courts aggressively involved themselves as one of the Justice Department's principals, directing the Justice Department to review Mississippi's new laws. The resistance to the Act's implementation by the Nixon Administration demonstrates the potential

[27] Parker (1990) describes how both houses of the Mississippi legislature attempted to maintain silence about the racial motivation of the proposed legislation, and that although there were some references to race and nullifying the Black vote, the thirteen bills were enacted with little floor debate that mentioned race as an issue. Public hearings about the discriminatory influence of the new measures were also avoided (Parker, 1990).

[28] The 1966 bills focused on the rules, procedures and structural aspects of elections and voting, rather than voting *per se*, which presented a veiled but very real threat to Black political participation (Parker, 1990, 39).

power that the White House has as one of the Justice Department's principals in trying to influence whether or not voting rights policy is implemented. It also demonstrates the effort of the White House to define the parameters in which the Act is put into practice.

Second, the earliest court cases and legal decisions establishing the principle of minority vote dilution in Supreme Court jurisprudence came out of the state of Mississippi. The legal framework for Section Five was set in Mississippi in the late 1960s, as the District Court and the U.S. Supreme Court addressed several questions related to Section Five, such as

> what kinds of voting-law changes are covered under Section Five? Were the preclearance procedures limited strictly to proposed changes in voter registration laws or balloting procedures? Or should the preclearance requirement be applied more broadly to cover all changes that might affect the impact of the vote? (Parker, 1990, 92).

Although there were several set backs along the way, Black political participation hinged on how the Supreme Court interpreted the Act and Section Five. If the federal courts took the second, broader position, *all* covered jurisdictions would be obligated to submit electoral and voting legislation to the Justice Department for preclearance. The question asked of the Supreme Court in *Allen v. State Board of Elections*[29] did not challenge whether or not Mississippi's statutes should be struck down as racially discriminatory, but rather asked whether or not the Act required preclearance of these new laws in order to determine the possible discriminatory purpose or effect. The sole issue was one of interpretation, and the questions asked by the Supreme Court included:

> how much had Congress intended to cover when it required Section Five preclearance for 'any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting'? Should Section Five be interpreted narrowly to cover only changes in voter registration laws or statutes regulating the casting of ballots? Or should Section Five be interpreted broadly to cover any change relating to the qualifications of candidates, switches from district to at-

[29] 393 U.S. 544 (1969).

> large elections, the manner of selecting public officials, or other electoral systems that could influence the outcome of elections? The language of the statute appeared to sustain either interpretation (Parker, 1990, 95-96).

Mississippi officials argued for a narrow reading of the Act, suggesting to the Supreme Court that a broad reading of Section Five would conflict with other federal court decisions *and* the Justice Department's implementation of the Act. More importantly, they argued, Section Five did not cover the new Mississippi statutes. To counter the arguments put forth by Mississippi officials, lawyers representing Black Mississippian voters pointed out that the congressional hearings in 1965 indicated that Congress intended for a broad interpretation because of the past history of evasion of court decrees in other civil rights cases. The congressional record provides direction to Congress' agent, the Justice Department, but also to the Justice Department's other principals, for the decision by the U.S. Supreme Court in *Allen* marked the turning point in voting rights policy: The Warren Court held that the Act should be given the broadest possible reach. This is a clear indication of the federal courts and Congress operating as the Justice Department's principals and providing direction to its agent.

Third, the state of Mississippi and its massive resistance to changing the status quo helped strengthen Section Five's preclearance requirement and the Justice Department's role as enforcer. The Justice Department, which had previously not been involved in the Mississippi cases, filed a friend of the court brief in support of Black voters and political candidates in *Allen*. Relying on the definition of voting in Section Fourteen of the Voting Rights Act, the Justice Department interpreted Section Five broadly, describing how discriminatory practices and procedures may result in abridging the right to vote of Black citizens. The Justice Department's interpretation of Section Five came about as a result of the actions taken by its principals; further

evidence that the Justice Department is an agent of multiple principals outside of the contractual agreement established by Congress and explored in Chapter Four.

Allen was important because it upheld Section Five, but the Supreme Court's decision also created more work for its agent, the Justice Department; because the challenged Mississippi statutes were found to be subject to Section Five review, all other comparable changes also required Section Five review. In May 1969, following the submission of Mississippi's 1966 statutes to the Justice Department for review, other similar changes proposed by covered southern jurisdictions were sent to the Justice Department for Section Five review, increasing the work load of the Voting Rights Section. Following the Supreme Court decision in *Allen*, the Assistant Attorney General, Jerris Leonard, acting on behalf of the Attorney General, John Mitchell, lodged a Section Five objection to all of the statutes challenged in *Allen*.

Although the Justice Department was not initially supportive of Section Five, once it began to object to plans following *Allen*, it objected to so many submissions that through its actions a deterrent effect was created. Parker (1990) argues that one reaction to the Justice Department's enforcement efforts was that covered jurisdictions decided to adopt voting laws and other related electoral changes that would pass muster under Section Five review rather than adopting discriminatory plans which they knew would be objected to during the review process. Nevertheless, for all of the Justice Department's progress, Parker argues it could still do more, because laws may comply with the Act, whereas at the same time violate the spirit of the Act.

Changing from elected school superintendents to appointed ones does not necessarily violate the Act, and most school districts have non-racial arguments for such a change, but Parker contends that there is evidence suggesting changing from elected to appointed electoral systems are racially motivated. Parker also wants to see the Justice Department do more to fight

discriminatory electoral practices by looking at how votes are counted. For all of what the Justice Department has not done or could do, however, Parker does detail the advances made in voting rights policy through the actions of the Justice Department and two of its principals, the Congress and the federal courts.

While national institutions have expanded the scope and nature of Section Five since the Act's passage, conservative scholars argue that the Act has become an instrument for promoting rights far beyond the Act's original intentions. Most notably, Abigail Thernstrom (1987, 1995) disagrees with the Act's expansion, and in particular, with the Supreme Court's broad reading of Section Five.[30] Thernstrom (1987) argues that the *single* aim of the Voting Rights Act was Black enfranchisement in the South and that all other electoral procedures and practices were to be left to state and local jurisdictions to determine. Conversely, this argument does not hold up when reviewing the entire legislative history of the Act (see Gluck, 1996) and her argument alters in later pieces.[31] Thernstrom (1987) admits references to Section Five "were sparse in the 1965 congressional hearings" (21) yet forges the majority of her opinions based on the dearth of evidence, seemingly discounting the importance of the 1970, 1975 and 1982 congressional hearings and corresponding amendments.

Thernstrom's work explores the Voting Rights Act of 1965 and looks at the administrative, judicial and legislative changes to the Act, arguing that they are tantamount to an affirmative action program for voters. Thernstrom argues that "the record shows that the [Justice

[30] Thernstrom points out that the broad reading of Section Five was not in the same spirit as the original purpose of the Act, and that the reasoning behind the expansion by *Allen* can not be found in the legislative record or debate surrounding the passage of the 1965 Act.

[31] In 1995, Thernstrom states, "the Voting Rights Act did clearly promise more than simple access to the polling booth" (926).

Department] has been both enforcing and inventing the law" (1987, 9).[32] For when the federal government alters the election system, she argues, it affects the racial and ethnic composition of governing councils and the partisan makeup of legislative holders as well. She does state that when public office is largely reserved for Whites, the system should be restructured to promote minority office-holding, but that it is not the role of the federal government to intervene; rather it is the job of Black political organizations to change the make-up of elected officials. The danger, she argues, is found when the government categorizes individuals by race for political purposes.

Thernstrom (1995) supports a narrow reading of Section Five, and argues that in the early 1990s the Justice Department sent signals through the preclearance process to Georgia and Louisiana, strongly suggesting they had to maximize the number of majority-minority districts to obtain preclearance. Thernstrom (1987) believes this sense of power began in the 1980s, and suggests that the Justice Department assumed a sense of "freewheeling power" when objecting to submitted plans. Thernstrom's argument is based on her assessment that Justice Department decisions followed no established guidelines or principles. I would argue that the Justice Department's actions could also be a result of an agent shirking its official duties, as determined by its principal, but it did so based on ensuring, at a minimum, partial compliance (see Ball et al., 1982). Thernstrom (1987) charges that the Justice Department failed in its role as a surrogate court because it clearly violates the rules of precedent, making decisions based on hypothetical districts instead of adhering to the dictates of the Act. Yet, the Justice Department is not a court

[32] Thernstrom (1987) argues her point based on evidence of the early 1980s; however, her argument does come true in the 1990s, largely through the *Miller v. Johnson* line of cases out of Georgia.

of law, it is an agent of three principals and all three principals have the power to direct and influence the Justice Department's actions.

Thernstrom's critique of the Justice Department unfairly assumes the Justice Department is an all-powerful bureaucratic agency that can do what it pleases without any hindrance.[33] Ball et al. (1982) indicate that this is far from the truth, as the Justice Department functioned within an environment that lent itself more to bargaining and negotiation over implementing a particular set of rules. Ball et al. (1982) see that the Justice Department is not constrained by its principals; rather, the Justice Department had the "space" to create a system of compliance, taking into consideration the political realities of the 1970s. When the Justice Department did alter its behavior, at least in the 1970s, it was largely due to court actions. In the sphere of redistricting and constitutional law, Thernstrom points out how the Justice Department can be an independent agency, but if this is the case, the Justice Department is not "independent" for a great length of time. One of the Justice Department's principals, the Supreme Court, has the power to restrict and rein in its permissive behavior, and has done so on several occasions (*i.e. Shaw v. Reno* and its successive cases).

Additionally, Thernstrom argues that Section Five became a tool to force jurisdictions to "correct" their electoral laws so as to meet standards envisioned by the Voting Section of the Justice Department. Thernstrom is correct in her assertion that Section Five alters the traditional federal-state relationship, but she fails to consider the reasons behind such drastic measures and

[33] Several scholars have criticized Thernstrom's work as distorting the evidence (see Karlan and McCrary, 1988) while others charge she is attempting to convince her audience that the Act is another type of affirmative action program (see Kousser, 1992) while still others argue that the testimonial tone of her scholarship mirrors the adversarial process she describes (Graham, 1992). Thernstrom's critics are not disinterested observers, as some of them are either litigants or expert witnesses, but both sides have valid arguments.

that overturning approximately 100 years of discriminatory practices and laws would take some far-reaching measures, especially when the legislative history of Section Five demonstrates on-going discriminatory practices throughout the 1970s and into the early1980s. Furthermore, the federal courts, from *Allen* to the present time, indicate meaningful participation in the political process is more than just having access to the voting booth (see Canon, 1999). Even though the right to vote is constitutionally protected, and the role of the Justice Department is to protect it, there are numerous instances in which the Justice Department has been called on the carpet by the federal courts for its actions with regard to implementing the Act. These cases and related cases are explored in Chapters Four and Five, which investigates the contractual agreement and the role of the federal courts, one of the Justice Department's main principals, plays in the development and continued implementation of Section Five and the Act.

Linking Redistricting and Preclearance

The two streams of literature reviewed here, redistricting and implementation of the Act, are largely separate entities. The dominant link between the two literatures, however, is demonstrated by the fact that the redistricting literature establishes the link to the Justice Department's preclearance process via the same types of principles developed in both instances. The same types of variables are oftentimes discussed by both sets of scholars and integrated by the Justice Department into its review process. Additionally, also the role of institutions, particularly the federal courts in shaping and interpreting the Act, are considered by both. Moreover, Section Five literature involves the institutional aspects of preclearance and its relationship to principal-agent theory. Therefore, redistricting literature introduces some of the variables related to drawing new district lines, as well as providing contextual information about

the Justice Department, its three principals and how they have a say in the preclearance process. The preclearance literature illustrates some of the institutions involved in preclearing redistricting plans, as well as the bureaucratic challenges. The theoretical framework of principal-agent theory can be used to bring the two literatures together and form the foundation upon which to study the relationship between the Justice Department and its principals.

Even though studies looking at redistricting in the South almost unanimously jump from the drawing of new districts to the post-election results without considering the institutional decisions that may have shaped the process, the courts are not ignored. Rather, the courts are the one institution that captures the attention of both redistricting and legal scholars, as well as scholars detailing the implementation of the Act. The role of the federal courts are built-in into redistricting studies because they, to a large degree, determine the framework with which district lines are drawn, establish the role race plays and ascertain when incumbents can be protected and when it is appropriate, if ever, to dismantle majority-minority districts. The legal and electoral information derived from studying redistricting, however, is just the first step in determining the institutional capacity to direct the Justice Department's powers and responsibilities. The Justice Department is responsible for interpreting and implementing the Act, so analyzing legal decisions and electoral outcomes of redistricting fails to explain fundamentally why the Justice Department makes the decisions it makes pertaining to the preclearance of redistricting plans. One way to study this process is to integrate the redistricting scholarship with the implementation of Section Five, via principal-agent theory. Principal-agent theory, as outlined in the next chapter, places the federal courts as one of three of the Justice Department's principals. The use of principal-agent theory allows for the incorporation of other institutional actors into the analysis, particularly the White House and Congress.

CHAPTER THREE

PRINCIPAL-AGENT THEORY AND PRECLEARANCE

The task of the theoretical imagination is to restate new possibilities.

~ Sheldon Wolin, 1969 ~

When redistricting unfolds in states covered by the Voting Rights Act, power is not only divided between two levels of government but it is also divided amongst various branches of the federal government as well. In order to explore the institutional relationships at the national level, an organizing theory was chosen to place the relevant national institutions at the forefront of this study, and distinguish it from other scholarship exploring preclearance and/or redistricting. Commonly known as principal-agent theory, this theory is used widely in economics and has become prominent in political science in the last twenty years, and though the potential set of institutional relationships envisioned via principal-agent theory is vast, this research asserts that one more application of the theory is possible. Through this research, the application of principal-agent theory is extended to include multiple principals and one agent, all of which are concerned with the preclearance of southern redistricting plans.

The role of principal-agent theory simplifies the complex phenomena of preclearance by highlighting the institutions under investigation, and brings some clarity to a unique set of institutional arrangements envisioned by Congress over thirty-five years ago. Furthermore, principal-agent theory conveys a contractual agreement between a principal and an agent, with the expectation that the agent will choose actions that produce a set of outcomes desired by the

principal (Miller and Moe, 1986). Considering that the implementation of the Act is initially structured by Congress, and that the federal courts and the White House are able to influence the actions of the Justice Department, principal-agent theory was chosen to guide this research project.

Through the development of a theoretical framework that examines the institutional relationships that characterize the preclearance process, this research can be helpful to both those who are deeply concerned about the preclearance of southern redistricting plans, but also a wider audience interested in the application of principal-agent theory in a multiple-principal-one-agent model. This research involves the conventional set of institutional actors, namely Congress, the White House and the federal courts, and describes the framework of preclearance through the theoretical perspective of a principal-agent model in order to set the stage to study the behavior of the institutions involved with preclearing southern redistricting plans.

Scholars interested in the redistricting process have not explored the theoretical idea that the Justice Department exists within a principal-agent relationship with multiple principals, but this study does by forging a new path; instead of studying the political or electoral consequences of drawing new district lines or creating a one-principal-one-agent model, this study fashions a multiple-principal-one agent relationship in order to explore the institutional implementation of Section Five of the Act. As shown in Chapter Two, redistricting scholarship tends to focus on the electoral facets of drawing new lines or spotlights the political consequences and ramifications of redistricting, and scholars have a propensity to ignore the institutions that preclear redistricting plans. Principal-agent models, on the other hand, are apt to focus on one principal-one agent relationships. The main purpose of this chapter is to explore principal-agent theory, its application and then how the theory can be expanded to preclearance.

In order to provide the foundation for the examination of the implementation of Section Five from an institutional perspective within a principal-agent framework and before contemplating the details of the contract, an overview of principal-agent theory is provided. Such an overview focuses on the relationships between a principal and an agent, whereby the principal has a set of interests or tasks that need completing, and which will only be realized through the delegation of tasks to another party, an agent. In terms of preclearance, the Justice Department and its three principals, the Congress, White House and federal courts, all focus on the implementation of Section Five of the Voting Rights Act, but from vastly different perspectives. Therefore, following the discussion of principal-agent theory, the theory is then applied to these institutional relationships. Using the preclearance policy process as the catalyst with which to shape the entire dissertation, the principal-agent model is extended to include multiple principals. The chapter concludes with a discussion as to why principal-agent theory is an appropriate theoretical tool to study preclearance.

Principal-Agency Theory

Principal-agent theory was initially developed in the economics and finance literatures (see Coase, 1937). Although Coases' ideas about the firms' boundaries lay dormant for several decades, the idea of vertical integration and corporate accountability was re-ignited and generated a body of research investigating principal-agent theory and transaction costs (Goldberg, 1976; Pratt and Zeckhauser, 1985; Ross, 1973; Shavell, 1979; Williamson, 1975, 1979, 1985). The models developed by these scholars center on the belief that there was a set of relationships between a principal and a contracting agent, and that these relationships were based in the economic system and had financial ramifications for the firm.

In the economics and finance literatures, principal-agent theory generally focuses on the relationship between buyers and sellers, and assumes each actor has a different set of goals and preferences. While buyers and sellers operate in the same market place, buyers want to pay the lowest price for the highest quality of merchandise in order to increase their buying power. Sellers, on the other hand, want to increase their profit margin, which entails selling more merchandise than the buyer needs or selling merchandise at higher prices. Therefore, in order to maximize profits, sellers must sell more merchandise to buyers at lower prices, while at the same time reducing the overall quality of the goods, or sellers have the choice to make a profit by selling their merchandise at the highest price that the market will sustain (see Pratt and Zeckhauser, 1985).

This basic illustration of buyers and sellers and how their objectives differ leads to a set of distinctive behaviors, providing the basis for understanding the premise of principal-agent models. Halachmi (1996) argues, however, that the principal-agent literature is varied and not so simplistic, as there are assorted models of principal-agent relationships, and collectively they do not necessarily represent a unified body of knowledge. One could argue that the diversity of principal-agent models reflects the richness and ever-changing context of interactions between principals and agents. On the other hand, many attempts at producing a single principal-agent model have left an absence of a theoretical core (see Halachmi, 1996). Yet, regardless of one's perspective on whether a unified theory of principal-agent models exists or not, Arrow (1985) simplifies the debate, arguing that principal-agent relationships develop around the straightforward idea that whenever one individual depends on the actions of another, a principal-agent relationship is formed.

Principal-agent theory emphasizes hierarchical relationships, therefore, the theory allows for the interactions between actors to be structured in an orderly framework, which can then be analyzed. Principal-agent theory presupposes that principals systematically influence their respective agent. Wood and Waterman (1994) argue that hierarchical control is the "ultimate goal of political principals" (25). The hierarchical nature of elected institutions and the bureaucracy is established in the Constitution, which makes Congress the chief policymaker, the President the executor of the laws and the federal courts the adjudicator of cases involving the violation of constitutional rights or procedural errors. Taking these ideas, established largely by economists, scholars in the field of political science, public administration and organizational theory, employ principal-agent theory as a tool to understand bureaucratic behavior (see Mitnick, 1980; see Wood and Waterman, 1994).

A significant amount of literature has emerged focusing on the interactions between the bureaucracy and elected institutions. The usefulness of a principal-agent framework for studying the relationship between elected and non-elected institutional actors is demonstrated by way of empirical analyses. Several scholars examine the implementation of a variety of federal programs in an attempt to articulate the institutional circumstances in which policies unfold (see Hill and Weissert, 1995; Ringquist, 1995); while other scholars reveal that many agencies are responsive to the political institutions that serve as their main principal (see Moe, 1982, 1985; Weingast and Moran, 1983; McCubbins, 1985; Wood and Waterman, 1991, 1994; and Chaney and Saltzstein, 1998). With few exceptions (i.e. Chubb, 1985; Hedge et al., 1991), studies employing principal-agent theory tend to focus on the institutional interactions at the federal level and the degree of control or the level of regulation a particular federal principal has over its bureaucratic agent.

Regardless of the context of principal-agent models, they share an analytical approach. According to Moe (1984), principal-agent models share a focus on the individual as the unit of analysis; assume rational utility maximization behavior; and have a concern for efficiency, optimization and equilibrium. Other general assumptions about principal-agent relationships that tend to apply to political phenomena suggest that there will be: (1) an inherent conflict of interest, known as negative externalities, between the agent and the principal; (2) misinformation and imperfect information transmitted between the agent and the principal, where asymmetrical information leads to situations where a principal must make decisions with incomplete knowledge; (3) institutional rules and regulations that may limit both sets of actors, principals and agents alike, from maximizing their utility; and (4) a contract or statutory agreement which lays out the nature of the relationship between the principal and the agent (see Neelen, 1993).

Principal-agent theory is concerned mainly with individuals' proclivity toward self-regarding behavior that maximizes the opportunity to achieve a desired set of preferences or policy outcomes. The relations between a principal and its agent oftentimes also involve a secondary set of assumptions. These assumptions presume that (1) goal conflict will exist between a principal and its agent; (2) that agent behavior is difficult to monitor; and (3) that an agent is more risk-adverse than its principal.

Goal conflict surfaces when principals and agents have divergent preferences. Problems arise when the interest of the agent differs vastly from the goals of its principal, and unless the principal creates an environment with substantial controls or inducements, its goals may not be achieved (see Shepsle and Bonchek, 1996). The division and specialization of labor allows large organizations to perform a multitude of functions, while at the same time decentralizing activities and authority. Authority and responsibility are delegated to specialists, who then have an

incentive to develop their expertise further to ensure that their influence and clout stays the same or increases. Problems crop up when the principal can no longer control its specialized agent. When the principal's objectives no longer guide the behavior of the agent, who may have the resources and opportunity to pursue private goals, the objectives of the principal are not met. When this occurs, the agent's behavior can be characterized as that of a self-interested utility maximizer.

Goal conflict between a principal and its agent is commonplace, as principals and agents naturally have different goals and preferences (Waterman and Meier, 1998). If goal conflict exists, the agent has three options: (1) the agent can *work* towards accomplishing the goal of the principal; (2) the agent can *shirk*, and take a leisurely approach to accomplishing the goals of the principal, which could be politically or socially motivated; or (3) the agent can *sabotage* the principal by working towards undermining the goals and objectives laid out and desired by its principal (Brehm and Gates, 1997). Consequently, because goal conflict and moral hazard are a common occurrence, the principal must monitor the agent's behavior to decrease the information deficit and asymmetric information (adverse selection), as well as reduce the agent's opportunity to shirk or sabotage the principal's objectives. The challenge with managing goal conflict is that it is a problem that is nearly impossible to fix; goal conflict is an issue that revolves around control of the implementation of the principal's plan, but oftentimes comes at a high price to the principal and can lead to moral hazard (*i.e.* conflict of interest or preferences) (see Brehm and Gates, 1997).

The second assumption, shirking, can lead to an increase in monitoring by the principal but also can be a result of a lack of monitoring by the principal. When a principal does decide to monitor an agent's behavior, the principal can do so through the use of outside entities like

interest groups, that tracks the activities of the agent from outside of the traditional principal-agent relationship (see McCubbins and Schwartz, 1984). Monitoring an agent this way is not always effective, so a principal may incorporate additional measures, such as a set of clearly defined goals to be accomplished by the agent. The achievement of these goals can then be measured against a number of specified markers. Moral hazards may crop up, however, when the costs associated with monitoring an agent are prohibitive, which then may force the principal to take an economical route to measure compliance, such as through the selection of a very narrow set of indicators to ensure compliance. The select set of indicators or proxy measures used by the principal tend to be easily recognizable and identifiable by the agent; consequently, these proxy measures or set of markers can lead to shirking by agents involved in projects or tasks outside of the defined goals established by the principal. The agent is able to shirk because the agent knows that certain areas are beyond the scope of the measurement tools and will not be monitored by the principal (see Eggertsson, 1990).

The third assumption is that agents are more risk-adverse than principals. This is largely because agents have a better sense of their own skills and abilities to carry out specific tasks assigned to them than do the principals who assign the tasks. In every principal-agent relationship, the principal and its agent have some level of information, which they are able to share with each other; however, the level of information shared is not equal. Typically, agents have more information than their respective principal because it is the agent who is closer to the issue and is involved in implementing the principal's plan, taking into consideration the political and institutional constraints presented. Principals may feel that progress is being made towards accomplishing a set of tasks, but the cost of monitoring can exceed the marginal increase in benefit to the principal. A consequence is that the principal monitors less and relies more

heavily on the agent for feedback and information in order to comprehend the level of compliance by the agent. This can result in asymmetrical information, as the agent provides only the necessary information required by the principal, and no more, oftentimes leaving the principal in the dark. Under such conditions, the principal may face the danger that the agent will exploit this informational advantage and create additional opportunities to shirk (Bendor, 1988).

Because agents' actions actually amount to making a countless number of small decisions to achieve a particular policy end, these decisions add to the wealth of knowledge the agent holds over its principal. It also provides the agent with the opportunity to specialize and further expand the information gap between the principal and agent, as the principal does not have direct access to the same sort of information and specialization. When the principal does gain entrée, it is at a much lesser degree than the agent's level of access. Asymmetric information results and is a consequence of the principal not being fully aware of its agents' true preferences and abilities. Principals are unable to observe all of their agent's actions, which may lead to an increased information deficit between the principal and the agent (see Brehm and Gates, 1997).

In summary, traditional principal-agent theory models a relationship and interactions between a set of actors, which can be individuals, groups, or in this instance, institutions. The actors agree to cooperate with each other based on a contract, and incorporate many of the same facets related to the theory of the firm in order to achieve a set of goals (see Halachmi, 1996). The development of policy actions is the consequence of the interactions between the principal and its agent (see Vachris, 1994), and the different perspectives and various applications of principal-agent models are possible and a result of unique conceptualizations of the nature of relationships between a diverse set of actors.

The Application of Principal-Agent Theory

When political scientists use principal-agent theory, most are seeking to understand the relationship between a superior (principal) and an inferior (agent), and aggregate studies demonstrate that an agency may be responsive to its political principals, namely the President or Congress (Moe, 1982, 1985; Wood, 1990, 1991) or principal-agent models are oriented towards overcoming problems associated with adverse selection (Brehm and Gates, 1997) while other studies explore the Supreme Court and lower court decisions using principal-agent theory (Songer, Segal and Cameron, 1994). There is also a line of scholarship on principal-agent relations that focus on government bureaucrats and multiple bureaus (Wilson, 1989) or the classic piece by Kaufman (1960) about U.S. Forest Rangers, who have a set of multiple constituencies they must try and please.

Perhaps the one exception to this scholarship is the work by Wood and Waterman (1994). In Bureaucratic Dynamics, Wood and Waterman study the interaction between bureaucrats and the larger political system, which includes how the bureaucracy interacts with the President, Congress, the courts, the media and the public. This broader perspective is taken in order to investigate the role of the bureaucracy in a democracy, but to also elevate the debate about the bureaucracy to include a wide variety of political actors operating in the system; however, like studies before and after them, academic investigations tend to focus on the political control that the President and Congress wield over agents and how various agencies respond to congressional and presidential stimuli; the federal courts, for the most part, are given little attention.

Regardless of the institutions involved, however, political science scholarship incorporating principal-agent theory is designed to explore bureaucratic behavior and the level of discretion in the hands of bureaucrats and how to overcome problems associated with who

controls bureaucratic policy choices. In some instances, the political realm is considered, but these models tend to only consider one institutional actor at a time, and rarely, if ever, consider multiple principals in the same principal-agent model [noted exception, Wood and Waterman (1994)]. In fact, few principal-agent models account for multiple principals because incorporating multiple principals into one principal-agent model is a complex undertaking. Perrow (1986) argues that the contractual agreement may establish the boundaries in which the agent and the principal operate, but the inherent nature of asymmetric information between a principal and an agent may lead to problems associated with cheating, limited information and bounded rationality. If a one-principal-one-agent model has these problems, then the challenges of a multiple-principal-one-agent model would be multifaceted.

Wood and Waterman (1994) state that if there are divergent preferences between principals and agents, then the agent has a distinct advantage and can shirk, which would suggest that the Justice Department has ample opportunity to shirk. In the case of preclearing redistricting plans, divergent preferences exist, but the increased likelihood of the Justice Department shirking does not necessarily hold true. The Justice Department, with its multiple principals suggests that it may have less opportunity to shirk than if it was in a traditional principal-agent relationship because there are additional institutions monitoring its behavior. On the other hand, multiple principals call into question the hierarchical relationship and unity of command. Each principal, in its own way, monitors the Justice Department and its activities with regard to how it implements Section Five. Therefore, in the realm of voting rights policy, the Justice Department's ability to shirk is greatly diminished because when the Justice Department does shirk, one of its principals, most notably, the federal courts, reacts and urges the Justice Department to change or modify its actions.

Although most principal-agent models are ordered in a hierarchical fashion, the hierarchical command structure between a principal and an agent is violated in many instances. When the bureaucracy can make policy, execute it and adjudicate disagreements, Wood and Waterman (1994) argue that this is inconsistent with the principles found in the Constitution. The presence of multiple principals further violates the basic principles found in the vast number of principal-agent theory studies.

Taking into consideration the preclearance process, a hierarchical model of institutional interactions and unity of command does not adequately explain the political and institutional stimulus that directs the Justice Department's actions. As the federal courts, Congress and the White House, as well as the Justice Department, are involved, to varying degrees, with preclearing redistricting plans, the unity of command often found in principal-agent models is violated. The unity of command is violated because even though the Justice Department is a subordinate to the White House, to the Congress and to the federal courts, the hierarchy is not as clear as to which one of the three constitutional actors is at the top of the hierarchy. Technically, the White House, the Congress and the federal courts are co-equal branches of government; therefore, when incorporating these three principals, there is not a clear hierarchical relationship. Wood and Waterman (1994) argue that when there are multiple principals and the unity of command is violated, the signals sent to the bureaucracy are ambiguous, communications between institutions are garbled and this uncertainty can lead to delayed or inappropriate responses. As described in the previous chapter, in the context of implementing the Act in the 1970s, particularly in response to the Nixon Administration and Mississippi's actions, the inconsistency of the Justice Department's implementation of the Act could be because of its multiple principals.

When multiple principals are considered in a principal-agent model and when principals are "competing" against one another to frame the bureaucrats behavior, this creates a situation in which whatever decision the bureaucrat makes, it will likely alienate one or more of its principals. Therefore, as a rational actor, the agent may respond slowly while it waits for direction from one or more of its principals. This delayed reaction was briefly explored in Chapter Two in the context of the Justice Department not implementing Section Five right after the passage of the Act (see Ball, Krane and Lauth, 1982).

Principal-Agent Theory: An Extension of the Traditional Model

The basic principal-agent relationship is premised on the idea that there is one principal and one agent, and the essence of *this* current research borrows from this often used and firmly established body of research but builds a model that includes multiple principals that steer an agent's behavior. In the case of preclearance, the Justice Department and its three principals operate in the same policy sphere, but one principals' desired policy outcomes are not guaranteed. For when three principals are providing direction to one agent, there is an increased likelihood that the actions taken by one institution will conflict or influence the actions and decisions of one of the other institutions in the policy arena (*i.e.* when the Nixon Administration backed off trying to stop the implementation of the Act as the Supreme Court told the Justice Department to go forward).

Since policy outcomes are determined by exogenous factors and other "random" variables, there is a certain level of variability in the implementation of voting rights policy by the Justice Department. That randomness can be in the form of legal decisions, internal politics at the Justice Department, political maneuvering at the state and local level and a countless

number of other possibilities, ranging from institutional responsibilities and obligations at the national level to individual and group demands. The randomness of factors that can influence the implementation of Section Five is largely out of the control of the principals and agent; consequently, the implementation of voting rights policy is an on-going interaction between principals and its agent, and these interactions evolve over time and are dynamic in nature [see Wood and Waterman (1994) for a discussion about principal-agent theory and see Ball et al. (1982) for a discussion of how the Act's implementation evolved].

The relationship between the Justice Department and the three branches of the federal government, within the policy domain of preclearance, suggests that a three-principal-one-agent relationship can be envisioned. First, there is the relationship between the democratically-elected Congress that serves as a principal and delegates power to non-elected bureaucrats in the Justice Department. Second, there is the relationship between the Justice Department and the federal courts. Lastly, there is a relationship between the White House and the Justice Department. Guided by principal-agent theory, these three institutional relationships are examined to explain the substantive nature of preclearance. An overview of the institutional parameters indicates that each institution influences and shapes the Justice Department's implementation of Section Five of the Act.

The initial contractual agreement established by Congress and laid out in the Voting Rights Act of 1965, delegated authority to the Justice Department. The contract has been amended three times, each time altering the Justice Department's scope and overall responsibilities related to the implementation of the Act.[34] The fact that Congress has altered the

[34] The 1970, 1975 and 1982 amendments are discussed in detail in Chapter Four.

Act, and therefore the Justice Department's implementation of such, is an important point in the building part of the multiple-principal-one-agent model.

As mentioned before, principal-agent relationships are governed based on a contractual agreement, and that the principal and agent connection tends to be structured around what the agent should do and what the principal must do in return (Perrow, 1986). In the case of preclearance, it is worthwhile to note that Congress' relationship with the Justice Department is structured based on a contractual agreement found in the Voting Rights Act while the contractual agreement between the Justice Department and the White House is one that is based on a clear line of authority between the President and the Justice Department.[35] The principal-agent relationship that lacks a contractual agreement is between the Justice Department and the federal courts, however, that does not stop or prevent them from influencing the Justice Department's decision-making process and the outcomes related to those decisions. Just as shareholders are bound by market contracts but not a formal legal contract, the institutional relationships between the White House and the Justice Department and between the federal courts and the Justice Department, are without a formal contract, when compared to the arrangement stipulated in the Voting Rights Act on the relationship between Congress and the Justice Department.[36]

With or without a contractual agreement establishing a principal-agent relationship, it is still possible to investigate how separate branches of the federal government influence the implementation of Section Five via principal-agent theory: For when preclearance unfolds as

[35] Since the Justice Department is part of the Executive Branch and its head, the U.S. Attorney General, serves at the pleasure of the President, there is a clear line of authority. In addition to the Attorney General, there are several other prominent political appointments that the President controls in terms of managing the Justice Department and its activities.

[36] Arguably, the President might influence preclearance by communicating his desires to the Attorney General, who would then implement the President's requests via the Assistant Attorney General for Civil Rights, who signs the preclearance letters.

Congress envisioned, events outside the scope of one institution may force another institution to make decisions based on a different set of interests, independent of the contractual agreement outlined in the Act. Therefore, a lack of a formal contract does not preclude other institutions from acting; just because the type of relationship that the Justice Department has with its principals begins with the unique and complicated set of institutional relationships that emerge out of the statutory provisions in the Act, the Act does not have the final say in how voting rights policy is implemented.

Explored in more detail in the next chapter, the District Court of the District of Columbia has a contractual agreement with covered jurisdictions regarding judicial preclearance, but not directly with the Justice Department, while the White House lacks a formal contractual agreement with the other institutions concerned with preclearing redistricting plans, in addition to the Justice Department, there is a formal understanding and relationship between the White House and the Justice Department because the Attorney General and Assistant Attorney General for the Civil Rights Section are appointed by the President. Moreover, there are other political appointees involved in the process of preclearing redistricting plans. Yet, all three institutions, Congress, the federal courts and the White House, operate in a manner that not only influences each other *and* the Justice Department, but also does so in a way that has policy consequences.

The first institutional relationship explored is between Congress and the Justice Department. Congress has the power to regulate federal laws governing the Voting Rights Act and its implementation, and when Congress has amended the Act, the statutory amendments influence how the Justice Department implements Section Five. Congressional amendments have altered the Act in response to political changes or court decisions, such as in the case of

Congress reacting to the *City of Mobile v. Bolden*[37] decision, a Section Two case. When the Act came up for renewal in 1982, Congress re-wrote parts of the Act in order to make clear what Congress intended for the Act and its related sections rather than letting the federal courts define the boundaries and meaning of the Act, particularly concerning proportional representation. With the *Bolden* decision, two of the Justice Department's three principals compete to "rule" the policy domain, and Congress was aggressive in 1982, determined to let the Justice Department and the federal courts know what it desired in terms of implementation and what the Act was not supposed to be (*i.e.* it did not mandate proportional representation).[38]

When Congress expanded the Justice Department's power and authority, in 1970, 1975 and 1982, each extension of the Act was a milestone for the voting rights of Blacks, particularly in the South, and language minorities throughout the country. Congress, however, has not actually monitored the day-to-day activities of the Justice Department in terms of its implementation of voting rights policy nor has Congress given the Justice Department much guidance or direction on how Section Five and the other sections of the Act should be implemented. Outside of the congressional hearings surrounding the issue of whether or not the temporary provisions should be extended, Congress has had a limited role as one of the Justice Department's three principals, and is infrequently attentive to its relationship with the Justice

[37] 446 U.S. 55 (1980). The Supreme Court narrowly interpreted the Fourteenth and Fifteenth Amendments to the Constitution, as well as the Voting Rights Act; holding that plaintiffs, in order to establish a violation, must prove that a change in voting practices that would harm minorities was actually motivated by discriminatory intent.

[38] In *Bolden*, plaintiffs were attacking the political system that had been in place for generations, and therefore, not subject to Section Five preclearance and had it been a Section Five case, there would have been no need to prove intent. Even though *Bolden* does not involve Section Five preclearance, the case is an example of congressional reaction to the courts' decisions and how Congress can exercise oversight over the Justice Department.

Department, though it has expanded the responsibilities of its agent; yet, once it gives its agent a new set of responsibilities, Congress has not interfered.

Since the Act's passage, Congress has rarely paid special attention to how the Justice Department implements Section Five and even though Congress has the power to make considerable changes, it has chosen not to exercise this authority. Congress has reduced its political costs and oversight of the Justice Department by having the Justice Department report its activities on an irregular basis (*i.e.* 1970, 1975, 1982 and 2007). This way, Congress still has the ability to act as the Justice Department's superior and ensure that most of its goals are being accomplished; when there is goal conflict, Congress can amend the contractual agreement. Additionally, because of the difficulty in monitoring the agent's behavior, Congress can use the mechanism of congressional hearings for feedback and information. This, however, can produce an asymmetrical exchange of information and may result in Congress not being fully aware of what is going on at the Justice Department.

One can plausibly argue that this arrangement was made by design, that Congress purposely did not create a set of substantial controls or inducements for the Justice Department to report its activities. This "understanding" is advantageous for Congress because it can protect its political goals. Congress would find it extremely difficult to determine the level of risk taken by bureaucrats on a day-to-day basis because the real-world of preclearance, with its charged political environment, encourages compliance to be secured through negotiations and bargaining (see Ball, Krane and Lauth, 1982). This is not to say that Congress is not an important institution in the implementation of the Act, not at all, for it played an important role by taking on the responsibility of defining the context of voting rights policy in the early crucial years.

Beyond the creation of the original contract (*i.e.* the Voting Rights Act), primarily designed to implement the Fifteenth Amendment of the Constitution, and continuing to extend the Act's temporary provisions beyond their original end date, particularly the 1982 Amendments, one can plausibly argue that Congress is not an active principal of the Justice Department. Congress lacks direct involvement with the Justice Department, and it could be easily argued that Congress has failed miserably as a principal. Congress has expanded the Justice Department's authority, but never actually monitored what the Justice Department has done on a regular basis, and though Congress could function as a principal, it has not done so since 1982 and won't again until 2007. One can conceivably argue that Congress' purposeful design of the Act abdicated a lot of responsibilities of monitoring and changing the Justice Department's implementation of the Act to the federal courts, the White House and interested and concerned citizens and organizations; the latter being outside of the control of the institutional actors portrayed in this multiple-principal-one-agent model.

Congress' relationship with the Justice Department is one that sees the principal expanding its agent's responsibilities whenever the contract comes up for renewal; however, once the amendment process is complete, Congress rarely if ever, interferes with the Justice Department and its actions. In fact, congressional inattention has allowed the Justice Department to broaden the interpretation of the Act, which is a primary charge often made by Abigail Thernstrom. In litigation, the point is often made that the Justice Department has the powers it has appropriated to itself, and that these powers are legitimated by Congress' failure to rein in the Justice Department. The lack of involvement by Congress in re-directing the Justice Department and its activities leads one to deduce that the Justice Department has the ability to take on new responsibility or develop a new interpretation of the Act. This behavior or set of

behaviors are affirmed, as Congress does not step in to reject what the Justice Department has done, and by its silence, Congress gives tacit approval of its agent's actions.

The lack of involvement by Congress signifies that it structures its relationship with the Justice Department via a contract and does not interfere unless the contract specifies so. This is not unusual, as for the most part Congress regularly delegates authority and responsibility to the Executive Branch of the federal government, but what this means in practical terms is that the federal courts, to a large degree, function in Congress' place; but the federal courts do not just operate as a third party observer of the Justice Department and its implementation of Section Five, rather the federal courts repeatedly and routinely monitor the Justice Department. It is safe to say that the federal courts function as the Justice Department's primary principal, and have had the largest influence on defining Section Five.

As a result, the second principal-agent relationship to emerge in the realm of preclearance is the one between the federal courts and the Justice Department. Congress may have a clear contractual agreement with the Justice Department, but the federal courts have considerable power over the Justice Department, too. For amongst the three institutions involved with the redistricting process and interpreting the Act on a consistent basis, the federal courts have had considerable sway over the Justice Department through its interpretation of the Constitution, related constitutional principles, as well as its legal decisions related to the Act and Section Five preclearance. The role of the federal courts, as the Justice Department's primary principal, is seen through the multiple cues that the federal courts give to its agent via legal decisions. At times, these decisions expand its agent's responsibilities, urging it to become more aggressive in

its implementation of the Act while at other times the federal courts have reined in its agent and even occasionally berated it for doing too much.[39]

The relationship between the federal courts and the Justice Department has evolved into a formal relationship, a relationship in which the federal courts have practically amended the initial contractual agreement established by Congress. The official language of the Voting Rights Act may not have changed a great deal with each congressional amendment cycle, but the federal courts have virtually taken on the role of constructing the Act through their decisions, essentially providing the framework with which the Act is put into effect. The federal courts' power to have the Justice Department formalize its correspondence with covered jurisdictions is one example of how the federal courts operate as one of the Justice Department's principals.

The formal language in the majority of preclearance letters signals the power of the federal courts and the deference that the Justice Department shows to the courts:

> We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed change has neither the purpose nor will have the effect of denying or abridging the right to vote on account of race or color…. However, until the objection is withdrawn or a judgment from the District Court is obtained, the districting plan continues to be legally unenforceable.[40]

The federal courts do not have a formal agreement with the Justice Department on how Section Five should be implemented; rather, the federal courts' involvement in structuring how Section Five is implemented is based on the traditional role of the federal courts determining the constitutionality of laws passed by Congress and how the Executive Branch implements them.

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[39] Chapters Four and Five explore the role of the federal courts as a principal of the Justice Department and detail a series of legal decisions pertaining to the implementation of Section Five of the Act.

[40] Quoted from *Clark v. Roemer*, 111 S.Ct. 2096 (1991) but found in the January 3, 1994 letter for the districting plan for the City of Greensboro in Hale County, Alabama.

The federal courts are not restricted by a contract in terms of their relationship with the Justice Department or the other two branches of government;[41] in fact, the absence of a contract gives the federal courts considerable power over how it instructs the Justice Department on how to implement Section Five through legal decisions, sending signals to the Justice Department, supporting or refuting, its activities.[42] The federal courts were active participants in declaring a large portion of the Act constitutional while at other times restricting the Justice Department's implementation of the Act, but the federal courts have given the Act the legal standing with which to continue to exist and be implemented, not Congress. The federal courts level of attentiveness has varied over time, but the "contact" with the Justice Department's implementation of Section Five has been greater and more consistent by the federal courts than the Justice Department's other two principals. It is also easier to examine the federal courts' involvement as a principal of the Justice Department because there is a more complete record of legal decisions.

The third and final relationship envisioned via principal-agent theory is between the Justice Department and the White House. The link between these two particular institutions is couched more in political terms rather than based on constitutional principles, statutory requirements or contractual agreements. It is possible for the White House to influence, informally, in the contract's implementation, as the White House has the power to nominate the Attorney General; but outside of this constitutional responsibility, which is shared with the Senate, the White House does not have any formal statutory powers to instruct the Justice

[41] *Marbury v. Madison* (1803) designated the Supreme Court as the final arbitrator and interpreter of the law.

[42] How the federal courts interpret and determine how the Act should be put into practice is outlined in Chapters Four and Five.

Department on how the Act should be implemented. For that reason alone, most of the White House's influence is political in nature.

Some scholars argue that the White House's dealings with the Justice Department and its implementation of the Act are politically motivated (see Ball, 1986; Bullock, 1983, 1995c). Some authors contend that the President has the power and ability to pressure the Justice Department to "view" the preclearance process in a particular light favoring the White House's vision and political leanings. As such, the Administration has the capacity to influence how the Act is interpreted and executed (see Ball, 1986), but the White House's attentiveness to the Justice Department's actions have arguably been inconsistent.

Under the Bush Justice Department in the early 1990s, the Justice Department wielded considerable power over the preclearance process and urged the creation of majority-minority districts (see Canon, 1999). The Reagan Administration also influenced the interpretation and implementation of the Act in the early 1980s. For instance, the Assistant Attorney General for Civil Rights, William Bradford Reynolds, instructed his staff that portions of the revised Act would be implemented for only a few weeks (see Ball, 1986). Bullock (1995c) noted that following the 1980s round of redistricting in southern states, the results suggested partisan motives of the Reagan Justice Department at work. Furthermore, Reagan's Justice Department promulgated new rules and regulations that codified the Administration's view that Sections Two and Five were not to be incorporated. This resulted in Section Five reviews that did not consider the discriminatory "results" of submitted changes but only looked at the discriminatory purpose behind the creation of a new redistricting plan, a much harder test to measure, detect and overcome (see Ball, 1986). This change in policy was viewed as a retreat from the original intent of the Voting Rights Act, but one that mirrored a general policy pattern of the Reagan

Administration. The Reagan Administration designed a set of policies surrounding the implementation of the Act in a way that put aside judicial and legislative decisions aimed at combating voting discrimination, and instead ensured that some discriminatory practices were allowed to flourish under the Justice Department's radar or were not addressed in any consistent or substantive manner (see Ball, 1986).

It is believed that the President can provide instructions and perhaps even dictate how the Justice Department implements the Act, and does so in a manner to promote a particular political agenda. White House involvement in preclearance, however, is harder to verify than congressional or court involvement because there is no official or public record of White House decisions. The federal courts have not reviewed a President's actions with regards to implementing Section Five or the Act in general, and there are no formal amendments to the Act by the White House, which would signal when the President becomes involved in directing the Justice Department's implementation of the Act.[43]

The White House, regardless of the lack of official documents, can "encourage" the Justice Department to take particular positions or interpret congressional amendments of the Act. The White House has been attentive at times to the Justice Department and how it implements the Act, and one could argue that that has been the result of partisan control of the White House. There is a limited amount of literature arguing how the White House influences the implementation of the Act, and there is not a clear consensus as to the degree of that influence or its ultimate effect (see Canon, 1999; Ball, 1986; Bullock, 1983, 1995c). The White House could

[43] The congressional record and some scholarship on this topic indicate the types of congressional amendments certain Administrations supported or tried to block, but outside of the congressional record, there is very little evidence as to the President's involvement with directing the implementation of Section Five and the Act.

be a self-interested institutional actor without delegated authority who acts for purely partisan purposes or it could be a silent institutional actor giving very little input on how to implement a politically charged piece of legislation; hence, this study incorporates the White House into the principal-agent framework because the White House has influenced the Justice Department.[44]

Through formal statutory and constitutional arrangements, the Justice Department, Congress, federal courts and the White House, each have a distinct role and set of responsibilities preclearing redistricting plans. The Justice Department is bound to the Congress because of Congress' power to pass and amend laws, and the Justice Department must adhere to Supreme Court decisions because the Supreme Court is the highest authority in the land. The Justice Department must also carry out the implementation of laws, as it is part of the Executive Branch, which has the constitutional duty to implement national laws. These interactions are incorporated into a multiple-principal-one-agent model in order to expand the traditional principal-agent model to the preclearance process.

Principal-Agent Theory and Preclearance

This study offers a new perspective on studying the bureaucracy and the political environment in which it operates, and this study offers some hope about the prospects for building a multiple-principal-one-agent model. The four institutions involved with the implementation of Section Five of the Voting Rights Act are responsible for translating the law into action, adapting to multiple and diverse stimuli, sending and responding to signals that reflect current preferences and legal decisions, as well as agreeing on what constitutes acceptable

[44] The inclusion of the White House is done with the knowledge that there is limited information about the degree to which the White House influences the Justice Department. In order to gather the sufficient data and information, in-depth interviews are required.

policy. While it is not hard to see how the Justice Department is an agent of three principals, it is more difficult to sort out the role of each principal and how the Justice Department reacts to each.

It is believed that principal-agent theory is a suitable tool to study this complicated environment, as voting rights policy and its implementation is shared amongst several federal institutions. Principal-agent theory can bring clarity in explaining why certain actors behave the way they do with regard to how other actors act and react in a policy environment. Principal-agent theory offers an interesting perspective to explore the structural dimensions between three important federal institutions, and as an organizing theoretical framework, it is used to understand the basic structure of interaction between several institutions. It also provides the necessary design to model some coherence into an oftentimes involved, yet integrative, institutional mechanism that characterizes the preclearance process. Wood and Waterman (1994) argue that there are multiple principals that perform various functions within the U.S. political system; thus, Congress can be a principal, delegating power to the President, who then can go from being an agent to a principal, which then delegates responsibility to the bureaucracy. The Congress and the President are agents of the law. The constitutional system of multiple principals may be better suited to a two-tiered hierarchy of principals and agents.

Principal-agent theory, however, is not a panacea for the study of preclearance. Principal-agent theory, although helpful in structuring the institutional relationships between the Justice Department and its three principals, it is not able to account for the lack of contractual agreement between two principals and its mutual agent; yet, the lack of a formal agreement or contract does not prevent a principal-agent relationship from forming. The missing contractual agreement between the Justice Department and the federal courts and the Justice Department and

the White House is cause for initial concern; however, relying on Arrow's (1985) simple illustration, that a principal-agent relationship develops whenever an individual depends on the actions of another, it is possible to continue with the use of principal-agent theory in the context of preclearing southern redistricting plans.

A principal-agent model generally casts the principals and agents as actors operating in an ordered framework, but the reality of the situation related to Section Five preclearance does not unfold in a neatly ordered framework as the theory suggests. The relationships between the individual federal institutions tend to have less of a central-command component and one that is more interactive; the Justice Department responds circuitously to Congress, in some form to the White House and directly to the federal courts. This goes hand-in-hand with the level of attention given by each principal to its agent. The different levels of attention and the lack of a hierarchal structure are addressed via a careful analysis of court cases, congressional amendments and presidential politics.

Other limitations of principal-agent theory are that it does not necessarily account for the differing levels of attentiveness amongst all of the Justice Department's principals and does not take into consideration different ways of monitoring or goal conflict amongst principals. As one principal recedes into the background and another moves onto center stage, the principal-agent model does not account for the changing relationship between the original principal and the agent. For instance, Congress passed the initial legislation, chartering the Justice Department to implement the Act, but when the federal courts became the Justice Department's primary principal, thereby taking over the role as lead principal from Congress, the principal-agent model does not take into consideration why. In terms of the level of attention each of the three principals gives to the Justice Department can be because of a host of reasons. The principal-

agent model can detail the new relationship between the principal and agent, and how the "new" main principal differs from the agent's previous main principal, but the model fails to consider the institutional reasons for the change in principal.

Even though each principal operates under a different set of political pressures and environmental factors, there are multiple reasons goal conflict between principals may arise, as well as differences in how they monitor their mutual agent; however, the principal-agent model does not consider goal conflict between multiple principals or how each principal may monitor the Justice Department in a different way. It is also difficult to structure interactions amongst each principal to determine its goal conflict and monitoring levels. In an attempt to overcome these limitations of principal-agent theory, the behavior of each of the three principals is considered through the documentation of their actions, which are detailed in the following chapters. Principal decisions and actions are then supplemented with information about the decisions made by the Justice Department. Justice Department actions are one way to sort through its principals' decisions, but also a way to explain the difference in attention levels, goal conflict and monitoring carried out by its three principals.

Even with these weaknesses, this chapter introduces the application of principal-agent theory to preclearance by specifying the institutional relationships involved with preclearing southern redistricting plans. An institutional perspective using principal-agent theory is appropriate in the case of Section Five preclearance because (1) there is a contractual agreement, spelled out in Chapter Four; (2) the Justice Department operates as an agent of three principals, which is explored throughout this dissertation; and (3) although not as technically challenging as Epstein and O'Halloran's (1999c) model[45] and one that may not include all of the concepts

[45] Epstein and O'Halloran (1999c) explore the dynamics of Congress deciding whether or not to delegate to the executive branch or make policy internally.

explored by Downs (1967),[46] the principal-agent model outlined here focuses on key institutional actors and their ability to influence the behavior of one agent. The model looks at not just how elected institutions attempt to control their agent, but also how the federal courts are active in shaping the agent's behavior, too.

The next chapter looks at the contractual agreement established by Congress, the Voting Rights Act of 1965, as amended. Congress, as is demonstrated in Chapter Four, plays a key role in extending Section Five through its amendment powers; however, just because Congress has the power to write "corrective legislation," it has not done so. In fact after the Act's passage in 1965, Congress has amended it three times, but has not overhauled it in any major way. The essence of the Act, as passed in 1965, is still "good law" today. Perhaps the Act is still considered "good law" because the institutional relationships tend to have less of a central-command component and are more reciprocal and interactive, which allows for some flexibility that allows the contractual arrangement to function and be implemented in the "real world." The institutional arrangements outlined in this chapter and expanded upon in the next were not an accidental event, but rather the transformation of power from the states to the federal government, which strengthened the level of authority placed at the national level in the realm of voting rights policy.

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[46] Downs (1967) examines how bureaucracies work, bureaucratic preferences, discretion and how elected institutions may control them.

CHAPTER FOUR

THE VOTING RIGHTS ACT OF 1965

> *At times, history and fate meet at a single time in a single place to shape a turning point in man's unending search for freedom…. So it was last week in Selma, Alabama…. There is no cause for self-satisfaction in the long denial of equal rights of millions of Americans…. Our mission is at once the oldest and the most basic of this country: to right wrong, to do justice, to serve man…. The most basic right of all was the right to choose your own leaders…. Yet the harsh fact is that in many places in this country men and women are kept from voting simply because they are Negroes. Every device…has been used to deny this right…. We have all sworn an oath before God to support and to defend [the] Constitution…. There is no constitutional issue here. The command of the Constitution is plain…. A century has passed, more than a hundred years, since equality was promised…. And the promise is unkept…. The bill I am presenting to you will be known as a civil rights bill.*[47]

Less than 48 hours after this historic speech, President Johnson sent Congress a bill that eventually became known as the Voting Rights Act of 1965. In August of the same year, Congress, with overwhelming majorities, passed this monumental piece of legislation. Some argue the Voting Rights Act of 1965 is perhaps second only to the U.S. Constitution in terms of securing and protecting the voting rights of minorities (Davidson, 1994; Graham, 1990; Henderson, 1995). This chapter details the contractual agreement that established preclearance, namely the Voting Rights Act of 1965. In order to investigate Section Five of this statute, the years preceding the Act's passage are examined, and then the chapter transitions into a brief

[47] President Lyndon B. Johnson, "Special Message to the Congress: The American Promise," March 15, 1965. Delivered before a Joint Session of Congress.

discussion of the objectives and rationale behind the Act, including an examination as to why some of the Act's provisions are temporary in nature and called "special."

The main purpose of this chapter is to further the discussion established in Chapters Two and Three about the Justice Department operating as an agent of three principals and that these relationships begin with the contractual agreement outlined in the Act. This chapter includes a detailed discussion about Section Five, how it is implemented, including administrative and judicial means to obtain preclearance, and what parts of the country Section Five is applied. The federal courts' involvement in declaring a large portion of the Act constitutional is also described. When the Supreme Court found the Act constitutional, it set the stage for the federal government to enforce the principles found in the Fourteenth and Fifteenth Amendments of the U.S. Constitution.

By declaring the Act constitutional, the federal courts gave the Justice Department the approval to implement the Act. Congress, as another one of the Justice Department's principals, provides additional direction to the Justice Department via congressional hearings and amendments. The Act was amended in 1970, and those amendments, as well as the ones that followed in 1975 and 1982, are detailed. The last section of this chapter describes the structure of the U.S. Department of Justice and the various offices within the Justice Department that are responsible for implementing the Act.

The Years Proceeding 1965

The Voting Rights Act contains the same principles found in the Fourteenth and Fifteenth Amendments to the United States Constitution; however, prior to 1965, the former Confederate states employed various tactics to prevent Blacks from participating in the electoral arena. Due

to this fact, portions of the Act were designed to apply largely to southern states. Southern states, particularly those in the Deep South, were highly effective in excluding Blacks from the voting booth. Due to northern indifference and several Supreme Court decisions, Blacks were effectively eliminated from the polity following Reconstruction, and it was not until the passage of the Voting Rights Act, almost one hundred years later, that the remaining barriers restricting Blacks from casting a vote were dismantled.

The Voting Rights Act of 1965 was a result of the accumulation of failure of other civil rights statutes. The civil rights laws passed in 1957, 1960 and 1964 were ineffective. The Civil Rights Act of 1957, largely an innocuous measure, was introduced during Eisenhower's presidency and was the first civil rights act passed by Congress in 82 years. It was the first sign that the federal government was somewhat concerned about revisiting unresolved issues stretching back to the 1870s; but for all of its good intentions, the 1957 Civil Rights Act had virtually no influence beyond its symbolic significance (see Bullock and Lamb, 1984; Schwartz, 1970). It did contain several provisions focused on ensuring that all Blacks could exercise their right to vote, such as creating the Civil Rights Division in the Justice Department, permitting the federal government to seek injunctive relief to protect the voting rights of individuals and assisting in the enforcement of the Fifteenth Amendment. In addition, a Civil Rights Commission was created. Yet, the Civil Rights Act of 1957 had little influence on the reality of Black Americans inability to vote and did not combat the discriminatory practices employed at the polls, and in the greater society.

The 1960 Civil Rights Act was geared towards patching the holes in the 1957 Civil Rights Act, but was more of a reaction to the violent outbreak of bombings against schools and churches in the South. The 1960 Civil Rights Act introduced federal penalties to be levied

against individuals who prevented others from voting, extended federal authority to promote voter registration by permitting federal judges to register qualified Blacks who had been denied by local officials and permitted access to local voting records by federal officials: Local election officials were required to maintain all voting records for 22 months after each election. The 1960 Civil Rights Act was an important measure because it allowed federal charges to be brought against local officials, which had previously been difficult to address because documents needed to prove that election practices were discriminatory in nature were only available from local entities (Scher and Button, 1984).[48]

Between 1960 and 1964 there was a dramatic shift in the national climate towards general civil rights and a move away from voting rights. This was, in part, a result of the undisputable facts found by the Civil Rights Commission created by the 1957 Civil Rights Act, which analyzed civil rights issues in America (see Schwartz, 1970).[49] However, before Kennedy was able to proceed in addressing these pressing issues, his life was cut short by an assassin's bullet.

President Johnson, whose conversion from a civil rights opponent to supporter, gave top priority to civil rights legislation used Kennedy's death to help push through the Civil Rights Act of 1964. Many southerners were horrified by the extent of the bill, and Johnson probably only got away with its broad federal powers because he was from a southern state and because of

[48] The two Eisenhower civil rights acts only added approximately an extra 3% of Black voters to the electoral roll for the 1960 elections. Some would argue that this reflected Eisenhower's failure to really put his weight behind civil rights legislation. Others would argue that after 80 years of federal apathy, something was finally being done to advance the cause of civil rights (see Schwartz, 1970).

[49] The Civil Rights Commission found that: 57% of African American housing was judged to be unacceptable; African American life expectancy was 7 years less than Whites; African American infant mortality was twice as great as Whites; African Americans found it all but impossible to get mortgages from mortgage lenders; and property values would drop a great deal if an African American family moved into a neighborhood that was not a ghetto.

Kennedy's death. Many historians now believe that the 1964 Civil Rights Act was of major importance to America's political and social development. It was focused, however, on discrimination involving civil rights rather than discrimination in the electoral arena.[50] This distinction made it necessary to continue the legislative fight to deal effectively with the problem of voting discrimination and inequality at the polls.

The Voting Rights Act of 1965[51]

The Voting Rights Act of 1965 embodies the principles in the Civil Rights Acts of 1957 and 1960, but concentrates solely on eliminating and prohibiting the abhorrent practices utilized to prevent individuals from voting. Although the Act applies to the entire nation, it was aimed at those jurisdictions with a long history of preventing Blacks from registering and voting. When Congress passed the Act, its initial purpose was to enforce the Fifteenth Amendment by reaching into those jurisdictions which on November 1, 1964, used any test or device to abridge Blacks' right to vote and had less than 50% of the voting age population registered or in which less than 50% of the voting age population voted in the 1964 presidential election.[52]

The Act focused on breaking the grip of state disenfranchisement of Black voters by creating a set of interlocking measures that ensured that the Justice Department, as an agent of

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[50] The Civil Rights Act of 1964 prohibited segregation in public places. A public place was defined as any institution that received federal funding. Under the 1964 Act, an Equal Employment Commission was created and federal funding would be withheld from segregated schools, and companies competing for federal contracts had to demonstrate their commitment to civil rights.

[51] Appendix C contains a copy of the Voting Rights Act of 1965.

[52] This formula is found in Section Four of the Act, and is commonly referred to as the "trigger mechanism." See *footnote 58* and surrounding text in this chapter for further information.

Congress, could enforce compliance by covered jurisdictions. Prior to the Act's passage, efforts by the Justice Department directed towards eliminating discriminatory election practices through the courts, on a case-by-case basis, had been unsuccessful in registering southern Blacks. Oftentimes, as one discriminatory practice or procedure was proven to be unconstitutional by the courts, covered jurisdictions would substitute the old one with a new one and litigation would have to commence anew.[53] To accomplish the desired goal of Black enfranchisement, Congress created a piece of legislation containing 18 separate sections with an interlocking set of permanent and (special or) temporary provisions designed to address invidious discriminatory tactics. The permanent provisions were applicable nationwide while the special provisions applied to jurisdictions meeting particular criteria, as specified in the Act. Section Five and the preclearance requirement were enacted as a temporary provision, to expire five years after its passage, in 1970.[54]

The objective and rationale behind Section Five was to end the "blight of racial discrimination in voting, which [had] infected the electoral process in parts of [the] country for nearly a century."[55] Through a series of stringent remedies aimed at areas where discrimination

[53] Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits. After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims (The Central Georgian: In Retrospect "The Voting Rights Act of 1965").

[54] Other temporary provisions of the Voting Rights Act include Section Six, authorizing the appointment of federal examiners to receive voter registration applications, which would be presented to local registrars; and Section Eight, authorizing the appointment of federal observers to enter polling places to observe whether voters were being permitted to vote and whether their votes were properly tabulated. Like Section Five, these temporary provisions have been extended by Congress and remain, to a large degree, in effect.

[55] *South Carolina v. Katzanbach*, 383 U.S. 301, 308 (1966).

was most flagrant and which persisted on a pervasive scale, Congress designed a statute that would rid the country of discriminatory electoral laws. To this end, Section Five suspends the implementation of all new voting procedures and practices, placing a federal preclearance barrier on covered states and political jurisdictions and preventing such jurisdictions from implementing new electoral laws tainted by discriminatory purpose or effect. The rationale for such intrusion on a state's rights is that the historic record "discloses unremitting and ingenious defiance" in certain parts of the country of violating the Fifteenth Amendment, resulting in calls for sterner and more elaborate measures than those previously used.[56]

In addition, the use of temporary measures facilitated the passage of the Act in 1965, even in the midst of great opposition from southern legislators. The notion at the time of the Act's passage was that the federal government would suspend local control of voting rights policy for a specific length of time. It was believed that by giving the more intrusive portions of the Act an end date, it would be possible to generate enough congressional support to pass the bill. This strategy sent a message to affected states, indicating that the federal government was taking immediate action to cope with present day issues stemming from Jim Crow, but that the federal government would withdraw at some point in the near future. Even while creating these temporary provisions, Congress, for the most part, felt that those provisions of the Act would not be needed in 1970 (see Schwartz, 1970).

In summation, the breadth of the Act's provisions include (1) suspending literacy tests and other tests and devices used to deny the right to vote on account of color or race; (2) authorizing federal examiners to register individuals who are qualified to vote under state law to vote in local, state and federal elections; (3) empowering federal courts to enforce the guarantees of the

[56] *Id*. at 303 and 309.

Fifteenth Amendment; (4) providing criminal penalties for intimidating, threatening or coercing any person voting or attempting to vote; and (5) furnishing both civil and criminal remedies for the enforcement of the Act.

Section Five of the Voting Rights Act of 1965

Section Five, implemented by the Justice Department, plays a major role in local and state election matters, as it erects a federal preclearance barrier for states and political subdivisions to hurdle before they are able to implement any new voting procedures or districting plans (see Posner, 1998). The preclearance measure is considered the most controversial section of the Act, as it enables federal agencies to determine whether or not a state and/or local voting change can take effect (Ball, 1985). Section Five is intended to further the goals of the Fifteenth Amendment and to curtail attempts by covered states and other political subdivisions from altering voting procedures (Erickson, 1995). The purpose of Section Five is to insure that local jurisdictions would not infringe upon the voting rights of Blacks after any discriminatory laws are declared unconstitutional by the courts or invalidated by the Act (Ball, 1985). The point of preclearance is simply to prevent "backsliding" and dissuade southern states from inventing new ways to continue to disenfranchise voters.

In order to obtain preclearance, covered jurisdictions either submit their electoral changes to the Justice Department or go to the District Court of the District of Columbia to obtain preclearance. "A covered jurisdiction must demonstrate that the proposed change 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."[57] Derfner (1973) simply states that Section Five is a "truly ingenious part of the

[57] 42 U.S.C. 1973.

Act" (576), as it is an open-ended provision that requires federal approval of changes and shifts the burden of proof from the voter to the covered state or subdivision, which then must demonstrate that the proposed electoral change or changes are non-discriminatory. As Deputy Attorney General Joseph Rauh explained, preclearance was simply a way to prevent southern states from inventing new ways to get around the basic provisions of the Act (see Thernstrom, 1995).

Section Five does not stand alone, but rather works in tandem with Section Four. Section 4(b), known as the "triggering mechanism," determines which states and/or political sub-jurisdictions must abide by the provisions in Section Five.[58] Any state or political subdivision captured by the Act's trigger mechanism is considered "covered" by the Act's provisions. Section Five requires these covered states to submit any changes in voting qualifications or standards, practices or procedures with respect to voting to the Attorney General or the District Court of the District of Columbia prior to their implementation. If a state as a whole is not covered by the Act, like North Carolina and Florida, the same criteria and standards are applied to individual counties within the state (Grofman, Handley and Niemi, 1992b).[59] Section Five

[58] Section 4(b) of the Act reads as follows: The provisions of subsection (a) shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 percentum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 percentum of such persons voted in the presidential election of November 1964. The states and political subdivisions initially "captured" in 1965 by this mechanism included Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, Virginia, 26 counties in North Carolina and 1 county in Arizona (United States Commission on Civil Rights, 1965; Scher and Button, 1984; Posner, 1998).

[59] As of December 2000, Section Five applies to several states including, Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina and Texas. States that are partially covered include California, Florida, New York, North Carolina, South Dakota, Michigan, New Hampshire and Virginia (3 political subdivisions in Virginia have "bailed out" from coverage pursuant to Section Four of the Voting Rights Act – Fairfax City, Frederick County and Shenandoah County).

does not extend to the entire country, as Section Four limits which states and political subdivisions are required to adhere to Section Five preclearance measures.

As a principal of the Justice Department, Congress instructed the Justice Department on the extent of the Act and Section Five, which included two separate measures, also referred to as prongs: a purpose prong and an effects prong. The purpose prong of Section Five looks at submitted plans and tries to determine the purpose or reasoning behind the adoption of the new plan. If it is found that the plan is purposely discriminatory, the plan cannot be precleared. The second prong of Section Five involves the effect of the new plan. Justice Department lawyers review a submitted plan to determine the ultimate effect of the plan on the minority community, and if after its analysis, it is found that the plan has a discriminatory effect, the plan is denied preclearance.[60]

When obtaining preclearance, a jurisdiction has the choice to seek either judicial or administrative preclearance of a voting change, yet almost all jurisdictions utilize the administrative preclearance option rather than filing a declaratory judgment (Posner, 1998). If, however, the Department of Justice interposes an objection, the jurisdiction may seek judicial preclearance. Nonetheless, because of the cost and time involved in obtaining judicial preclearance, most jurisdictions seek administrative preclearance via the Justice Department (see Posner, 1998).

[60] The purpose and effect prongs are detailed in Chapter Five, and are discussed in context with several court decisions.

Administrative Preclearance[61]

The Justice Department has promulgated guidelines concerning Section Five preclearance. The regulations establish the procedures for submitting electoral changes to the Justice Department, including the contents of submissions and the relevant standards. Local and state officials, including legislative bodies (state legislatures, county commissions, city councils and school boards), executive officials (governors or mayors), and other officials (secretaries of state, county clerks, registrars), are required to obtain these standards and utilize them when creating new electoral laws. Regardless of who or what body administers the changes, all changes adopted by a covered state or political subdivision within the state must gain preclearance prior to the change being implemented.[62]

States' or political subdivisions' chief legal officers have the authority to submit new election requirements or changes to the U.S. Attorney General. If the Justice Department does not interpose an objection within 60 days, the procedures, practices or prerequisites are deemed non-discriminatory, and the changes can be implemented. If the new qualifications, prerequisites, standards, practices or procedures are not submitted to the Justice Department or if they are submitted and an objection is interposed, then the state or political subdivision must obtain a declaratory judgment from the District Court of the District of Columbia stating that the changes will not have the effect of denying or abridging rights guaranteed by the Fifteenth Amendment. In covered jurisdictions, any change affecting voting, even changes that appear

[61] Appendix A includes a list of electoral changes subject to Section Five preclearance, the required contents of each submission, as well as a list of the special requirements for redistricting plans and annexations submitted to the Justice Department for preclearance.

[62] Once the Justice Department preclears a plan, the decision is not subject to judicial review [*Morris v. Gressette*, 432 U.S. 491 (1977)].

minor or indirect, or a return to a prior practice or procedure, or changes resulting from a previous objection, must obtain Section Five preclearance.

As an administrative substitute for lawsuits and injunctions, Derfner (1973) argues that administrative preclearance provides several benefits wholly apart from the considerable investment of time and money, which is required for any litigation. Derfner points out three important aspects of administrative preclearance, including (1) that the shift in burden of proof has "resulted in objections to many changes that could not have been judicially enjoined because the burden of proving discrimination could not be met" (580); (2) that the awareness of the preclearance requirement has had a positive effect in preventing covered jurisdictions from attempting certain tactics that Justice Department officials find to be objectionable; and (3) that concentrating the preclearance function in one office has resulted in a growth of expertise in the area of discriminatory voting procedures that aids the judging and analysis of submitted plans.[63]

Judicial Preclearance

If covered jurisdictions choose the judicial route to preclearance, they have the burden of proving any proposed change(s) are not discriminatory in the United States District Court for the District of Columbia (D.C.D.C.), just as they would if they took the administrative avenue to obtain preclearance. The main difference, however, between administrative preclearance and judicial preclearance is that the presentation and decision making unfolds in a court of law rather than through the process of submitting documentation directly to the Justice Department. When

[63] In the early 1970s, the Justice Department identified several types of voting mechanisms or electoral practices that were deemed discriminatory (*i.e.* vote dilution, barriers to gaining public office and hindrances to Black voters). A result of identifying such practices enabled the Justice Department to object to a bulk of these particular types of submitted electoral changes, even though the courts had only begun to recognize the negative racial impact of such systems (Derfner, 1973).

judicial preclearance takes place, the Justice Department serves as the opposing party to the covered jurisdiction in front of a three-judge panel.

A declaratory judgment is brought before a three-judge panel in the District Court for the District of Columbia, while appeals go directly to the United States Supreme Court. If a plan is declared unacceptable by the District Court's three-judge panel, the uncleared changes must still obtain preclearance prior to implementation. Preclearance at this juncture can either be obtained via an additional declaratory judgment via the D.C.D.C. or the covered jurisdiction has the right to submit its revised plan to the Justice Department for preclearance review.

As Section Five allows, covered jurisdictions have a right to sue for a declaratory judgment after the Attorney General rules, and oftentimes in the initial time period following the implementation of Section Five, covered jurisdictions in effect appealed the Attorney General's negative decision which resulted in an objection (see Derfner, 1973).[64] Despite the consequences and circumstances surrounding whether or not a covered jurisdiction chooses to take the judicial or administrative route to preclearance, its redistricting plan must be precleared, administratively or judicially, before the laws are legally enforceable. The covered jurisdiction cannot implement the electoral change until the declaratory judgment action or administrative preclearance is obtained.[65] Regardless of whether covered jurisdictions use the administrative or judicial option, all submitting jurisdictions in covered areas must prove the voting change they

[64] In the first two such declaratory judgments, the United States Attorney General objected to two separate plans, one in Virginia and one in Alabama. In the case of the Virginia plan, the 3-judge district court agreed with the Attorney General and declined to grant the judgment while in the case of Alabama, the declaratory judgment was granted with the Attorney General's consent (Derfner, 1973).

[65] If a plan is prepared by a federal court, it is not subject to preclearance, *Connor v. Johnson*, 402 U.S. 690 (1971); *Texas v. U.S.* 785 F. Supp. 201 D.D.C. (1992). On the other hand, all plans adopted by a legislative body, a state court or a redistricting commission, are subject to Section Five review (see Posner, 1998).

want to implement 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. In states which are entirely covered, all statewide and local redistricting plans must be precleared by the Justice Department or the District Court for the District of Columbia, and in states partially covered, statewide plans must be precleared to the extent that covered jurisdictions are affected, and all local plans in those covered political subdivisions must be precleared (Posner, 1998). Section Five allows the Justice Department (and the federal courts) to keep covered jurisdictions from administering discriminatory plans or from allowing choices tainted with a discriminatory purpose from going into effect (Posner, 1998; see Davidson, 1992).

The Act's Constitutionality

In view of the Act's controversial nature, it was challenged in court shortly after its passage. The state of South Carolina argued that the Act, and in particular Sections Four and Five, violated the U.S. Constitution. South Carolina attorneys reasoned that the Act mandated unnecessary intrusion by the federal government into state's affairs. In *South Carolina v. Katzenbach*,[66] the Supreme Court declared in an eight-to-one majority, the Voting Rights Act of 1965 constitutional in all of the sections challenged, including most of Section Four and all of Section Five. In denying South Carolina's challenge and affirming the constitutionality of the Act, the Supreme Court stated the long history of discrimination in South Carolina was evidence enough of the discriminatory practices carried out by the state. *Katzenbach* held that the Justice Department had the authority, by way of its principal, Congress, to intervene directly in local and

[66] 383 U. S. 301 (1966).

state voting issues through the preclearance process, ensuring that discrimination at the polls would not continue.[67]

South Carolina v. Katzenbach was a major victory for civil rights activists, as it gave an extremely broad reading of the legislative history and congressional objectives related to the Act. The Supreme Court made sweeping statements regarding the Act's purpose and Gluck (1996) argues that two statements in particular, "the Voting Rights Act reflects Congress's firm intention to rid the country of racial discrimination in voting"[68] and "the Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting"[69] distorted the original congressional intent. For in later cases, the Supreme Court seized upon these statements and used them to justify an extremely broad interpretation of Section Five. The ramifications of the Supreme Court's initial decisions are still felt today, as evident in the current political and legal quarrels between opposing viewpoints on the drawing of new districts.

Once the Supreme Court declared the Act constitutional, the legal challenges came in different forms and attacked different features of the Act.[70] Rather than challenging the entire Act, certain sections of the Act were brought under the microscope and questioned, especially Section Five and preclearance; even though *Katzenbach* declared its provisions constitutional.

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[67] The legal history surrounding Section Five makes abundantly clear that the covered jurisdiction bears the burden of proof. The placement of the burden of proof on covered jurisdictions is a significant focus of opposition to the Voting Rights Act [see *Georgia v. United States* (411 U.S. 526 (1973), where the Supreme Court rejected a challenge to the Justice Department's interpretation of the Act.].

[68] 303 U.S. 301 at 315.

[69] *Id.* at 308.

[70] The Court reaffirmed the constitutionality of the Act and Section Five in *City of Rome v. U.S.* 446 U.S. 156 (1980).

The Supreme Court addressed the related issues and construed the scope of Section Five in two important cases: *Allen v. State Board of Elections*[71] and *Perkins v. Matthews*.[72]

Allen v. State Board of Elections was brought to the court's attention by private plaintiffs, and through their actions, the Supreme Court, acting as a principal of the Justice Department, directed its agent to pursue a more aggressive interpretation of the Act and broaden the scope of Section Five preclearance. *Allen* was the first case to latch onto statements made in *Katzenbach*, as the Supreme Court reached its conclusions on a number of key holdings on what it found in the judicial record. *Allen* dealt with three cases from Mississippi and one from Virginia. In each, local citizens brought suit to enjoin enforcement of uncleared voting changes. The state statutes in dispute revolved around several issues related to denying citizens the right to vote on account of race. Because the Supreme Court took a very liberal view on what it meant to vote, uncleared changes were deemed to include procedures for write-in votes, changing from an elected board to an appointed one, changing from district to an at-large voting scheme and changing the rules for independent candidates running in general elections.

The Supreme Court declared that election laws such as these were designed for Section Five preclearance, reasoning Congress devised a plan to reach any alterations in election law by a covered state. Furthermore, the Supreme Court confirmed that Section Five was to receive the broadest possible scope and interpretation that recognized all actions necessary to cast an effective vote.[73] Drawing on the "one person, one vote" principle, the Supreme Court recognized that "[t]he right to vote can be affected by a dilution of voting power as well as by an

[71] 393 U.S. 544 (1969).

[72] 400 U.S. 379 (1971).

[73] 393 U.S. 544 at 565-566 (1969).

absolute prohibition on casting a ballot."[74] The Supreme Court's criticisms of the Justice Department fits with Laughlin McDonald's (1983) and Frank Parker's (1990) assessment; both of whom felt that the Justice Department was not doing all that it could to implement the Voting Rights Act to ensure that minority voters' rights were protected.

Although the Supreme Court looked to the congressional record to make its decision in *Allen*, one wonders whether or not Congress would have been as explicit in defining the scope of preclearance as the federal courts. As one can envision, Congress would probably have left the meaning of the Act to be determined by its agent, the Justice Department. As a result, the federal courts played a more formal role as the Justice Department's principal than Congress. As one of the Justice Department's principals, the Supreme Court directed the Justice Department's activities. After 1969, at the direction of the federal courts, the Justice Department began to object to egregious voting schemes and continued to do so thereafter.[75] *Allen* is an important decision in regards to Section Five of the Act,[76] because the Supreme Court interpreted Section Five's preclearance broadly, applying it to all election changes affecting registration and voting.

This is one of the first instances in which one of the Justice Department's principals, the Supreme Court gave new directions to its agent. The Supreme Court's actions directed the Justice Department to pursue a more aggressive interpretation of the Act and to expand the

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[74] *Id*. at 569.

[75] *Allen* did not directly involve the districting plan in Mississippi, but the Supreme Court's rationale and final decision made it inevitable new district plans would be subject to preclearance under Section Five. The Supreme Court decided in *Georgia v. United States*, 411 U.S. 526 (1973) that that was in fact the case.

[76] The decision in *Allen* underscored the advantage Section Five had, as covered jurisdictions had to show that a new voting law or procedure did not have the purpose and would not have the effect of discriminating on the basis of race or color. Placing the burden of proof on covered jurisdictions was a vital element of the enforcement machinery.

boundaries of preclearance and Section Five. The interpretation of *Allen* by the Supreme Court may have given the Justice Department greater review power, but Thernstrom (1987) argues that the Supreme Court's decision undermines the original objective of the Act. If the original meaning of the Act was to eliminate barriers to voting, to implement and enforce the Fifteenth Amendment and resolve questions related to registration and the mechanics of voting, then the standards articulated in *Allen* are not in line with the intent of the Act (Thernstrom, 1987). Thernstrom argues that *Allen* conveyed a much broader view of what it meant to vote than what is articulated in the Fifteenth Amendment; however, the Supreme Court argued that its decision reiterated Congress' intent of broadly interpreting the right to vote, which included all actions necessary to cast an effective vote.

The Supreme Court declared that the type and scope of electoral changes considered in *Allen* "constitutes a voting qualification or prerequisite to voting, or standard, practice, or procedures with respect to voting within the meaning of Section Five."[77] This opinion resulted in having covered jurisdictions obtain preclearance if they switched from elective to appointed office; changed their voting system from single-member districts to at-large elections; redistricted; annexed surrounding areas; or engaged in any legislative activity that would potentially abridge or deny the right to vote based on race or color (see Canon, 1999). Within a few months of the *Allen* decision, the importance of Section Five was established, and the Justice Department, as an agent of Congress and the federal courts, used the preclearance mechanism to protect minorities against the obvious, as well as subtle, state regulations which had the effect of denying citizens their right to vote.[78]

[77] 393 U.S. 544 at 546.

[78] 393 U.S. 544 at 565 (1969).

The Warren Court stated that a "narrow construction" of Section Five must be rejected,[79] and went on to state that the Act gives broad interpretation to the right to vote, and that as this right is recognized by the Supreme Court, all changes, no matter how small, are subject to Section Five preclearance. This broad interpretation remains in effect for most changes, except court created plans (see Copeland, 1985), as a non-exhaustive list of changes requiring prior approval does not exist, and the bounds of preclearance are expansive because of the varied interpretations by the Supreme Court and the Justice Department.[80]

Gluck (1996) argues that the *Allen* Court's interpretation of the legislative history was cursory, especially as *Katzenbach* did not directly involve Section Five. Although the 89th Congress in 1965 did not intend for every electoral change to be cleared through Washington, the 91st Congress in 1970 was abundantly clear that it approved such a mandate (see Schwartz, 1970). This approval was communicated during the legislative hearings in 1970, which attempted to clarify the issues in which Section Five was to address. Combining the 1970 Amendments and the decision made in *Allen*, it became clear that two of the Justice Department's three principals supported the Justice Department's expansive implementation of Section Five.

If the Supreme Court had taken a narrow view of Section Five instead of the standards adopted and articulated in *Allen* or if Congress had restricted the implementation of Section Five

[79] The application of a narrow construction in the application of Section Five would apply to a class of statutes that specifically dealt with a "test or device" and that all other electoral changes would not fall under Section Five's preclearance requirements. The Appellees argued that the statutory formula requires federal approval for changes in any "standard, practice, or procedure with respect to voting," but that this statement can be read to support either a broad construction (adopted by the Supreme Court) or a narrower one.

[80] See Appendix A.

via the amendment process in 1970, the Act, and Section Five, would have been seriously threatened. Although each part of the Act plays an integral role in its overall effectiveness, Section Five is key to ensuring that the rights of minorities are guaranteed on a continual basis. In conjunction with *Allen* and *Katzenbach*, the 1970 hearings solidified Section Five's importance in combating the discriminatory efforts of southern jurisdictions, which is another instance of the federal courts and Congress providing direction to its agent, the Justice Department.

In *Perkins*, the Supreme Court heard a case from Mississippi involving a change from districts to an at-large system in the City of Canton. The state passed a law in 1962 requiring city aldermen to be elected at-large. In violation of this state law, the City of Canton continued to elect individuals from single-member wards. In 1969, in an attempt to comply with the state law, the city implemented an at-large election system. Local voters and candidates stated the plan had to be precleared, while the City argued it had no other choice than to comply with the 1962 state law. The lower court agreed with the city and did not provide relief, but the Supreme Court overturned the decision, holding that the 1969 changes were a new procedure with respect to voting and one that was different from the procedure in place before its implementation, and therefore required preclearance. In *Perkins*, the Supreme Court did not retreat from *Allen*, and held that this sort of change, as well as annexations and the relocation of polling places, must be precleared pursuant to Section Five.[81]

Thus, Section Five of the Act, as interpreted in *Allen* and *Perkins*, gave the Justice Department further support to preclear election changes in covered states and political subdivisions. Both legal decisions are also examples of how the federal courts act as one of the

[81] 400 U.S. 379 at 387-390 (1971).

Justice Department's principals. The Supreme Court made it clear that preclearance procedures were applicable to not only new laws but also to any state action which altered the election law of a covered jurisdiction in any way. This understanding of the Act and preclearance by the federal courts directed its agent, the Justice Department, to pursue a specific agenda in terms of voting rights policy. The Supreme Court's interpretation of the Act is supported by the legislative history of Congress, another one of the Justice Department's principals, that through the interpretation of Section Five the Justice Department (or the District Court for the District of Columbia) can object to procedures that deny minorities the right to register and vote (see Wright, 1985).

Amendments to the Voting Rights Act of 1965

The 1970 Amendments

Section Five came up for renewal in 1970 and two of the Justice Department's principals considered the Act and its role in the South. Congress recognized the continued need for preclearance, but the Nixon Administration challenged the idea. The Attorney General at the time, John Mitchell, suggested abandoning the trigger mechanism under Section Four, and having the Voting Section of the Justice Department monitor voting changes nationwide. The Nixon Administration's legislative initiative was based on the belief that criteria subjecting southern states to Section Five's preclearance requirement arbitrarily punished southern states and inhibited reforms in the area of voting rights. The Nixon Administration successfully alienated civil rights organizations, which in response pointed out the problems that continued to exist in the South.

In 1970, Congress listened to the Administration's concerns about the Act, but also heard extensive testimony concerning the ways in which the electoral process was manipulated through gerrymandering, annexations, adoption of at-large systems and other structural changes preventing newly registered Black voters from effectively using their ballot.[82] Congress amended Section Five and the other special provisions of the Voting Rights Act, and renewed them for another five years. This particular extension of the Act validated the Supreme Court's broad interpretation of Section Five's preclearance requirements in *Allen*, and directed the Justice Department to continue in its role as implementer of the Act.

Congress also adopted a new coverage formula in 1970, expanding Section Four to include the November 1968 elections to determine which jurisdictions were to be covered. This additional coverage formula was identical to the original formula to determine maintenance of a test or device, and levels of voter registration and electoral participation. This new formula resulted in the partial coverage of ten additional states.[83] As its agent, the Justice Department included this enlarged set of covered states into its review process.

The 1975 Amendments

In 1975, Congress convened for a second time to hear from several groups and individuals about the effectiveness, or lack thereof, of the Act. After extensive testimony about voting discrimination suffered by Hispanic, Asian and Native American citizens, Congress added

[82] The United States Department of Justice, Civil Rights Division, Voting Section website: http://www.usdoj.gov/crt/voting/intro/intro_b.htm.

[83] States captured by the 1970 Amendments included: Alaska, Arizona, California, Connecticut, Idaho, Maine, Massachusetts, New Hampshire, New York, and Wyoming. Half of these states have since bailed out through the provisions found in Section Four of the Act - Connecticut, Idaho, Maine, Massachusetts, and Wyoming.

protections for minority-language citizens.[84] In 1975, the Act was amended to include rights of language minorities for a period of ten years.[85] The 1975 Amendments require covered jurisdictions in which a single language minority is more than five percent of eligible voters, as well as non-covered jurisdictions in which a language minority is more than five percent of the eligible voters, and where the illiteracy rate within the language minority is higher than the national average, to conduct bilingual elections and registration campaigns. Jurisdictions captured by this amendment include numerous states and over 200 counties in several states.[86]

The 1975 Amendments also resulted in the entire state of Texas being captured by the Act, and it alone nearly doubled the number of voting changes submitted to the Justice Department for review (Posner, 1998). Although the language amendments were extended for ten years, the other provisions were extended for only seven years, in anticipation of the 1980 Census. It was decided the Act should be extended for seven years so its 1975 Amendments would cover the redrawing of new districts. The 1975 Amendments also changed Section Four of the 1965 Act, using the 1972 elections as the basis for the formula to determine covered states.

By 1975, virtually all interested parties understood the ramifications of Section Five, and that Congress and the federal courts, for the most part, supported the Justice Department's implementation of the Act, which formed an effective barrier against discriminatory laws being implemented by covered jurisdictions. Some argue, however, that Congress did not initially

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[84] The Voting Rights Act defines 'language minorities' or 'language minority group' as persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage. 42 U.S.C. 1973l(c)(3). The United States Department of Justice, Civil Rights Division, Voting Section website: http://www.usdoj.gov/crt/voting/sec_5/types.htm#note7

[85] These amendments mandated bilingual ballots and oral assistance to those who spoke Spanish, Chinese, Japanese, Korean, Native American languages, and Eskimo languages.

intend for Section Five to evolve in the way that it has. The Justice Department has implemented Section Five in the broadest terms possible, and when Congress had the opportunity to rein in and limit the scope of Section Five, and its agent's implementation of the Act, Congress did not do so.

Instead, Congress, in 1970 *and* 1975, refined the meaning of Section Five and clarified its legislative intent for how the Act should be implemented. In doing so, Congress explicitly endorsed an expansive reading of Section Five by the Justice Department and directed its agent to continue to protect minority voters. This is a clear example of Congress acting as a principal of the Justice Department, as Congress attempts to communicate to its agent what its appropriate role and responsibilities are concerning the Act's implementation. The "message" that Congress sent to its agent, the Justice Department was supported, to a large extent, by the federal courts in a series of critical decisions. The legal decisions that structure the implementation of the Act are explored in Chapter Five.

The 1982 Amendments[87]

Prior to the 1982 Amendments to the Act, there was much discussion about the preclearance requirements of Section Five and if those requirements should be retained, extended or dismantled. This debate was not a new one: Previous to each amendment process, there was

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[86] States that were entirely covered by the 1975 language amendments to the Act include: Alaska, Arizona, and Texas. States that had counties covered by the 1975 language amendments include: California, Florida, Michigan, New York, North Carolina and South Dakota.

[87] During the debate surrounding the 1982 Amendments, Congress decided that Section Two should be amended to prohibit vote dilution. This changed the landscape of submissions, as individuals did not have to prove discriminatory purpose to challenge any new laws. In addition to Section Two, the language minority amendments were extended for another ten years, to 1992, and in 1992 they were extended for an additional 15 years.

heated discussion on the need for Section Five. The 1982 Amendments added key provisions that centered on the debate of whether or not the Act guaranteed equal opportunity or equal results. Prior to the actual congressional hearings, President Reagan believed that the Act had served its purpose and it was time to let the temporary provisions expire; however, political necessity ensured that the Act was extended, as the House and Senate Judiciary Committees reviewing the Act found a continued need for Section Five coverage, but Congress also amended Sections Two and Four of the Act (Erickson, 1995).

Congress determined that the existing federal anti-discrimination laws were not sufficient to overcome the resistance by state officials in order to enforce the Fifteenth Amendment. Congressional committees noted that progress had been made regarding minority political representation and combating racial discrimination at the polls, but comprehended that the concept of equal opportunity in the realm of voting was still not a complete reality for individuals living in states covered by Section Five. Hence, Congress retained the preclearance requirements for 25 additional years in 1982, to 2007. Congress did not change the trigger mechanism to capture additional states under Section Five. It was believed that a more extensive or national preclearance measure would be impractical and perhaps even unconstitutional (see Erickson, 1995).

The 1982 Amendments altered the requirements for jurisdictions to "bailout" of Section Five coverage. Under the original "bailout" formula, the only bailout option in a fully covered state was for the entire state to bailout. The 1982 Amendments allowed any political sub-jurisdiction to bailout if it met certain requirements, regardless of the jurisdiction's original

coverage date.[88] The new standards provided details on how covered jurisdictions could terminate ("bail out" from) coverage under the special provisions of Section Four of the Act.

In addition to the bail out measures, Congress also extended Section Two of the Act, strengthening it in response to the *City of Mobile v. Bolden*[89] decision. When Congress renewed the Act in 1982, it "overturned" the *Bolden* decision, despite objections by the Reagan Administration. Reagan's plan was to have Congress amend Section Two by introducing a "fatal flaw" into the Act. The fatal flaw was designed to address Republican fears related to a sizable Democratic Black vote and consisted of adopting a variety of electoral means to minimize the Black vote, which included utilizing at-large elections and districts re-drawn to dilute black representation. Over Reagan's objections, the fatal flaw was not introduced as Congress made clear that it was unnecessary to prove that any voting practices or procedures were established with a discriminatory intent; rather, Congress barred the implementation of any election laws that had a discriminatory intent *or* had the effect of reducing minority voting power. The idea was that even laws that were not overtly racist or discriminatory on their face were nonetheless illegal.

Therefore, Section Two of the Act is violated if the court finds that a voting practice limits the electoral influence of minorities, even if the procedures are not motivated by race. In addition to this stipulation, Congress attached a proviso stating that the Act did not encourage or

[88] The first bailout action filed under the 1982 bailout standards was brought in 1997 by the City of Fairfax, Virginia. In Virginia, independent cities are the functional equivalent of counties, and possess the same authority over voter registration and elections as counties do in other parts of the South. The Justice Department consented to the declaratory judgment, which was entered on October 21, 1997, for the City of Fairfax. The Justice Department has subsequently consented to bailout in declaratory judgment actions in 1999 by Frederick and Shenandoah Counties, Virginia, which were entered by the District Court on September 9 and October 15, 1999, respectively.

[89] 446 U.S. 55 (1980).

establish the right for certain protected classes to proportional representation. The intent behind these amendments were to undermine the Act's power. It was believed that by introducing a serious of elements that required litigation, then certain electoral changes would be in place for an undetermined amount of time as the issue weaved its way through the court process; but in the end, the Reagan-sponsored amendments did not achieve their desired influence, and instead ensured that the Act was enforced by the federal courts. This was the case because anyone who felt that the enforcement of the Act was directed towards protecting certain political rights and representation could challenge it and go to court, which we see in the 1990s with the *Shaw v. Reno* line of cases.

Despite vigorous resistance from the Reagan administration, Congress also extended Section Five of the Act, an important extension. It is believed that without preclearance, new laws would be enacted and new schemes created to wipe out or at least slow down the progress made since the passage of the Voting Rights Act in 1965. In several instances, election systems were changed voluntarily to comply with the Act, however several were changed under threat of a lawsuit or because of federal court litigation (Posner, 1998).[90] Overall, the combination of the congressional amendments and critical early court decisions allowed the Act to be implemented, and once the Act's constitutionality was validated by other court decisions, it was the

[90] The courts developed the concept of "vote dilution" in the 1970s, which allowed individuals to challenge at-large election systems on the basis that they were discriminatory in nature. In 1982, Congress incorporated that law into Section Two of the Act, reversing the decision in *Mobile v. Bolden* [(446 U.S. 55 (1980)]. This amendment created a "results" test rather than a discriminatory purpose test. The change resulted in hundreds of political jurisdictions covered by Section Five changing to single member district systems.

responsibility of the Justice Department to implement the Act, as directed by its three principals, but mostly Congress and the federal courts.[91]

The Organizational Structure of the Justice Department

As an agent of three principals, the Justice Department has a wide variety of responsibilities related to implementing the Act, in particular Section Five. The Civil Rights Division consists of nine program-related sections that were established with the enactment of the Civil Rights Act of 1957.[92] The Voting Section is a subsection of the Civil Rights Division, and is responsible for the implementation of the Voting Rights Act of 1965, as well as other statutory provisions designed to safeguard the right to vote of the disabled and illiterate, overseas citizens, persons who change their residence shortly before a Presidential election, those persons 18 to 20 years of age and the right to vote for racial and language minorities.[93] The Attorney General protects the rights of voters by bringing lawsuits on behalf of individuals, thereby shifting the burden from local citizens becoming plaintiffs to the United States government, with its immense resources, becoming the plaintiff in voting rights suits. In addition, the Justice

[91] For the most part, the implementation of Section Five was straight forward until the mid-1980s; however, the first round of redistricting following *Thornburg v. Gingles* (1986) created a situation that put Sections Two and Five on a collision course. Through various court interpretations, congressional amendments and Justice Department actions, the two sections, previously treated separately, were incorporated by the Justice Department. The incorporation of Sections Two and Five is discussed in Chapters Five, Six and Seven.

[92] An Assistant Attorney General and Deputy Assistant to the Attorney General head the Civil Rights Division, and the Office of the Assistant Attorney General establishes the general policy direction and has control over the enforcement and management activities in the Division.

[93] The Voting Section is responsible for the enforcement of the Voting Accessibility for the Elderly and Handicapped Act, the Uniformed and Overseas Citizens Absentee Voting Act and the National Voter Registration Act of 1993.

Department is given access to FBI resources to conduct investigations into the use of discriminatory techniques.

In order to protect individuals from discriminatory electoral practices, the Voting Section follows the lead of its three principals, but also relies on several different methods to carry out its responsibilities. These include bringing lawsuits against states, counties, cities, and other covered political jurisdictions to remedy denials and abridgements of the right to vote; defending lawsuits brought against the U.S. Attorney General; reviewing changes in voting laws and procedures under Section Five of the Voting Rights Act;[94] and monitoring election day activities through the assignment of federal observers under Section Eight of the Voting Rights Act.[95] The various sections of the Voting Rights Act needed to be addressed and the suitable resources appropriated in order to tackle the complicated predicament of voting rights policy, but the Act produces a situation that generates inherent tension between the three principal institutions involved with directing and determining the scope and requirements of the Act. A result of the strain and conflict between the institutions involved with implementing the Act, the subsequent consequences of those decisions influenced how the Justice Department implemented the Act.

Immediately after passage of the Act, the Justice Department was focused on registering millions of Blacks in the South and ensuring that discriminatory techniques and devices, such as the literacy tests, were not utilized by covered jurisdictions (see Ball, 1985). Yet, the controversial nature of the Act's intrusion on the constitutional principles of federalism concerned many bureaucrats. Since the level of uncertainty concerning the form in which

[94] Between 15,000 to 24,000 electoral changes are reviewed each year by the Voting Section of the Civil Rights Division.

[95] The United States Justice Department: http://www.usdoj.gov/crt/activity.html#voting.

federal involvement would take was so high, the Civil Rights Division and the Voting Section took a cautious approach to the Act's implementation. Because of the Act's intrusive nature and its directive to alter state-federal relations, Doar (1997) argues that the Justice Department waited for the Supreme Court to determine the constitutionality of the Act and to establish the extent of the federal government's involvement and authority over voting rights, a policy area previously defined at the state's discretion.

As an agent of three principals, the Justice Department was clearly waiting for a directive from one of them before pursuing any actions or moving forward with implementing the Act. There are consequences related to having the Justice Department wait for the federal courts to shape its behavior in terms of how to implement legislation or having Congress pass legislation that clearly outlines the intent and scope of the Act for the Justice Department to implement immediately. The effects of delayed implementation are that there is a pause between passage and actual implementation, and in the case of implementing Section Five, the pause lasted approximately five years while the Justice Department waited for direction from one or more of its principals. The Justice Department did not begin seriously implementing Section Five until the early 1970s (see Ball, Krane and Lauth, 1982). Although the Justice Department did implement other parts of the Act in the years immediately after the Act's passage, Section Five was not a top priority for the Johnson and Nixon Administrations; in fact, the two Administrations attempted to slow down the implementation of large sections of the Act, including Section Five (Ball et al., 1982). As an agent of the White House, the Justice Department's delay in implementing the Act is another example of the agent taking direction from one of its principals, but also of the opportunity for the Justice Department to shirk while it waits for a course of action provided by one of its principals.

Furthermore, because of the general reluctance of the Johnson and Nixon Administrations to implement the Act, the development of administrative regulations on how to implement and enforce the Act, in particular Section Five, was slow (Ball et al., 1982; Ball, 1985). While the Justice Department did develop a set of regulations for the Act's implementation, it did not take an active administrative stance until after 1970, when a series of legal, administrative and political forces motivated the Justice Department to take action in terms of implementing the full extent of Act and Section Five (see Ball et al., 1982).

The notion that the Justice Department acts as an agent with multiple principals has been outlined to a certain degree to this point; however, the treatment of the role of the federal courts has been superficial. Therefore, the next chapter examines the role that the federal courts play in determining how Section Five is defined, including its reach, its application, but also its limitations. To understand fully how the Justice Department implements Section Five, a detailed discussion about the federal courts and how their involvement in the redistricting process goes beyond simply stating the Act's constitutionality; rather, in the intervening years between congressional amendments, the federal courts are the dominant principal in defining voting rights policy, in a general sense, and specifically, the federal courts determine the applicability and scope of Section Five. A result of the federal courts involvement in voting rights policy is that they are an active principal structuring its agent's capacity and responsibilities. Chapter Five lays out the federal courts involvement and explores how they defined Section Five, but also how legal interpretations of the Act have created an environment in which the Justice Department is responding to the federal courts on a regular and on-going basis.

CHAPTER FIVE

THE FEDERAL COURTS & PRECLEARANCE

The judicial process affords those who are determined to resist plentiful opportunity to resist. Indeed, even after apparent defeat resisters seek new ways and means of discriminating. Barring one contrivance too often has caused no change in result, only in methods.

~ U.S. House Judiciary Committee, H.R. Report No. 439 ~

Representative Melvin L. Watt (NC-12) argues that issues related to preclearance and redistricting cannot be discussed without taking the federal courts into consideration, and if someone should know about the courts and redistricting, it is Representative Watt. Representative Watt's North Carolina district was redrawn several times in the 1990s, and the resulting litigation threw the federal court system into a quagmire resulting in more questions than answers regarding the use of race and redrawing district lines. The Supreme Court was called upon to balance two competing constitutional guarantees: 1) no state shall purposefully discriminate against any individual on the basis of race and 2) members of a minority group shall be free from discrimination in the electoral process.

The initial case involving Representative Watt's district, *Shaw v. Reno*,[96] addressed a series of very complex and sensitive issues, including defining the meaning of the constitutional right to vote and the propriety of race-based legislation designed to benefit members of a

[96] 509 U.S. 630 (1993).

historically disadvantaged minority group.[97] Although the legal issues raised in *Shaw* were problematic and challenging, the case was far from being the first in which the federal courts were asked to tackle the complicated issues of race, redistricting, representation and preclearance. When new lines are drawn and then challenged in a court of law, the federal courts are forced to untangle the resulting "mess," but the federal courts may not necessarily have the ability or means to straighten out the challenges presented to them. In practice, the federal courts may only adjudicate cases and controversies involving individuals with standing. Moreover, a review of the major cases involving issues related to preclearance will demonstrate that the federal courts involvement concerns procedural harm or the infringement upon constitutional rights.

Over the last 40 years, the Supreme Court has struggled to classify and characterize the concepts of race and how it should be applied to the issue of voting, equality of voting rights and equal representation (Schwartz, 1988). Through a series of unprecedented cases in the 1960s, the Supreme Court paved the way for the judiciary to consider the weight, dilution and effectiveness of a vote.[98] In considering these notions, the federal courts opened themselves up to answering fundamental questions regarding the meaning of political representation.[99]

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[97] *Id*. at 633.

[98] Vote dilution may be defined as a process where election laws or practices, either singly or in concert, combined with consistent racial bloc voting, cancels or diminishes the voting strength of a minority group (Davidson, 1992).

[99] Several Supreme Court and U.S. District Court decisions defining the context and scope of Section Five are examined in this chapter. Although District Court decisions are not binding on the entire nation, they provide guidance to the Justice Department when preclearing redistricting plans from other jurisdictions, and for that reason a select group of lower court decisions are examined to demonstrate the scope and complexity raised via Section Five.

The federal courts role, as a principal of the Justice Department, is vastly different than the principal-agent relationship envisioned between the Justice Department and Congress and the Justice Department and the White House. The federal courts position takes on new meaning because in its quest to address the complex subject matter of race and representation, the federal courts, namely the Supreme Court, have been responsible for creating the structures and arrangements under which redistricting practices have evolved (Ryden, 1996), but also, the federal courts have developed what little there is in the way of a national law for preclearance. The difficulty with a court-sanctioned course of action instead of a legislative one, is that the rhetoric of federal court decisions over the past thirty-plus years can be characterized as confusing, indecisive and at times, some argue, misguided (see Vandiver, 1998).

A court-sanctioned set of principles for the Justice Department to follow creates a situation where one principal, namely the federal courts, structures the policy domain with little regard for the contractual agreement established by Congress, one of the Justice Department's other principals. To better understand the federal courts involvement in voting rights policy, specifically, preclearance and redistricting, a broad overview of the constitutional rulings and case law is undertaken. This is followed by an examination of voting rights policy, in particular, how the federal courts define the scope of Section Five.[100] Additionally, this chapter includes a discussion about the incorporation of Sections Two and Five of the Act, and concludes with a review of the purpose and effects prongs of Section Five.

[100] See Copeland (1985) and McDonald (1983) for a wide-ranging review of court cases in the 1970s and early 1980s dealing with the Supreme Court's interpretation of Section Five as it is applied to changes other than redistricting.

One Person, One Vote[101]

The federal courts endorsed a new era in voting rights policy in the 1960s, and that policy evolved from the line of "one-person, one-vote" legal decisions. The Supreme Court, after declining repeated invitations to enter the "political thicket" and address concerns and concepts related to voting rights, formally had to deal with the issue when it was placed in its hands in the early 1960s. Prior to the 1960s, even though districts were malapportioned across the country, the Supreme Court refused to entertain a claim that the apportionment of Illinois' congressional districts violated provisions of the U.S. Constitution.[102] The appellants in *Colgrove* complained of vote dilution resulting from legislative inaction over a course of many years. The Supreme Court held that the apportionment plan was a political question to be addressed by the legislature, and therefore was not to be decided by the judiciary.[103] Additionally, because congressional districts were at issue in *Colgrove*, the Supreme Court was not willing to infringe upon a co-equal branch of government, especially as the appellants were asking the Supreme Court to redraw Illinois' congressional districts, and therefore act as if it were the state of Illinois.

In essence, the Supreme Court declared that it could not re-map Illinois' congressional districts because it would cut into the very being of Congress to bring the districts into

[101] Since the earliest days of the republic, state legislatures have been responsible for redrawing district lines for the state legislature and congressional districts after each decennial census. The postwar years witnessed staggering changes, as the nation's population shifted from rural areas to urban areas. The shift in population resulted in questions of representation and misrepresentation (Hacker, 1963). The exodus of population from the rural areas did not elicit a response from many state legislatures, as the controlling rural legislators displayed a marked indifference towards drawing new district lines, thereby failing to carry out their constitutional responsibilities (Guinier, 1995).

[102] *Colgrove v. Green,* 328 U.S. 549 (1946).

[103] Justice Felix Frankfurter stated that it was not the place for the judiciary to decide political questions, as the "courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure state legislatures that will apportion properly…." *Id*. at 556.

conformity.[104] This decision held until 1960, when the Supreme Court was asked to address further questions related to redistricting, but the concern of these questions was directed at a local redistricting plan and not a congressional plan. The local case, *Gomillion v. Lightfoot,*[105] involved a redistricting claim in Tuskegee, Alabama. The change in venue and level of government involved in the redistricting dispute, the Supreme Court argued, permitted its hesitant entry into the "political thicket," the same one it had shunned in the 1940s.

The City of Tuskegee, Alabama, was faced with a determined and highly educated Black community that was gradually successful at registering to vote.[106] In 1957, to respond to the growing number of registered Blacks, the City of Tuskegee asked the Alabama state legislature to redraw the city's boundaries to convert it into a very nearly all-White town. The legislature responded, diluting the voting strength of Blacks by drawing an unusual twenty-eight sided figure, effectively excluding virtually all Black voters from the city while at the same time not removing any White voters (Davis and Graham, 1995; see Taper, 1962). Black citizens of Alabama, who at the time of the redistricting measure were citizens of the City of Tuskegee, brought action seeking a declaratory judgment that Alabama's state law was unconstitutional.

In *Gomillion v. Lightfoot*,[107] the Supreme Court invalidated the state law and declared that the sole purpose for redrawing the boundaries was to disenfranchise Black voters, violating

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[104] The Supreme Court's argument was based on the belief that congressional redistricting problems were purely a "political question," and therefore out of the scope of judicial intervention. Any resolution had to be confided to the legislative branch of government.

[105] see *Gomillion v. Lightfoot,* 364 U.S. 339 (1960).

[106] In the late 1950s, the population of Tuskegee, Alabama, was approximately 5,300 Blacks and 1,400 Whites (Taper, 1962).

[107] 364 U.S. 339 (1960).

the Equal Protection Clause of the Fourteenth Amendment and voting rights as outlined in the Fifteenth Amendment. The Supreme Court's decision reversed the U.S. District Court and U.S. Court of Appeals decisions, entitling the plaintiffs to a full court trial on the merits of their case. Following the decision, United States District Court Judge Frank M. Johnson, Jr., abiding by the principles of the Supreme Court decision in *Gomillion*, ruled that Alabama's Act 140 was unconstitutional and ordered that the City of Tuskegee's boundaries revert back to what they were pre-1957 (Taper, 1962).

Following in the wake of *Gomillion*, a series of court decisions transformed the nature and character of redistricting. As virtually every state legislative district and congressional district was malapportioned, the Supreme Court did not have much choice other than to address the very political issue of redistricting. For the Supreme Court declared in *Gomillion* that:

> When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right…. It has long been recognized in cases which have prohibited a State from exploiting a power acknowledged to be absolute in an isolated context to justify the imposition of an "unconstitutional condition." …that "Acts generally lawful may become unlawful when done to accomplish an unlawful end (*United States v. Reading Co.*, 226 U.S. 324, 357), and a constitutional power cannot be used by way of condition to attain an unconstitutional result" (*Western Union Telegraph Co. v. Foster*, 247 U.S. 105, 114).[108]

The Supreme Court basically said that when a state legislature singles out an isolated segment of society for special discriminatory treatment, it violates the U.S. Constitution.

Although redistricting, *per se*, does not always involve racial gerrymanders, it always involves the reallocation of voters amongst several districts. *Gomillion* discusses how Alabama's legislative redistricting plan deprived the petitioners of their municipal franchise and

[108] *Id*. at 348.

consequently their voting rights, and how the establishment of district lines has the ability to deprive individuals of their voting rights, and voting rights are a federally protected right. Upon further examination, the Supreme Court also touched upon the particular issue of unequal weight in the distribution of votes, though the Supreme Court did not necessarily say it was illegal, it did leave the door open for future challenges against malapportioned districts, stating that affirmative legislative action that differentiates on racial lines lifts the consideration of those lines out of the "political" arena and into the conventional sphere of constitutional litigation.[109] Through a series of decisions and over a period of four years, the Supreme Court decided that equal population was to be the foundation for drawing legislative districts. In doing so, the Supreme Court determined that one person's vote in an election was worth as much as another's.

In 1962, the U.S. Supreme Court held in *Baker v. Carr*[110] that the federal courts had jurisdiction to consider constitutional challenges to districting plans.[111] The state of Tennesse had been operating under a statue that had been untouched for some sixty years, and the complaint alleged a denial of equal protection under the Fourteenth Amendment of the U.S. Constitution. The Supreme Court reversed the U.S. District Court, but did not force the state of Tennessee to redraw its legislative districts. The decision made clear, however, that state redistricting questions were properly within the jurisdiction of the federal courts; another sharp departure from the court's long standing policy of judicial non-intervention.

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[109] *Id*. at 347-348.

[110] 369 U.S. 186 (1962). The state of Tennessee had failed to redraw its legislative districts and due to an enlarged voting population, the districts were grossly malapportioned.

[111] For a detailed discussion of pertinent U.S. Supreme Court case law preceding *Baker v. Carr*, as well as an informative summary of the development of redistricting standards, see Padilla and Gross (1979).

Within a matter of months of *Baker*, litigation was underway in 34 states challenging the constitutionality of state legislative apportionment schemes. The 1950 and 1960 Censuses revealed extreme disparities in the populations of state legislative districts, reflective of the vast population changes and mobility following the Second World War. The Censuses also indicated the failure of legislative institutions to reflect the increasingly large population divide between urban, suburban and rural areas (Baker, 1986). Political tension surfaced between rural and urban legislators; critics regarded the status quo as a problem rooted in one of political legitimacy, and that there was a large gap between theory and practice. Statistics show that six states were apportioned in such a way that 40% of the state's population could elect a majority, while in 13 states one third or less of the population could elect a solid majority of both legislative houses (see Baker, 1986). Population disparities among state legislative districts ranged from as high as 987 to 1 to as low as 2.2 to 1; while congressional districts were less severe, the extremes were still considerable. Nationally, congressional district populations ranged from 177,431 (upper peninsula Michigan) to 951,527 (Dallas, Texas), a ratio of 5.4 to 1. The 20 most populous congressional districts had almost fourteen million people, compared to four and a half million in the 20 least populated congressional districts (see Baker, 1986).

After holding that apportionment plans were justiciable, lower federal courts accepted numerous cases; however, because the Supreme Court did not provide specific standards or criteria for judicial review of state districting in *Baker*, the substantive case law standards governing state legislative and congressional districting followed. Three cases, *Gray v. Sanders*,[112] *Reynolds v. Sims*[113] and *Wesberry v. Saunders,*[114] introduced the federal courts to

[112] 372 U.S. 368 (1963).

[113] 377 U.S. 533 (1964).

new challenges based on the principle of equal population. In *Gray*, Justice Douglas declared: "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing – one person, one vote."[115]

The state of Georgia used an indirect method of nominating candidates through a county-unit system designed to tally votes for statewide offices in Democratic primary elections. Akin to the Electoral College used to elect the U.S. President, nominations were determined by unit votes and not popular votes, and the unit votes for each county went to the candidate with the plurality of popular votes in the county.[116] *Gray* struck down Georgia's county-unit system, stating that all votes must count equally within the political unit from which representatives are chosen. The Supreme Court determined that rural votes counted for more when compared to non-rural votes, and therefore violated the Equal Protection Clause of the Fourteenth Amendment.

In 1964, the U.S. Supreme Court heard the *Reynolds* case, which examined malapportionment in Alabama's state legislative districts, where it was argued the state house and senate were analogous to the federal legislature. *Reynolds* addressed a substantive issue related to the Fourteenth Amendment's Equal Protection Clause and whether or not legislators

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[114] 376 U.S. 1 (1964).

[115] 372 U.S. 368 at 381 (1963).

[116] The Neill Primary Act of 1917 determined the number of county unit votes allocated to each county. This state statue gave each county twice as many unit votes as it had members in the Georgia House of Representatives. The eight most populous of the 159 counties were entitled to three representatives each; the next 30 counties, two each; and the remaining counties one each. The most populist counties were sorely underrepresented, giving the smaller and rural counties a commanding voice in nominating the governor, U.S. Senators, statehouse offices, judges of the court of appeals and justices of the Georgia Supreme Court (Key, 1949).

represented people or geographic regions. The Supreme Court declared that applying the federal analogy of Congress to state legislative chambers was inappropriate.[117] *Reynolds* required states to re-construct legislative districts noting that the "overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State."[118] The Supreme Court's opinion in *Reynolds* set forth fair and effective representation as the ultimate aim of state reapportionment schemes (Ryden, 1996). The *Reynolds* decision began an assault on the constitutionality of multi-member districts and the refinement of what "one person, one vote" meant and firmly established the "one person, one vote" standard (Grofman, et al., 1992b). The same year, in *Wesberry*,[119] the Supreme Court held that congressional districts must be as near as possible to "one person, one vote," as "one man's vote in a congressional election is...worth as much as another's."[120]

The Voting Rights Act was passed the year following *Wesberry*, and the Justice Department, as the federal courts' agent, was responsible for implementing the Supreme Court's new standards when reviewing redistricting plans. Once the federal courts established the need

[117] The difference being the historical significance written into the Constitution, while state senates did not have the same historical setting or basis, as states did not have a "Great Compromise" issue to resolve.

[118] 377 U.S. 533 at 579 (1964).

[119] 376 U.S. 1 (1964).

[120] *Id*. at 8. The Supreme Court treats redistricting plans and population disparity between congressional seats and state legislative seats differently because states draw districts to send individuals to Congress and do so on behalf of the federal government; therefore, there is a strict standard imposed on population deviations at the national level, to ensure the entire nation is represented equally. Several cases in the 1960s, 1970s and 1980s established the grounds to which populations could deviate from within congressional districts: *Kirkpatrick v. Preisler,* 394 U.S. 526 (1969); *White v. Weiser,* 412 U.S. 783 (1973); *Chapman v. Meir,* 420 U.S. 1 (1975); *Connor v. Finch,* 431 U.S. 407 (1977); and *Karcher v. Dagett,* 462 U.S. 725 (1983).

to equalize population among districts, it became necessary for political units to redraw district lines after each Census, which began in earnest following the 1970 Census. With the Supreme Court having decided that redistricting involved the kind of actions that must be precleared under Section Five of the Act, covered jurisdictions subject to Section Five were required to submit their electoral changes, most notably their districting plans for federal review following each Census. In response, the Justice Department developed a list of changes requiring preclearance.[121] Covered jurisdictions challenged Section Five and the electoral changes requiring Section Five preclearance; a consequence of this reality is that the federal courts, operating as a principal of the Justice Department, play a huge role in assisting and directing the development of the list of electoral changes required to be precleared under Section Five.

Voting Rights Policy and the Federal Courts

With each legal challenge to the Act and Section Five, the federal courts are put in the position to interpret Section Five, and the ensuing case law ultimately establishes how the Justice Department implements the Act, as an agent of the federal courts. Therefore, the implementation process changes from decade to decade as the federal courts react to new legal challenges, providing on-going directives to the Justice Department on how the Act is to be implemented, under what circumstances redistricting plans submitted under Section Five should be precleared and what electoral changes need to be reviewed. As an agent of the federal courts, the Justice Department must stay abreast of decisions made by the federal courts, but also determine how those decisions influence its interpretation and implementation of the Act.

[121] That list of electoral changes is not a comprehensive set of possible changes requiring approval under Section Five of the Act. See Appendix A for information on administrative preclearance.

The 1970s: In the Beginning

On November 5, 1971, the State of Georgia submitted to the Justice Department for Section Five preclearance its state house reapportionment plan. On March 3, citing the combination of multi-member districts, majority runoff elections, and numbered posts, the Justice Department objected to the plan. The state legislature then enacted an additional plan, which was submitted on March 15, 1972, and rejected on March 24, 1972, because it did not address the concerns raised in the previous objection. The United States brought suit after the legislature decided against drawing a new reapportionment plan. A three-judge District Court held that the 1972 plan came under the domain of Section Five and issued an injunction.[122]

The State of Georgia claimed that Section Five was inapplicable to the 1972 plan because the Act did not constitute a "reapportionment," and because the 1972 plan did not constitute a change from procedures in force or effect on November 1, 1964, it was not necessarily to obtain preclearance.[123] The District Court disagreed, holding that Georgia's 1972 reapportionment plan had the potential to dilute Black voting power, and constituted a change in the "standards, practices, or procedures with respect to voting," as articulated in *Allen v. State Board of Elections*.[124] The District Court also placed the burden of proof on Georgia to prove the absence

[122] 411 U.S. 526 (1973).

[123] Despite the fact that multi-member districts, numbered posts, and a majority run-off requirement were features of Georgia election law prior to November 1, 1964, the changes that followed from the 1972 reapportionment are sufficient to invoke Section Five, as that section of the Act reaches the substance of those changes (*Georgia v. United States*, 411 U.S. 526 at 531). Concerning when covered jurisdictions had to submit plans for preclearance, the Supreme Court declared that "the Act requires us to use practices in existence on November 1, 1964, as our standard of comparison" [*Presley v. Etowah County Commission*, 502 U.S. 491 (1992)].

[124] 393 U.S. 544 (1969).

of discrimination.[125] The Supreme Court agreed with the three-judge District Court in the Northern District of Georgia. Citing *Allen* and *Perkins*, the Supreme Court ruled that the extensive reorganization of voting districts and the creation of multi-member districts in place of single-member districts in certain areas of the State amounted to substantial departures from previous law.[126]

Georgia v. United States[127] is an important case for a variety of reasons. First, it established the fact that the federal courts were committed to upholding earlier decisions regarding the applicability of Section Five, and served notice to covered jurisdictions that the burden of proof was on them to submit plans for preclearance and demonstrate the plan's non-discriminatory purpose and effect. Second, *Georgia* provided additional clarification on what sorts of changes required Section Five preclearance, such as creating multi-member districts where single member districts use to exist. Third, the decision reinforced the federal court's role as one of the Justice Department's principals, formally approving the regulations that governed the implementation of Section Five, declaring that:

> Any less stringent standard might well have rendered the formal declaratory judgment procedure a dead letter by making available to covered States a far smoother path to clearance. The Attorney General's choice of a proof standard was thus at least reasonable and consistent with the Act, and we hold that his objection pursuant to that standard was lawful and effective.[128]

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[125] Rather than requiring affected parties to bring suit to challenge every changed voting practice, covered jurisdictions subject to Section Five were required to obtain preclearance before proposed changes could be put into effect. The burden of proof is on "the areas seeking relief" [*South Carolina v. Katzenbach*, 383 U.S. 301 at 335 (1966)].

[126] 411 U.S. 526 at 532 (1973).

[127] 411 U.S. 526 (1973).

[128] 411 U.S. 526 at 539 (1973).

Fourth, the State of Georgia argued that the objection to the 1971 plan was untimely, as it occurred after the 60-day administrative deadline. The government countered with the argument that the 60-day clock was re-set when additional information arrived from Georgia and was included in the review. The Supreme Court addressed the varying perspectives on the 60-day clock by stating,

> If the Attorney General were denied the power to suspend the 60-day period until a complete submission were tendered, his only plausible response to an inadequate or incomplete submission would be simply to object to it. He would then leave it to the State to submit adequate information if it wished to take advantage of this means of clearance under 5. This result would only add acrimony to the administration of 5. We conclude, therefore, that this facet of the Attorney General's regulations is wholly reasonable and consistent with the Act.[129]

The Supreme Court argued that the Justice Department regulations were a reasonable administrative effectuation of Section Five, as the Attorney General makes difficult and complex decisions, oftentimes without adequate information.[130] The State of Georgia argued that to allow the Attorney General to promulgate this regulation would open the way to frivolous and repeated delays by the Justice Department. Fifth, because the U.S. Supreme Court disagreed with the State of Georgia's argument, the Supreme Court assured the continuation of electoral submissions to the Attorney General.

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[129] *Id*. at 541.

[130] "In promulgating regulations, the Attorney General dealt with several aspects of the 60-day time limit established by Section Five of the Act. The regulations provide that all calendar days count as part of the allotted period, that parties whose submissions are objected to may seek reconsideration on the basis of new information and obtain a ruling within 60 days of that request, and that the 60-day period shall commence from the time the Department of Justice receives a submission satisfying the enumerated requirements." *Id*. at 540.

By upholding the basic validity of the regulations for Section Five, the Supreme Court, in *Georgia v. United States*,[131] noted that the administrative mode of preclearance was not the only one available; establishing the notion that covered jurisdictions had two avenues with which to obtain preclearance.[132] Moreover, the Supreme Court firmly established the Justice Department's role as an agent of the federal courts, framing how the Justice Department developed Section Five and its administrative regulations. *Georgia* placed the Supreme Court in position to move beyond the acceptability of Section Five to issues of its applicability, but its decision also indicated that the Supreme Court, as the Justice Department's principal, would provide crucial guidance and approval on how the Justice Department was to implement the law. Furthermore, the *Georgia* decision witnesses the Supreme Court directing the Justice Department to pursue an aggressive interpretation of the Act, and that its actions to that point were well within the boundaries of the contractual agreement established by Congress.

In the ensuing years, the Supreme Court, as one of three principals, provided additional guidance, finding that the following changes required Section Five review: annexations;[133] personnel regulations for a county school board;[134] majority vote, numbered posts and staggered

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[131] 411 U.S. 526 (1973).

[132] If a State finds the Attorney General's delays unreasonable, or if he objects to the submission, the State may still enforce the legislation upon securing a declaratory judgment in the District Court for the District of Columbia [*Allen v. State Board of Elections*, 393 U.S. 544 at 549 (1969)].

[133] The following three cases deal explicitly with annexations: *City of Petersburg v. United States*, 410 U.S. 962 (1973); *City of Richmond v. United States*, 422 U.S. 358 (1975); and *City of Port Arthur v. United States*, 459 U.S. 159 (1982).

[134] *Dougherty County Board of Education v. White*, 439 U.S. 32 at 38-39 (1978). A Black employee of the Dougherty County Board of Education announced his candidacy for the Georgia House of Representatives, and shortly after, the Board adopted Rule 58, which stated employees had to take unpaid leaves of absence while campaigning for elective political office. As a consequence of Rule 58, the Black employee, who sought election to the Georgia House on three occasions, was forced to take leave and lost over $11,000 in salary. When compelled to take his third leave of absence, he went to court and alleged

terms;[135] enforcement of neglected state statutes;[136] as well as redrawn districts.[137] The U.S. Supreme Court's involvement gave structure to the coverage elements of Section Five, repeatedly applied *Allen* and *Perkins,* while reaffirming the Act's constitutionality, all the while giving Section Five a broad reading.[138] The line of legal decisions by the Supreme Court indicates its support of the Act and let the Justice Department know that it was monitoring its behavior on a regular and on-going basis.

Nonetheless, for all of the Supreme Court's support of a broad reading of Section Five by its agent the Justice Department, there are at least two cases that are generally viewed as diminishing the Justice Department's enforcement power of Section Five: *City of Richmond v. United States*[139] and *Beer v. United States*[140] (see Days, 1992). These two 1970s cases are examples of the federal courts reining in the actions of its agent; but the two cases also demonstrate that up to this point there was relatively minimal goal conflict between the federal courts and the Justice Department. The federal courts largely approved of the Justice

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that Rule 58 was unenforceable because it had not been precleared under Section Five of the Voting Rights Act of 1965.

[135] *City of Rome v. United States*, 446 U.S. 156 (1980).

[136] *Hathorn v. Lovorn* 457 U.S. 256 (1982). A 1964 Mississippi state statute provided that boards of trustees of municipal separate school districts consist of five members. Since 1960, the Louisville mayor and city aldermen appointed three of the five members of the District's Board of Trustees, and Winston County voters residing outside Louisville elected the other two members. The county officials never implemented the 1964 statute. The Supreme Court ruled that even though the state law predated the Act, Section Five comes into play whenever a covered jurisdiction departed from an election procedure that was in force on November 1, 1964, and therefore the change required preclearance.

[137] *Beer v. United States*, 425 U.S. 130 (1976).

[138] Refer to McDonald's (1983) article for a discussion of other related cases.

[139] 422 U.S. 358 (1975).

[140] 425 U.S. 130 (1976).

Department's implementation of the Act until *Richmond* and *Beer*, which demonstrate instances of goal conflict between the federal courts and the Justice Department. When goal conflict exists between the Justice Department and one of its principals, it is likely that the principal will take the necessary steps to "re-direct" the Justice Department by transmitting new messages on how the Justice Department is to implement the Act. This took place in the case of *City of Richmond*.

The *City of Richmond* case presented the challenge of annexations and whether or not the resulting changes of the city's borders, that also altered the racial composition of the "new" city, were subject to Section Five review. In 1969, the City of Richmond annexed an adjacent area, reducing the proportion of Blacks in the city from 52% to 42%.[141] A reading of Section Five at this point would suggest a drop of 10% in voting strength within the new city limits would negatively dilute the Black vote. The Justice Department felt the reduction in Black voting strength was problematic, for when the city sought preclearance, it was denied.[142]

Prior to annexation, the City of Richmond had a nine-member city council elected at-large. In the post-annexation, the City of Richmond developed and the Attorney General approved, a plan for nine wards, four with substantial Black majorities, four with substantial White majorities, and the ninth with a 59% White, 41% Black division. Black voters opposed the implementation of the annexation plan because it diluted the Black vote. Because of the dispute, the case was referred to a Special Master. The Special Master concluded that the city

[141] 422 U.S. 358 (1975).

[142] Just prior to hearing the *City of Richmond*, the U.S. District Court for the District of Columbia decided *City of Petersburg v. United States* [354 F. Supp. 1021 (1972); 410 U.S. 962 (1973)] invalidating another Virginia annexation plan. The difference between the two cases is that annexation in the City of Petersburg was believed to be for economic considerations while the City of Richmond annexed surrounding areas for fear of Black political control [*City of Richmond v. United States*, 376 F. Supp. 1344 at 1349-1350 (1975)].

had not met its burden of proving that the annexation's purpose was not to dilute the Black vote, and that the ward plan did not cure the racially discriminatory purpose of the plan. Furthermore, the Special Master concluded that the annexation's diluting effect had not been dissipated to the greatest extent possible, that no acceptable offsetting economic or administrative benefits had been shown and that deannexation was the only acceptable remedy to address the Section Five violations. Except for the deannexation recommendation, the District Court accepted the Special Master's findings and conclusions.[143] The District Court concluded that:

> [i]f the proportion of Blacks in the new citizenry from the annexed area is appreciably less than the proportion of Blacks living within the city's old boundaries, and particularly if there is a history of racial bloc voting in the city, the voting power of Black citizens as a class is diluted and thus abridged.[144]

The decision held that if it was found an annexation had no discriminatory purpose, Section Five could be satisfied if the City of Richmond created an electoral system that afforded Blacks political representation that was equivalent to their political strength in the expanded city boundaries (see Days, 1992).[145] The modifications were calculated to neutralize the adverse effect upon the political participation of Black voters, but the Supreme Court articulated that racial minorities were not guaranteed a right to retain their pre-annexation political strength, and it disapproved of any approach that preserved pre-annexation Black voting strength in the post-annexation city.[146]

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[143] *City of Richmond v. United States*, 422 U.S. 358 (1975).

[144] *Id.*, at 359.

[145] *Id*., at 370.

[146] The Court could not approve the "…requirement that the city allocate to the Negro community in the larger city the voting power or seats on the city council in excess of its proportion in the new community and thus permanently to under represent other elements in the community" (*Id*. at 373). Justice White went further, stating, "it would be only in the most extraordinary circumstances that the annexation

The ruling in *City of Richmond* altered the application of the effects standard of Section Five; for when a plan reduces the electoral opportunity of minorities and the reduction can be avoided, this amounts to a violation of the effects prong. However, *City of Richmond* created an exception to this rule. When covered jurisdictions can prove a non-racial reason to reduce the electoral opportunities of minorities, such as because of an annexation, then a reduction in minority electoral opportunity is possible. The decision, however, did ensure that Blacks had the right to single-member districts reflective of their "new" voting strength in any enlarged jurisdiction. As the Justice Department's principal, the Supreme Court, in the *City of Richmond*, directed its agent to incorporate these new standards into its preclearance process.

The *City of Richmond* case created an environment that allowed for annexations, which is a political and economic necessity for many southern communities, but it also created a sense that diluting minority voters was acceptable. The Supreme Court clarified its position on this issue in *Beer v. United States*.[147] While the City of Richmond was annexing adjacent areas, the City of New Orleans was reapportioning its seven council seats. According to the 1970 census, Blacks comprised nearly 45 percent of the City of New Orleans, and since 1954, two of the seven council members were elected at-large, while the other five members were elected from single-member districts. Out of the seven districts, Blacks had never been elected to the city council.[148] After the city council redistricted in 1971, one district was compromised of a Black majority population and registered voters, another district had a Black majority but Whites had a

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should be permitted on condition that the Negro community be permanently over-represented in the governing councils of the enlarged city" (*Id*. at 374).

[147] 425 U.S. 130 (1976).

[148] In one district, Blacks constituted a majority of the population but only about half of the registered voters.

larger number of registered voters while the other three districts had White majorities, both in terms of population and registration. New Orleans went to the Justice Department for preclearance, but following the Justice Department's review and eventual objection, the city filed a declaratory judgment action.

When the effects standard established in *Richmond* was applied to the City of New Orleans in *Beer*, the U.S. Supreme Court held that a jurisdiction seeking judicial preclearance was entitled to a declaratory judgment, but only if the electoral change did not lead to retrogression in minority voting strength. In the case of the New Orleans plan, the redrawing of districts enhanced the position of racial minorities. The Supreme Court initially noted that the new redistricting plan for New Orleans increased the number of Black majority districts from one to two, and granted the city a declaratory judgment.

The Supreme Court reasoned that the purpose of Section Five was to ensure that no voting procedure or change would be made that would lead to retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.[149] The standards established in *Beer* are as follows: (1) electoral changes must enhance or leave unchanged the position of minorities with respect to their effective exercise of the electoral franchise and (2) electoral changes must not discriminate on the basis of race or ethnic group to avoid violating constitutional standards.[150] *Beer* held that if a change satisfies the non-retrogression test and minorities are able to increase their voting strength from their current

[149] 425 U.S. 130 at 141 (1976).

[150] The Supreme Court created the retrogression test while at the same time being concerned about creating a right to proportional representation under Section Five. To remedy this dilemma, the Court emphasized that members of a minority group have no federal right to proportional representation in legislative bodies (*Id.* at 136-137).

levels, the plan is then deemed to be in compliance with Section Five and will not have a discriminatory effect. The retrogressive standard was incorporated into the Justice Department's preclearance process, as its principal, the federal courts, directed.

City of Richmond and *Beer* are viewed as diminishing the enforcement power of the Justice Department via Section Five. This was the case because, operating as one of the Justice Department's principals, the Supreme Court's restrictive reading of the facts shifted the focus of Section Five from whether the proposed change had a discriminatory effect to whether the plan was intentionally discriminatory (purposeful discrimination). This change is subtle. *Richmond* allowed jurisdictions to ensure fair representation was accomplished based on the post-annexation minority population and did not require the retention of the same level of minority voting strength at the pre-annexation levels. Many cities annex surrounding majority White suburbs, and annexing majority White areas tends to have a retrogressive effect on Black voters in the former jurisdiction; however, the Supreme Court ruled that when cities annex surrounding areas *and* abandon their at-large electoral systems in favor of single-member districts, minority representation, post-annexation, should be reflected in the new redistricting plan.

The Supreme Court determined that it was unrealistic for cities to maintain minority representation at the pre-annexation levels, but the Supreme Court made it clear that if covered jurisdictions adhered to the new standards, post-annexation, the plan would be precleared.[151] To reconcile past decisions regarding annexations and current cases at the time dealing with redistricting and retrogression, the Supreme Courts' rationale was that the retrogression standard did not apply in the case of annexation. The Supreme Court stated that cities might need to annex surrounding suburban/rural areas for a host of reasons that had nothing to do with racial

[151] *City of Richmond v. United States*, 422 U.S. 358 at 378 (1975).

politics, as most annexations revolve around fiscal motives and rationales (see Haddad, 1984). As the federal court's agent, the Justice Department incorporated the standard for annexations and retrogression into its Section Five regulations.

Thernstrom (1987) argues that *Richmond* and *Beer* are at odds with each other. Annexations tend to decrease minority voting strength, either via vote dilution or the creation of fewer majority-minority districts; however, a careful reading of the two cases suggests two distinct issues are at hand. O'Rourke (1992) argues that *Richmond* dealt with annexations, and if an annexation increases the White population of a city at the expense of minority electoral opportunities, it is retrogressive; however, by permitting municipalities to engage in annexations and implement electoral systems that reflect the minority's political strength post-annexation, generally through the creation of majority-Black single-member districts, then *Richmond* is a pragmatic, but narrow reading and interpretation of Section Five, which *Beer* resembles.[152]

The 1980s: More of the Same

For the most part, the legal decisions of the 1980s reflected the legal decisions of the 1970s. The federal courts continued to be involved in addressing the applicability of Section Five and the agent's preclearance behavior as it relates to minority voting strength. In response to each case, its agent, the Justice Department, responded to the legal decisions by incorporating the standards articulated by the federal courts into its Section Five regulations and the implementation of the Act.

[152] In instances where an annexation increases the percentage of the White population, decreasing the percentage of minorities and already employs single member districts, Black political influence is decreased. Enhancement would only come in the form of changing the number of individuals elected to the board or council.

The first case involving questions surrounding Section Five and preclearance was decided in the 1980s, but it began in 1966. The case of *City of Rome v. United States*[153] involved the city of Rome, Georgia, which changed its electoral system, including: provisions for majority vote requirements; numbered posts within each of the three wards (reduced from nine to three); staggered terms; and residency requirements. In addition, the city made 60 annexations that were not submitted for preclearance.

Following the 1975 Amendments to the Act, Rome submitted the annexations and the 1966 electoral changes for preclearance, but the Attorney General declined to preclear the electoral changes, concluding that the City of Rome's electoral changes, with a predominately White population and the existence of racial bloc voting, would deprive Black voters of the opportunity to elect a candidate of their choice. After continued disagreement with the Justice Department, the city and two of its officials filed a declaratory judgment action in the United States District Court for the District of Columbia, seeking relief from the Act based on a variety of claims. A three-judge court rejected the city's arguments, finding that the disapproved electoral changes and annexations had a discriminatory effect.[154]

The importance of the *City of Rome* is that the Supreme Court upheld preclearance for new voting standards, even if the changes did not have a racially discriminatory effect. The Supreme Court also upheld several other important provisions of the Act and its purpose, including the bailout procedures,[155] the 1975 Amendments[156] and Congress' power to enforce the

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[153] 446 U.S. 156 (1980).

[154] *Id*. at 157.

[155] The Supreme Court declared Rome could not use Section 4(a)'s "bailout" procedure because the city failed to meet the necessary requirements, as Section 4 (b)'s coverage formula had never been applied to it. The Court went on, stating Georgia was designated a covered jurisdiction in 1965, and the

Civil War Amendments through "proper legislation."[157] More importantly, the *City of Rome* upheld critical parts of Section Five, including the 60-day time period[158] and the overall usefulness of Section Five.

The Supreme Court found no evidence that the preclearance requirement and related regulations had outlived their utility. In addition, the Supreme Court found no merit in the argument put forth by the City of Rome because the city had not held elections since 1974 because the city was waiting on the Justice Department for preclearance. The Attorney General's refusal to preclear the electoral changes did not necessarily prevent the city from conducting its elections under its prior electoral scheme, and it was the city's fault for not holding elections. It was not the operation of the Act that was at fault.[159]

The significance of the *City of Rome* is that it validated the 1975 Amendments. The case also provided support for the overall effectiveness of Section Five at preventing the implementation of discriminatory electoral practices or procedures. *City of Rome* created an important historical record that was used to substantiate the 1982 Amendments, which extended

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municipalities of that State must comply with the preclearance procedure, and therefore any "bailout" action to exempt the city must be filed by the State.

[156] The Supreme Court looked to the legislative record, arguing, "Congress plainly intended that a voting practice not be precleared unless both discriminatory purpose and effect [were] absent. Furthermore, Congress recognized this when, in 1975, it extended the Act for another seven years" [*City of Rome v. United States*, 446 U.S. 156 at 158 (1980).

[157] The Supreme Court declared that the Act did not violate principles of federalism and legislation passed by Congress to enforce the Civil War Amendments, and as such, the Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty. Accordingly, Congress had the authority to regulate state and local voting through the provisions of the Act (*Id*. at 158).

[158] The Supreme Court stated that under the Attorney General's regulations for preclearance, electoral changes are to be decided within 60 days of their receipt, and that the clock starts anew when the submitting jurisdiction submits additional and/or supplemental information.

[159] 446 U.S. 156 at 159 (1980).

Section Five for an additional 25 years. *City of Rome* also instructed the Justice Department that its regulations were still "good law" and that its implementation of such continued to be appropriate within the contractual agreement established by its principal, Congress, and the framework maintained by its other principal, the federal courts.

Following the 1980 Census, the *City of Rome* decision reinforced the importance of Section Five review at a time when states were reapportioning and redrawing new districts. But more importantly, the federal court's involvement reinforced criticisms leveled at the Justice Department. The Supreme Court instructed its agent, the Justice Department, to do more, within certain limits. As discussed in Chapter Two, McDonald (1983) and Parker (1990) felt that the Justice Department was not doing all that it could do in terms of implementing the Act. When federal court decisions admonished the Justice Department to do more, as well increase the number of electoral changes needed to be precleared, the combination of factors recognized the importance of the Act but also the level of and lack of enforcement carried out by the Justice Department. As the Justice Department's main principal, the Supreme Court stepped in and reaffirmed its commitment to Section Five and continued to direct the Justice Department and its implementation of Section Five. The federal courts created the Justice Department's regulations, largely in response to the set of electoral changes requiring preclearance. In fact, the federal courts continually provide the Justice Department direction as to its responsibilities and the scope of Section Five.

Seven years following *Beer* and just three years after the *City of Rome*, the Supreme Court faced the issue of Section Five preclearance and retrogression in *City of Lockhart v. United States.*[160] Prior to 1973, a commission consisting of a mayor and two commissioners, all serving

[160] 460 U.S. 125 (1983).

the same 2-year terms, governed Lockhart, Texas. These offices were filled in even-numbered years through at-large elections using a "numbered post" system whereby the two commission posts were designated by number, and each candidate specified the post for which he or she sought election. In 1973, the city adopted a new charter whereby a mayor would govern with four councilmen serving staggered 2-year terms, with the mayor and two councilmen being elected in even-numbered years through at-large elections using the numbered-post system and the other two councilmen being similarly elected in odd-numbered years. Forty-seven percent of the city was Mexican American, but as of 1977, less than 30% of the registered voters were Hispanic.

The Justice Department precleared the changes except for the at-large elections, the numbered-post system and staggered terms for councilmen. The City of Lockhart filed suit under Section Five in the District Court for the District of Columbia, seeking a declaratory judgment that the remaining changes did not have the purpose or effect of denying voting rights to Mexican Americans. The Supreme Court held that numbered posts and staggered terms had the potential to discriminate against protected minorities, and when the Supreme Court found evidence of a history of racial bloc voting in the city, the use of such tactics increased the likelihood of discrimination at the polls.

In *Lockhart*, the U.S. Supreme Court applied the retrogression test developed in *Beer*.[161] The Supreme Court determined (1) there may be times when new district plans do not improve the level of minority voting strength: (2) that voting changes did not always have to improve the position of minority voting strength; and (3) that as long as there was no evidence of

[161] The retrogression test used in *Lockhart* for Section Five preclearance is very similar to the intent test used to determine Section Two violations.

retrogression, these plans were to be granted preclearance.[162] The Supreme Court held that since the new plan did not increase the degree of discrimination, it was entitled to Section 5 preclearance.[163] The retrogression test established in *Beer* and reaffirmed in *Lockhart* remains a cornerstone of Section Five.[164] Despite the odd holding in *Lockhart*, however, the Justice Department incorporated the new retrogression standards into its review of redistricting plans, and did so as an agent of the federal courts.

Section Five is designed to halt actual retrogression in minority voting strength and to prevent covered jurisdictions from implementing electoral schemes that diminish the voting strength of racial and language minorities, but covered jurisdictions have no obligation to enhance or maximize minority political strength. The Supreme Court's directive in 1983 to the Justice Department shadowed the preclearance environment into the late 1980s and early 1990s. As one of its main principals, the Supreme Court gave the Justice Department a set of clear instructions detailing the parameters of Section Five. Although there was no conflict amongst the Justice Department's principals, one wonders whether Congress would have been as explicit in defining the scope of Section Five and preclearance as the federal courts have been.

As demonstrated in Chapter Four, congressional action towards the Act in the form of the amendment process was not geared towards defining Section Five's boundaries or elaborating on what preclearance meant. Rather, the three opportunities that Congress had to act as a directing

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[162] 460 U.S. 125 at 135 (1983).

[163] *Id*. at 134.

[164] *Id*. at 125. *Lockhart* is a seemingly odd holding, but is a function of the limited remedy available under Section Five (see Butler, 2002), stating, even if a change perpetuates existing discrimination, the plan is entitled to preclearance, and is denied preclearance only when it actually increases the degree of discrimination [*City of Lockhart v. United States*, 460 U.S. 125 at 133-136 (1983)].

principal of the Justice Department was directed towards maintaining the status quo. Congress' lack of direction resulted in relinquishing a large degree of power and authority to the federal court's, which then determined the Justice Department's responsibilities and limitations. In the 1970s and 1980s, the Justice Department's principals, mainly in the form of the federal courts and Congress, focused most of their attention on matters concerning definitional concerns, the scope of Section Five and its application; however, the 1990s did not follow the same patterns. The 1990s can be characterized as a time when the Justice Department began implementing the Act in a way that disagreed with the Supreme Court's interpretation of Section Five and the Act, creating a situation of goal conflict between principal and agent, and the principal reined in its agent's behavior. With some intervening actions by the White House, the Justice Department implemented a set of standards in the early 1990s; however, by mid-way through the 1990s, the courts signaled an end to its agent's permissive Section Five standards.

The 1990s: Stuck Between a Rock and a Hard Place – Race is But Just One Factor[165]

During the 1980s, Section Five and the preclearance provision received scant attention from the federal courts, as Section Two of the Act occupied most of their time.[166] During the

[165] Occasionally, redistricting cases examine Section Two and Section Five issues at the same time; however, the two sections of the Act work independently of each other. A change that has been precleared under Section Five may still be challenged under Section Two. Consequently, Section Two cases and issues are discussed only if they are related to Section Five concerns.

[166] Section Two of the Act protects against vote dilution by prohibiting jurisdictions from imposing voting qualifications or procedures that result in the denial or abridgement of the right to vote. Section Two is applicable nation-wide. Although interrelated, Sections Two and Five are very different. To obtain Section Five preclearance, the proposed voting change must be approved prior to its enforcement, whereas a Section Two challenge is brought against an existing electoral practice or procedure. Some important Section Two cases include: *Major v. Treen*, 574 F. Supp. 325 (E.D. La) (1983); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Armour v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991); *Voinovich v. Quilter*, 507 U.S. 146 (1993); *Grove v. Emison*, 507 U.S. 25 (1993); *Shaw v. Reno*, 509 U.S. 630 (1993) [not initially brought as a Section Two suit, but had major implications for Section Two later]; *Johnson v.*

1990s round of redistricting, however, Section Five and preclearance caught everyone's attention and the legal landscape changed in profound ways. Through the interpretation of the Act and related court cases, the Justice Department and southern state legislatures believed they had an affirmative duty to maximize the voting strength of minorities, and that this could be accomplished through the creation of single-member majority-minority districts (see Wickline, 1998).

Commonly referred to as a racial gerrymander,[167] this technique was used to increase minority representation at all levels of government. Prior to *Georgia v. United States*, the Justice Department had deferred to the states on the creation of majority-minority districts, and racial gerrymandering was used as a means to either eliminate or severely hamper minority political participation and to circumvent the Fifteenth Amendment.[168] The Supreme Court had approved the drawing of majority-minority districts in *United Jewish Organizations v. Carey*,[169] where the court upheld New York's use of race to enhance minority representation in the state legislature.[170]

DeGrandy, 114 S. Ct. 2647 (1994); *Shaw v. Hunt*, 116 S. Ct. 1894 (1996); and *Bush v. Vera*, 116 S. Ct. 1941 (1996).

[167] A gerrymander is defined as dividing an area into political units while giving special advantages to one group (Merriam-Webster's Collegiate Dictionary). It can also be defined as dividing a state into districts for the purpose of choosing representatives in an unnatural and unfair way, with a view to give a political party an advantage over its opponents (Webster's Revised Unabridged Dictionary). When district boundaries are drawn using race as the guiding principle, the districts are known as a racial gerrymander.

[168] See the discussion on *Gomillion v. Lightfoot* earlier in this chapter.

[169] 430 U.S. 144 (1977). *United Jewish Organizations v. Carey* is referred to as *UJO.*

[170] New York submitted its state plan for preclearance and the Justice Department objected to the plan, stating it appeared to dilute minority voters. State officials responded by re-drawing the plan, taking into consideration Black and Hispanic voters. The Justice Department approved this new plan, but a group of Hasidic Jews sued, alleging that their vote was diluted, arguing that their was "no reason other than race" that the community was divided between two districts. (*Id*. at 151-154).

In *UJO*, the Supreme Court attempted to provide states with an outline on how to proceed in drawing districts in compliance with the Act and Section Five. The Supreme Court ruled that to satisfy the Act's requirements, states could employ districting principles such as compactness and population equality while at the same time securing districts that would afford fair representation to minority groups who were sufficiently numerous in a residential area.[171] Three of the eight participating judges found the intentional use of race not necessarily unconstitutional if the state did not participate in vote dilution.[172] The plurality decision in *UJO* made clear that the state could consider race when redrawing district lines.[173] This particular line of reasoning remained dormant until the 1990s round of redistricting.

The legal decisions of the 1980s played a role in the 1990s round of redistricting and beyond. Parker (1996) argues that several actors were involved in the creation of majority Black districts, but it was the result of the Supreme Court's decision in *Thornburg v. Gingles*,[174] a Section Two case, that instigated the creation of majority-minority districts in the early 1990s.[175] *Gingles* defined Section Two of the Act, and set the standards for bringing private actions under Section Two of the Act. The criteria for the *Gingles* test was based on a Senate report, listing factors that should be considered to determine discriminatory effect under amended Section

[171] 430 U.S. 144 (1977).

[172] *Id*. at 165.

[173] *Id*. at 155-165.

[174] 478 U.S. 30 (1986).

[175] In general, Section Two cases arise when plaintiff's challenge long established at-large or multi-member electoral systems and other similar arrangements that are not subject to Section Five review. Section Two directs courts to ask whether an electoral system has a discriminatory *result*, and applies nationwide, while Section Five considers discriminatory *purpose* and *effect*, but only in jurisdictions captured by Section Four, as amended. The Court recognized the right of private citizens to bring judicial action, and these private actions are known as "coverage" suits (see Lamar, 1988).

Two, and provided specific criteria required to raise a Section Two claim against multi-member districting schemes (see Kilgore, 1997).[176] *Gingles* set out three preconditions for proving a Section Two violation: 1) can a majority-minority district be drawn; 2) are minority voters politically cohesive, defined as a voting bloc; and 3) are minority-preferred candidates usually defeated by White bloc voting?[177] All three factors must be satisfied affirmatively for a majority-minority district to be drawn to avoid violating Section Two of the Act.

Although *Gingles* did not involve Section Five, the court's decision upheld Section Two of the Act, and led to the eventual incorporation of Sections Two and Five, which is discussed later in the chapter. *Gingles* was interpreted to mean that majority-minority districts should be created where additional ones could be created. A three-judge district court supported this interpretation of *Gingles* in *Jeffers v. Clinton*,[178] which was summarily affirmed by the United States Supreme Court (see Parker, 1996).[179] Following the 1990 Census, seven state legislatures, and federal and state courts in an additional seven states, drew the maximum number of majority-minority districts wherever humanly possible. The number of congressional majority-minority districts doubled from twenty-six to fifty-two, increasing the Congressional Black Caucus 50-percent and the Hispanic Congressional Caucus 38-percent.

The interpretation of Section Two, established in *Gingles*, and combined with the 1982 congressional amendments to the Act, resulted in placing Sections Two and Five on a collision

[176] 478 U.S. 30 at 48-49 (1986).

[177] *Id*. at 56.

[178] 730 F. Supp. 196 (E.D. Ark. 1989), aff'd mem., 498 U.S. 1019 (1991).

[179] Again, *Jeffers v Clinton*, did not involve Section Five, since Arkansas is not subject to that provision; however, this is another instance when the courts uphold one section of the Act which then influences how another section, most notably Section Five, is implemented.

course. In order to maneuver legally between the requirements of both Sections Two and Five, the Justice Department (and covered jurisdictions) thought that they had to draw the maximum number of majority-minority districts following the 1990 Census. It was believed that the drawing of majority-minority districts would protect states from Section Two liability. Consequently, the Justice Department refused to preclear plans submitted from several southern states when alternative proposals were available which increased the level of minority representation, even though the submitted plans were not retrogressive or in violation of other sections of the Act.[180] In response to these objections, state legislatures drew new plans that included additional majority-minority districts. When those new plans were submitted to the Justice Department for preclearance, they were approved.[181] Although these plans were approved, newly drawn districts took on bizarre shapes and the Justice Department's approval signaled they had little concern if majority-minority districts were compact or did not follow other traditional districting principles.

Several plaintiffs challenged the newly drawn majority-minority districts in federal court on the grounds that their constitutional rights, in relationship to the Equal Protection Clause of the Fourteenth Amendment, were infringed upon. An important case in the long list of cases to address the issue was *Shaw v. Reno.*[182] *Shaw I* specifically dealt with how district lines and majority-minority districts were drawn, which was not adequately addressed by the Supreme

[180] "Redistricting Law 2000" from the National Conference of State Legislature's National Redistricting Seminar in Denver, Colorado, March 4-6, 1999. Available on-line at http://www.ncsl.org/programs/legman/elect/redist.htm.

[181] See *Johnson v. Miller*, 864 F. Supp. 1354 (1994), stating that the Justice Department encouraged states to maximize the number of majority-minority districts.

[182] 509 U.S. 630 (1993), hereinafter *Shaw I*.

Court in *UJO*. Because of the changing politics surrounding redistricting and since its decision in *UJO* in 1977, the Supreme Court departed from the lenient standard established in *UJO*, and created a new standard for covered jurisdictions to follow in order to obtain preclearance and not violate the U.S. Constitution.

In a five-to-four decision, the Supreme Court stated that when a legislative redistricting plan is extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, then the same principles applied to other race-based statutes need to be applied.[183] The Supreme Court applied strict scrutiny to the plan and declared that once plaintiffs successfully demonstrate that a redistricting plan is racially gerrymandered, the state must show that the plan is narrowly tailored to satisfy a compelling government interest.[184] *Shaw I* is an example of one of the Justice Department's principals stepping in and reining in the behavior of its agent. Although not tied to preclearance and Section Five, *Shaw I* set in motion the decision in *Miller v. Johnson,*[185] which changed the direction of the Justice Department's preclearance behavior regarding redistricting plans and its interpretation of Section Five. Parker (1996) argues that the *Shaw v. Reno* and *Miller v. Johnson* decisions indicate that the Supreme Court was determined to eliminate majority Black and majority Hispanic districts, but also demonstrates how one of the Justice Department's principals altered its own interpretation of Section Five, and subsequently the Justice Department's implementation of such.

[183] *Id*. at 641-647.

[184] *Id*. at 658.

[185] 515 U.S. 900 (1995).

In *Miller*, the District Court lambasted the Justice Department for its maximization policy[186] and limited the scope of Section Five for the first time, holding that in some instances a Justice Department Section Five preclearance mandate will not supply a jurisdiction with a compelling state interest to engage in race-based redistricting (see Way, 1996).[187] The Supreme Court's decision in *Miller* restricts its agent, the Justice Department, from using Section Five to maximize the number of majority-minority districts drawn in the absence of any violation of the Act. *Miller* is also important because it signaled that all legal challenges to future Section Five objections would be subject to strict scrutiny. The Supreme Court, acting as the Justice Department's principal, clearly demonstrates its unhappiness with its agent's behavior, stating that the Justice Department overreached its authority under Section Five by demanding that southern states draw majority-minority districts wherever possible.

Following *Lockhart*, the Supreme Court tended to defer to the Justice Department, but *Miller*, along with *Beer* and *Lockhart*, are three instances in which the Supreme Court did not apply its usual level of deference towards its agent, the Justice Department. Prior to the 1991 round of redistricting, if covered jurisdictions simply maintained the status quo in terms of the number of majority-minority districts, these actions would have satisfied Section Five under the Supreme Court's interpretation, absent any showing of purposeful discrimination. The Supreme Court's new policy message to its agent, the Justice Department, however, stated that earlier redistricting plans that did increase the number of majority-minority districts were to be accepted

[186] 115 S. Ct. 2475, 2492-93.

[187] *Miller v. Johnson* 115 S. Ct. 2475 at 2491 (1995).

under Section Five, and that if a covered jurisdiction failed to maximize the number of majority-minority districts it did not by itself constitute a Section Five violation.[188]

The Purpose and Effects Prongs of Section Five

U.S. Supreme Court cases dealing with Section Five issues are not merely engaged with generating a list of voting procedures to be precleared; rather, the federal courts are concerned with "the reality of changed practices as they affect Negro voters."[189] One could argue that the legal standards for Section Five review are therefore broad, so as to take into consideration every aspect of voting. As such, the legal standards used to define Section Five and the types of electoral changes requiring preclearance are extremely fluid, and change over time in reaction to court cases. Each electoral change, if precleared via the Justice Department, must be reviewed in light of new legal precedents and this occurs on a continuous basis. For instance, the Supreme Court dealt with annexations, the relocation of polling places, the implementation of past laws and the matter of retrogression in a matter of a few years, with little time for reflection. A consequence of decisions made by the federal courts is that the courts are placed firmly in a position of principal to clarify and define two important features related to Section Five: the purpose and effects prongs. The purpose and effect prongs of Section Five are the touchstone in determining which plans should be granted preclearance, and the majority of redistricting plans are objected to based on the purpose prong of Section Five, which is established through a study of the past and present reality of the jurisdiction and the political process (see Posner, 1998).[190]

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[188] *Id*. at 2493.

[189] *Georgia v. United States*, 411 U.S. 526 at 531 (1973).

[190] See also *Thornburg v. Gingles*, 478 U.S. 30 at 45 (1986).

The Purpose Prong of Section Five

The objective of analyzing submitted plans is to determine whether or not there is a discriminatory purpose in the creation of a plan submitted for preclearance. The purpose test looks for instances when new redistricting plans minimize the electoral opportunity of minorities for discriminatory reasons. The Supreme Court laid out the framework for evaluating whether plans have an unconstitutional discriminatory purpose, thereby violating the Equal Protection Clause, in *Arlington Heights v. Metropolitan Housing Development Corp*.[191] *Arlington Heights* states that:

> determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action – whether it 'bears more heavily on one race than another' – may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.[192]

When the Justice Department reviews a redistricting plan, absent a pattern of discriminatory purpose, then it determines the racial influence of the plan; however, the effect alone of a plan is not determinative of racial discrimination. Other evidence, such as the historical background of the decisions, and whether or not it reveals instances of a series of official decisions taken for invidious purposes, must be considered before a plan can be precleared or not. The specific sequence of events leading up to an actual challenge might also shed some light on the purpose(s) behind the plan's formulation. Departures from normal procedural and substantive actions might provide evidence that discriminatory purpose is playing

[191] 429 U.S. 252 (1977).

[192] *Id*. at 266.

a role in the plan's formulation, particularly if the factors usually considered important by the decision makers strongly favor a decision contrary to the one reached. In addition to the history and procedural and substantive aspects of the plan's implementation, the legislative record may reflect instances of inflammatory statements by legislators, but also the minutes of meetings and related reports provide further evidence to analyze for discriminatory purpose. The Supreme Court stated that this summary of evidence is not exhaustive, but are "subjects of proper inquiry in determining whether racially discriminatory intent existed," and should be part of the investigation to determine discriminatory purpose, by the Justice Department.[193]

The Effects Prong of Section Five

The second prong of Section Five is related to the effect of the new plan, and whether or not the implementation of the plan will have a racially discriminatory effect. In *Beer v. United States*,[194] the Supreme Court interpreted the effects prong of Section Five, stating that it requires covered jurisdictions to demonstrate that any change in election procedures will not lead to retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.[195] Under the effects test, the Supreme Court analyzes the influence of new voting practices against a baseline of minority voting strength. The benchmark for comparison tends to be the existing plan or practice. To determine the effect of a new plan, its minority voting strength is measured against the old plan, and if the new plan improves the ability of Blacks to elect a candidate of their choice, it is determined to be free from discriminatory effect.

[193] *Id*. at 266-271.

[194] 425 U.S. 130 (1976).

[195] *Id*. at 141.

Thus, a legislative reapportionment plan that enhances the position of racial minorities can hardly have the "effect" of diluting or abridging the right to vote on account of race within the meaning of Section Five.[196] In *Beer*, the Supreme Court issued a decision that stated that discriminatory effect is evident when the electoral opportunities of minorities are reduced, and if the reduction is avoidable this constitutes a discriminatory effect, and therefore violates the Constitution.[197] Although the Justice Department relied on the Supreme Court's opinion in *Beer* to formulate its regulations which judge retrogression using the effects prong, the *Bossier Parish II* Court decided that retrogression, not discrimination, was the proper standard to evaluate the purpose prong of Section Five.[198]

The Incorporation of Sections Two & Five

As one of the Justice Department's principals, the Supreme Court made clear in the mid-1990s that the maximization of majority-minority districts was not required under the Act. The Justice Department's so-called maximization policy and changes in the interpretation of Section Five came about, to a large degree, as a result of the inclusion of Section Two during Section Five reviews.[199] In the mid-1980s, following the 1982 Amendments to the Act and the *Gingles*

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[196] *Id*. at 141.

[197] The ban on retrogressive effects was established in *Beer v. United States*, 425 U.S. 130, 141 (1976) while retrogressive purpose was clarified in *Reno v. Bossier Parish* School Board, 528 U.S. 320, 341 (2000).

[198] *Bossier Parish II*, 120 S. Ct. 866 at 871 (2000).

[199] The Supreme Court did not incorporate Section Two of the Act with Section Five, and does not necessarily prohibit future incorporation but it does prohibit the Justice Department from using preclearance to force jurisdictions to remedy Section Two violations, at this time (see *Bossier Parish* cases). A totality of the circumstances standard suggests that there is no single deciding factor, that one must consider all the facts, the context, and conclude from the whole picture whether there is probable cause of discrimination.

decision, the Justice Department thought it was required to deny preclearance to submitted redistricting plans if it found a Section Two violation. During its Section Five reviews, the Justice Department began to deny preclearance to plans that violated Section Two.

The incorporation of Sections Two and Five occurred in the wake of *Gingles*, after the Supreme Court heard several redistricting challenges, which resulted in an alteration of the landscape related to redistricting practice and litigation. The tension between Sections Two and Five lies in the fact that the Supreme Court's attempts at removing race from the political process of redrawing district lines, which conflicts with the legal precedent established in many vote dilution cases, which oftentimes deal with race. Section Two cases, in particular, where race is found to play a significant role in how voters make decisions, forces the government to be color-blind when voters are not (Wickline, 1998).

After the 1982 amendments to the Act, the Justice Department's administrative guidelines for Section Five declared that a non-retrogressive change would be denied preclearance if it was so discriminatory as to constitute a clear violation of Section Two (see Butler, 2002).[200] The Justice Department based its position about Sections Two and Five on "directives" it received from the federal courts, one of its three principals. The directives suggested that the retrogression and dilution language found in *Beer* and the totality-of-the-circumstances test articulated in the *Whitcomb-White*[201] line of cases made clear that all discriminatory plans should be denied preclearance.[202] The rationale behind the Justice Department's incorporation of

[200] See 28 C.F.R. 51.55(b)(2) (1996).

[201] *Whitcomb v. Chavis*, 403 U.S.124 (1971) and *White v. Regester*, 412 U.S. 755 (1973). See Canon (1999) and Davidson and Grofman (1994) for a discussion about Section Two and vote dilution.

[202] See *Bossier Parish I*, 520 U.S. 471 at 504 (1997). The Justice Department reasoned that Sections Two could be incorporated into Section Five because Section Two had adopted the same standards (see Butler, 2002).

Sections Two and Five is that it helps effectuate broad remedial purposes of Section Five, and that this "corrective" measure ensures that discriminatory electoral practices or procedures, including redistricting plans, are not implemented in covered jurisdictions.

When Section Five administrative regulations are applied to a submitted electoral change and the Justice Department finds no proof of discriminatory purpose behind the new procedures, then those same electoral changes are evaluated under a different set of guidelines to determine if the plan is completely free of discrimination (*i.e.* Section Two principles). When the Justice Department collapsed Section Two into Section Five reviews, any submitted redistricting plans were evaluated for preclearance based on the parameters of Section Two *and* Section Five. The incorporation of Section Two into Five only occurred after the initial Section Five review was complete.

Way (1996) argues that this two-prong approach, first Section Five review and then the application of Section Two principles, was necessary because Section Two suits did not provide adequate coverage to deal with discriminatory changes. Section Two challenges must be brought against an existing practice or procedure while Section Five deals with new changes, so if the Justice Department incorporated the two sections, it could force a change if it found a Section Two violation during its Section Five review (see Way, 1996). The incorporation of Sections Two and Five shifts the burden to covered jurisdictions to prove, in advance, that the proposed change will not have the purpose or effect of denying the right to vote on account of race.

Kilgore (1997) argues that the process of incorporating the two, and related court judgments, bypass the effects test of Section Five and the *Gingles* standard by looking for an equal protection cause of action. The incorporation of Sections Two and Five was evident in the early 1990s, as covered jurisdictions were urged to draw the maximum number of majority-

minority districts. Most of these districts were overturned by the federal courts, which altered the way Section Five was to be applied to covered jurisdictions. In particular, the two keu cases were *Shaw v. Reno*[203] and *Miller v. Johnson.*[204]

In *Shaw*, the U.S. Supreme Court looked to the Equal Protection Clause of the Fourteenth Amendment, and applied strict scrutiny to redistricting plans that contained bizarrely shaped districts drawn on the basis of racial considerations.[205] This holding was expanded in *Miller*, which found that strict scrutiny was to be applied not only to outrageously shaped majority-minority districts but to any district where it could be shown that race was the predominant factor in its creation (Kilgore, 1997; see Latimer, 1995). When covered jurisdictions draw the maximum number of majority-minority districts, race tends to be the *only* factor in the creation of the redistricting plan. Kilgore (1997) argues that *Shaw* and *Miller* illustrate the challenges faced by covered jurisdictions: Section Five requires administrative or judicial preclearance while Section Two forbids a jurisdiction from enforcing plans that limit minorities political access. The application of strict scrutiny, as articulated in *Miller*, has placed a difficult burden on lower courts and legislative bodies that must interpret what it means in practice (Kilgore, 1997). The difficulty has been compounded by the fact that since *Shaw*, the Supreme Court has delivered divided opinions that do not necessarily provide a coherent set of principles for lower courts and legislative bodies to follow, or for the Justice Department to implement.

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[203] 509 U.S. 630 (1993).

[204] 115 S. Ct. 2475 (1995).

[205] Strict scrutiny, as articulated in *Shaw*, has two parts. First, a plaintiff must prove that the drawing of district lines by the legislature was motivated by race, raising an equal protection claim (see *Id*. at 644). Second, if it is determined that race is the motivating factor; any court must decide if the plan is "narrowly tailored to further a compelling government interest" (see *Id*. at 658). In *Shaw*, the Supreme Court found that complying with Section Five would not provide the necessary justification for drawing majority-minority districts.

Neither *Shaw* nor *Miller* declared that the Act was unconstitutional, thus covered jurisdictions must continue to meet Section Five requirements, but in both cases, the Supreme Court limited the use of race as a factor in drawing new district lines (Kilgore, 1997). Wickline (1998) argues that the U.S. Supreme Court should clarify the relationship between its decision in *Shaw* and the application of the Equal Protection Clause with the requirements of the Act. In the late-1990s, these two issues were in tension and sent conflicting messages to those involved in the redistricting process.

Through *Shaw* and *Miller*, the Supreme Court created an environment that narrows the scope of the Act and brings into question the Justice Department's range of authority, which the Supreme Court can do as one of the Justice Department's principals. Even though Congress granted significant power to the office of the U.S. Attorney General, the federal courts have stepped-in during recent years to restrict what is permissible under Section Five and to curtail the Justice Department's authority. *Shaw* and *Miller* are examples of how one of the Justice Department's principal's can restrict the actions carried out by the Justice Department, leaving the Justice Department to put a new set of rules in place for preclearing redistricting plans.

The fact that the Justice Department must redirect its efforts is just one instance of the challenges faced when the Supreme Court makes decisions related to preclearance and redistricting. Some argue that the *Shaw* line of cases has contributed significantly to the confusion of what is permissible under the Act and how Section Five should be implemented. The uncertainty of how Section Five should be applied lies in the fact that the Supreme Court created a set of standards which are difficult to apply and then applies these same standards inconsistently: the decisions since *Shaw* have been narrowly divided, and the Supreme Court has never clarified the significance of the Act (Kilgore, 1997). Examples of the confusion are seen

with the Supreme Court's decision in *Reno v. Bossier Parish School Board*[206] and *Reno v. Bossier Parish School Board,*[207] which effectively lowered the standards to obtain preclearance from the Justice Department, while untangling Sections Two and Five from each other.

In Bossier Parish, Louisiana, the Police Jury passed a redistricting plan in the summer of 1991 for the parish's twelve districts, which contained no majority-minority districts.[208] Initially, the School Board did not adopt the Police Jury plan, and instead hired its own redistricting consultant to draw a plan. At the same time the consultant was drawing the School Board plan, the president of the local NAACP Chapter presented an alternative plan to the School Board that contained two majority-minority districts. The School Board changed its mind, however, and decided to adopt the parish's Police Jury redistricting plan. Without addressing the NAACP plan, the School Board adopted the Police Jury plan over vocal opposition from both the Black and White communities.[209] After a while, the adoption of the Police Jury plan made sense to the School Board, as the plan had already been approved by the Justice Department, even though it had no majority-minority districts.[210]

The Justice Department objected to the School Board's plan in January of 1993 because it was deemed to violate Section Two, and in response the School Board sought a declaratory

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[206] 520 U.S. 471 (1997), hereinafter *Bossier Parish I*.

[207] *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000); 120 S. Ct. 866 (2000), hereinafter *Bossier Parish II*.

[208] The Police Jury is one of the parish's representative governing bodies, and is equivalent to a county commission.

[209] *Bossier Parish I*, 520 U.S. 471 at 475 (1997). Petitioners argued that the School Board adopted the Police Jury plan in an effort to avoid having to consider a plan with two majority-minority districts. The argument is based on the belief that the School Board had circumvented its obligations to desegregate the parish schools for decades, and the adoption of the Police Jury plan was just one more attempt to avoid complying with the Voting Rights Act [see *Bossier Parish II*, 120 S. Ct. 866 at 869-880 (2000)].

[210] 120 S. Ct. 866 at 869 (2000).

judgment in the District Court for the District of Columbia. The District Court granted preclearance and the Supreme Court affirmed the District Court's decision, stating that a plan cannot be denied preclearance on the basis that the plan may violate Section Two of the Act.[211] The Supreme Court declared that such a position

> would inevitably make compliance with 5 contingent upon compliance with 2 .... [which would] replace the standards for 5 with those for 2 [thereby] contradicting...[the Supreme Court's] longstanding interpretation of these two sections of the Act.[212]

On remand, the District Court concluded there was no evidence of a discriminatory non-retrogressive purpose, but did not determine whether Section Five prohibits preclearance if a plan is created with discriminatory purpose.[213]

In *Bossier Parish II*,[214] the Supreme Court answered some of its own questions related to whether or not Section Five preclearance is meant to weed out discriminatory purpose or focus solely on retrogression and discriminatory effect.[215] The Supreme Court upheld the School Board's adoption of the Police Jury plan because the plan was not intentionally drawn to discriminate against minorities. The Supreme Court's narrow interpretation of the purpose prong of Section Five effectively collapses the purpose and effect prongs together (see Beverly, 2000). The Supreme Court's new definition of the purpose prong established in *Bossier Parish II*, holds that Section Five is a tool which is designed to freeze election procedures, and that only retrogressive plans, by definition, require a denial of preclearance. The Supreme Court

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[211] *Id*. at 485.

[212] *Id* at 477 (see Butler, 2002).

[213] *Bossier Parish II*, 120 S. Ct. 866 at 870 (2000).

[214] 528 U.S. 320 (2000); 120 S. Ct. 866 (2000).

[215] *Id*. at 878.

interpreted Section Five in a consistent manner, banning steps that would weaken the position of minorities. As the federal courts never required the kind of maximization of minority interests that the Justice Department adopted in the early 1990s, then it is possible to argue that the Supreme Court was consistent in its interpretation and position as it relates to Section Five. With the Bossier Parish decisions, the Supreme Court ultimately rebukes the Justice Department for incorporating Section Two into Section Five reviews, and communicates its displeasure to its overly aggressive agent. Therefore, the Supreme Court's new holding states that covered jurisdictions do not have to consider alternative or hypothetical plans that would maximize the voting potential of minorities (see Beverly, 2000).[216]

Along the same line, Harper (2000) points out that the U.S. Supreme Court, twenty-four years after *Beer*, decided that retrogression and *not* discrimination, was the proper standard to evaluate the purpose prong of Section Five.[217] Beverly (2000) argues that such an interpretation leaves Section Five isolated from voting rights jurisprudence and that the Section becomes no more than an administrative process to maintain the status quo. Effectively, the holding in *Bossier Parish II* shifts the burden from the submitting jurisdiction to private plaintiff's who must now prove discriminatory purpose for relief (Beverly, 2000; see Harper, 2000). Harper (2000) states that the bar for preclearance has been lowered by the *Bossier Parish II* decision, as Section Five is now interpreted to prevent nothing but "backsliding." Butler (2002) argues that the purpose of the preclearance requirement is limited to simply preventing covered jurisdictions

[216] *Id*. at 874 – 876. Hypothetical plans are commonly used during Section Two challenges when the status quo is challenged, and if the status quo results in an abridgement of the right to vote, relative to what the right to vote ought to be, the status quo itself must be changed [see *Reno v. Bossier Parish School Board*, 120 S. Ct. 866 at 874 (2000)].

[217] *Bossier Parish II*, 528 U.S. 320 (2000).

from eroding minorities' existing political opportunities, stepping back to standards articulated in the mid-1970s.[218]

Butler (2002) interprets the *Bossier Parish II* decision as one that re-states the retrogression standards established prior to the 1990s round of redistricting; the Supreme Court held in *Bossier II* that the only discriminatory purpose sufficient to support the denial of preclearance was the intent to enact a retrogressive plan that worsened the position of minorities.[219] The Supreme Court's rationale for this interpretation rested on its reading of Section Five, which was geared towards preventing covered jurisdictions from implementing discriminatory plans (see Butler, 2002).[220] Katz (2001) reasons that *Bossier Parish I and II* narrowly construe Section Five's preclearance provision, and in particular *Bossier II*, which reaffirms that Section Five's purpose prong applies to retrogressive intent only.[221] The Supreme Court reiterated, however, that the purpose and effects prongs of Section Five are distinguishable, and the context and goal of Section Five is to prevent "backsliding" and any broader interpretation would converge with Section Two of the Act. Despite the Justice Department efforts to incorporate Sections Two and Five, Butler (2002) argues that it is clear that Section Two is not incorporated into Section Five, and in coming to this conclusion, it is believed that the *Bossier* decisions will enable covered jurisdictions to obtain preclearance more easily (see Katz, 2001).[222]

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[218] See *City of Richmond v. United States*, 422 U.S. 358 at 388 (1975).

[219] *Reno v. Bossier Parish* (*Bossier Parish II*), 528 U.S. 320 at 340 (2000).

[220] *Id*. at 335.

[221] *Id*. at 336.

[222] See *Bossier Parish I and II*.

In practice, one could argue that the Supreme Court collapsed the purpose and effect prongs of Section Five and effectively lowered the barrier to preclearance for covered jurisdictions. This claim is possible because the Supreme Court's interpretation in *Bossier Parish II* makes it significantly easier for covered jurisdictions to obtain preclearance for a discriminatory plan, as long as it is not retrogressive. Yet, the Supreme Court denies that this is the case.[223] In fact, the Supreme Court's ruling in the *Bossier Parish* cases struck down the incorporation of Section Two into Section Five preclearance.

Prior to *Bossier Parish I* and *II*, a plan that was precleared by the Justice Department was somewhat insulated from a Section Two vote dilution claim because the Justice Department refused to preclear plans that had a discriminatory effect and/or was retrogressive.[224] This behavior encouraged covered jurisdictions to draw plans that were not only non-retrogressive but were also not discriminatory (see Harper, 2000); however, because of the holding in *Bossier Parish II* it is believed that this protection against discriminatory actions is no longer available. The Supreme Court's decision in *Bossier Parish II* has two major ramifications on future preclearance submissions: (1) the decision leaves an opening for discriminatory plans to be precleared, as long as they are not retrogressive and (2) the Supreme Court made clear that preclearance did not prevent a subsequent Section Two challenge. Because the federal courts serve as the Justice Department's main principal in terms of defining the scope of Section Five, any shifts in the federal court's interpretation of Section Five has major implications for the Justice Department's implementation of the Act.[225]

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[223] See the discussion on *Miller v. Johnson* earlier in this chapter.

[224] *Miller v. Johnson* at 892.

[225] See Grofman (1998) and Canon (1999) for a full accounting of the legal ramifications associated with the implementation of the Act.

Institutional Change

Combined with the previous chapter's discussion, the legal analysis reveals that the Justice Department has not one, but two active principals, Congress and the federal courts. It would be more accurate, however, to note that even though Congress began as the primary principal of the Justice Department, taking the lead in passing the initial legislation and designating the Justice Department as the sole federal bureaucratic agency responsible for allocating resources in order to implement the Act, it is no longer the Justice Department's main principal. The examination of court decisions indicates that over time Congress has receded in importance and the role of the federal courts has increased. Since the passage of the Act, the federal courts have become more active in directing the Justice Department and taking the lead in determining its role, first by expanding it and then eventually restraining and curtailing the extent of its review authority.

Gluck (1996) argues that judicial opinions have expanded Section Five beyond what was intended by Congress in 1965, but that when Congress had the opportunity to change the Justice Department's course, in 1970, 1975 and again in 1982, Congress saw no reason to restrict the range and scope of Section Five. The U.S. Supreme Court provided a broad interpretation of Section Five, and the Justice Department's other principal, Congress, approved of such actions via its consent and affirmation in 1970, 1975 and 1982. Congress compiled an extensive record for the continued need for Section Five, and the federal courts "complied" with this interpretation through their continued commitment to an expansive interpretation. Congress chose not to be involved in re-structuring or refining its agent's activities beyond the status quo, which is evidenced by Congress in 1982 extending the temporary provisions until 2007, but not changing them. Will Congress re-assert itself in 2007, and restructure the Justice Department's

implementation of the Act? Only time will tell, but until 2007, the federal courts will continue to exert the most influence as the Justice Department's principal. Regardless of who is the Justice Department's primary or secondary principal, Section Five has played a critical role in the advancement of minority voting rights (Way, 1996).

The federal courts' authority to direct the Justice Department's implementation of the Act is witnessed through the time line of legal decisions, beginning with *Allen* and extending to *Shaw* and then the *Bossier Parish* cases, that change and modify the Justice Department's responsibilities. Beginning with *Allen*, the Justice Department's principal tells it to go and do more with Section Five, and the federal courts consistently broadened the scope and range of Section Five while placing few, if any, limitations on its review authority, at least in the beginning. In effect, *Allen* made certain that Section Five would apply to the largest possible set of electoral changes. This was, in essence, how the Justice Department implemented Section Five for twenty-four years. Except for *Beer*, *Richmond* and *Lockhart*, it was not until later, in *Shaw*, that the same principal tells the same agent to do less in its implementation of Section Five, and then to limit its implementation of the Act even further, in *Bossier Parish*.

The next chapter turns to the task of providing additional information to answer the research questions stated in the first chapter. While continually keeping in mind that the Justice Department responds to three principals, a way in which to analyze some of the Justice Department's decisions are through the written correspondence that the Justice Department regularly sends to covered jurisdictions after a redistricting submission has been reviewed. The written correspondence provides a general sense of the principles established by the Justice Department's principals and how the Justice Department responds. The next chapter tackles preclearance letters through a qualitative analysis of the set of preclearance letters utilized in this

study. The correspondence is also analyzed to verify what the Justice Department looks for when it objects to redistricting plans submitted for Section Five preclearance. The content analysis in Chapter Six presents the opportunity to synthesize how the Justice Department makes its determinations and sets up the presentation of preclearance principles in Chapter Seven, which determines the degree each factor plays in preclearance and the role institutions play in the overall process.

CHAPTER SIX

WHAT'S IN A LETTER?

There exists no comprehensive published analysis of the substantive law of Section Five.

~ Hiroshi Motomura, 1983 ~

The Justice Department is one of two institutional actors that can determine if a submitted redistricting plan meets Section Five preclearance requirements.[226] Once a determination has been made regarding a submitted redistricting plan, the Justice Department's decision is communicated to the covered jurisdiction in question via a letter known as a preclearance or compliance letter. Preclearance letters offer a unique perspective into the types of scenarios, questions and challenges the Justice Department faces when conducting a Section Five review; however, the letters also explain some of the reasons behind the Justice Department's decision to grant preclearance or not. Although the set of letters only contain the Justice Department's perspective, these letters are a valuable resource that can be used to discern which factors dominate the Justice Department's thinking; therefore, preclearance letters are the main data source utilized to analyze Justice Department Section Five decisions concerning redistricting submissions from covered jurisdictions in the South from 1970-2000.[227]

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[226] Discussed in Chapter Four, covered jurisdictions have two avenues to obtain preclearance: administratively through the Justice Department or judicial preclearance via the U.S. District Court for the District of Columbia.

[227] Preclearance letters are not publicly reported but are kept on file at the Civil Rights Division of the Justice Department and are available for inspection and copying (see Derfner, 1973; Motomura, 1983; Crowell, 1986; Procedures for the Administration of Section Five 28 C.F.R. 51.49). I asked a former

Hiroshi Motomura (1983) conducted one of the most extensive examinations of preclearance letters over twenty years ago. Motomura examines preclearance letters in an attempt to articulate and define the form of Section Five preclearance determinations, and his research points out that preclearance letters are an appropriate data source to analyze Section Five decisions. Using some of the same preclearance letters in this research, I also conduct an analysis of Section Five determinations, but there are three major differences between Motomura's (1983) work and this current research: (1) this work encompasses a larger number of preclearance letters; (2) each redistricting plan is analyzed as a single unit rather than relying on individual letters for the basis of this investigation; and (3) this research covers a wider time period. Motomura's research precedes the 1982 Amendments to the Act while this research covers the same period as Motomura, as well as Justice Department decisions in the 1980s and 1990s. Since the time of Motomura's research, the landscape of Section Five implementation has changed considerably because of the politics of race, its influence on redistricting and the continued attention of one of the Justice Department's principals, the federal courts.

At the time of Motomura's examination of preclearance letters, there was no comprehensive published analysis of the substantive law of Section Five and the principles the Justice Department relies on to preclear submitted electoral changes. Over the years, in terms of legal and electoral analyses, an abundance of information has emerged and is available for covered jurisdictions and interested parties to use in order to learn about the "best" methods and practices needed to navigate the redistricting process while complying with Section Five, related court cases and constitutional principles; however, I would argue that this wealth of knowledge

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Federal Fellow for assistance, and eventually was able to get in contact with a staff member of the Voting Rights Section of the Justice Department. This individual was kind enough to visit with me and provide access to the preclearance letters housed in Washington, D.C. during the summer of 2001.

and information has not necessarily led to a comprehensive understanding of Justice Department preclearance decisions. This chapter attempts to address this deficit by offering a broad descriptive examination of the content of available redistricting preclearance letters, covering the years 1970 to 2000, in order to offer an overview of one type of electoral change precleared by the Justice Department.

This chapter assesses preclearance letters in several ways, and is divided into a number of sections. The first part of this chapter provides a general description of preclearance letters, including how they relate to the review process. The second section describes the time frame and scope of the preclearance letters and details the number of plans and types of jurisdictions. In this discussion, the shortcomings of the letters are acknowledged; nonetheless, the obvious and subtle flaws with the data used in this study do not prevent the creation of a preclearance principal-agent model. The available data offer a unique opportunity to explore the use of principal-agent theory in a novel context with the formation of a multiple-principal-one-agent model. The material and content found in preclearance letters guides the use of the theoretical model chosen for this study, and through the use of the rich text of these letters, insights about preclearance can be made. The next segment discusses preclearance letters and how they change in focus and nature from the 1970s to the 1980s, and then again from the 1980s to the 1990s. The chapter concludes with an overall assessment of the preclearance letters.

Preclearance Letters

Preclearance letters render Justice Department assessments of Section Five. Typically, preclearance letters outline the covered jurisdiction's submission, including the actual jurisdiction in question, its demographic characteristics, related court cases, an examination of

the current submission and its immediate history with Section Five. These letters serve as a way to call covered jurisdictions to task for various shortcomings, but also follow a standardized format that rises to the level of a formal reprimand by the Justice Department. A denial of preclearance does not preclude a covered jurisdiction from gaining preclearance in the future, but a preclearance letter indicating that a redistricting plan is not precleared holds the same power as law, for those plans cannot be implemented until preclearance is granted for all of the proposed changes.

The preclearance letters related to redistricting and analyzed in this study are catalogued based on the date of the letter, type of jurisdiction involved and the state from which the plan originated. The system of categorization relies on the dates that each letter was written because preclearance letters do not cite each other, and there is no apparent effort by the Justice Department to create a body of precedent, so it is a difficult task to produce an analytical matrix to categorize the letters in any comprehensive system in which to draw parallels and conclusions, beyond the date they were written. Yet, even with the inherent difficulty associated with data that has very little continuity or connectedness, preclearance letters appear promising in a structured and limited content analysis in this and the next chapter.

There are common themes running throughout the set of letters, and I attempt to capture the richness of the letters through a descriptive analysis. Each preclearance letter is critical to the submitting jurisdiction and is crafted to reflect the jurisdiction's specific situation, and as such contains information and facts that are unique to that jurisdiction. During its review, the Justice Department carefully considers facts and figures from the submitting jurisdiction, as well as Census data and information and comments from other interested persons. Even though each preclearance letter addresses a specific redistricting plan exclusive to the political jurisdiction

undergoing review, there are themes, principles and procedures applied by the Justice Department during its review process that could theoretically apply to any covered jurisdiction, particularly ones with similar political or historical circumstances.

If the Justice Department does not find any parts of a submitted plan objectionable, the preclearance letter states that, thereby approving the plan. Acceptance letters tend to be short and to the point. Even after determining that a submitted plan is acceptable and does not have a discriminatory purpose nor a discriminatory effect (see *Georgia v. United States*),[228] the Attorney General notes in the letter that Section Five expressly provides that the failure of the U.S. Attorney General to object to a plan does not bar subsequent litigation to enjoin enforcement of the change.[229] The ultimate goal of this study is to determine the principles and factors that lead to a Justice Department denial of preclearance, and because of that objective the lack of information in acceptance letters and the small number of acceptance letters in this study does not prevent the formation of a preclearance framework being developed in the next chapter.

Examining the preclearance process, to a large extent, relies on objection letters, which are more detailed than the acceptance letters. If the Justice Department is objecting to a submission, a typical objection letter provides several points which the covered jurisdiction must address before its submitted redistricting plan will be precleared. The Justice Department's examination and response is more in-depth and includes a discussion about the submitted plan's objectionable parts, such as its racial influence on minorities, its exclusion of minorities from the redistricting process, any deviation from standard redistricting criteria by the jurisdiction (the Justice Department will even include the jurisdiction's own redistricting criteria in the

[228] 411 U.S. 526 (1973). See Procedures for the Administration of Section Five 28 C.F.R. 51.52.

[229] Procedures for the Administration of Section Five, 28 C.F.R. 51.41.

preclearance letter), Census data related to the racial make-up of the jurisdiction, election irregularities (if any), the placement of district lines in relation to neighborhoods or communities of interest, evidence of racially polarized voting, fragmentation of minority communities and vote dilution. As a part of the Justice Department's investigation, it articulates the specific parts of the redistricting plan that are in violation of the Act and refers to court cases and Section Five regulations to provide support for each point and overall determination. The Justice Department then summarizes the reasoning behind the objection, including delineating the possible course(s) of action to address the perceived problem(s).

It is important to note that the Justice Department's response to a submitted plan is meant to only provide guidance to the submitting jurisdiction with regard to the areas of any submitted map which it views as a problem under Section Five.[230] Although there are several instances in which the Justice Department articulates its rationale for any suggested changes and its reasoning for certain determinations, it does state that "the only function of the Attorney General is to object or approve submitted legislation and [it is] not authorized nor would it be appropriate for [it] to recommend alternative approaches."[231] The actual responsibility for drawing district lines rests with elected officials, and the Justice Department's role is to serve as an "advisor" who does not provide or include all of the possible scenarios the covered jurisdiction could implement to come into compliance; rather the Justice Department suggests ways in which the covered jurisdiction can reduce the fragmentation or dilution of certain minority communities.

[230] March 20, 1992, letter for the redistricting plan for Georgia's House of Representatives, Senate and congressional plans.

[231] August 20, 1971, letter for the reapportionment of districts for the Louisiana House and Senate.

When viewed individually by a covered jurisdiction, a preclearance letter provides guidance in obtaining preclearance, but when all of the letters are reviewed as a whole, two clear images emerge. First, preclearance letters demonstrate an extensive effort by several different covered jurisdictions in nine states attempting to try and thwart the requirements of the Act. The language of the letters may be matter of fact and straightforward, but what is described is powerful evidence demonstrating the extent to which covered jurisdictions will go to stymie Black political power. Second, the letters also describe the Justice Department's attempts and continual work at curtailing such efforts. The Justice Department has prevented the implementation of hundreds of discriminatory redistricting changes, and in doing so protected the voting rights of minorities throughout the South.

Preclearance letters provide an up-close assessment of Justice Department reasoning related to the preclearance of southern redistricting plans, which is often not the chosen perspective to take when examining redistricting plans. And yet, preclearance letters provide a significant and substantive dialogue about the factors which the Justice Department raises as potential concerns when determining whether to object to or preclear a submitted redistricting plan. An in-depth content analysis of such letters provides at least three advantages. First, the letters provide a way to focus on key elements that the Justice Department concentrates on since it began preclearing redistricting plans under Section Five in the 1970s. Second, it is possible to use the content analysis to develop an overtime assessment of which principles the Justice Department relied on in the 1970s, 1980s and 1990s, and to test whether they are the same, different and how they have changed. Third, a content analysis helps determine the circumstances when a plan is denied preclearance. Lastly, examining the redistricting process

from the Justice Department's perspective provides an additional point of analysis with which to comprehend the redistricting process instead of relying on the courts or politicians.

Time Frame and Scope of Preclearance Letters

Compliance letters written by the Justice Department to state and/or local elected bodies in the states of Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas and Virginia are analyzed and cover the years 1970 to 2000. Although the Act was passed in 1965, over 35 years ago, the truth of the matter is that preclearance letters related to redistricting are only available for 30 years, beginning in 1970. Data are only available for 1970 to the year 2000 due in large part to the slowness of the Justice Department's implementation of Section Five, as described in Chapters Two, Three and Four (see Ball et al., 1982). Therefore, the data in this dissertation consist of the available redistricting preclearance letters from that latter time period.

The data collection yields a total of 431 preclearance letters written by the Justice Department to covered jurisdictions. The 431 preclearance letters have an average length of 751 words; the shortest letter is approximately 102 words long while the longest letter contains approximately 4160 words. The specific types of redistricting plans submitted for preclearance and included in this study are congressional districts, state house and state senate districts and local districts, such as school boards, city and county councils, judges and police juries,[232] as well as 812 covered counties.[233] It is strongly believed at the time of this writing that the letters

[232] Louisiana is unique in the nation in that it has parishes, which are governed in most cases by police juries. Parishes correspond to counties and police juries to county boards of commissioners or similar local government bodies found in other states.

[233] The following states' counties total: Alabama, 67; Florida, 5 (5 of the state's 67 counties are covered – Collier, Hardee, Hendry, Hillsborough and Monroe Counties); Georgia, 159; Louisiana, 64; Mississippi,

in this study do not constitute every instance in which the Justice Department has reviewed a redistricting plan for preclearance in the nine states in this study. The set of letters included in this study does not contain the vast bulk of redistricting preclearance letters, especially acceptance letters: there are 431 preclearance letters, which review and address a total of 528 redistricting plans which were submitted to the Justice Department for preclearance,[234] of which 452 are denials of preclearance while 76 redistricting plans are granted preclearance. It is reasonable to conclude that a large number of preclearance letters are missing because the number of acceptance letters comes nowhere close to equaling the number of objection letters.[235]

The focus of this study is to determine the principles that lead to a denial of preclearance. To understand fully where the Justice Department wants district lines to be drawn, one would need to compare the characteristics of redistricting plans that are precleared with those that are denied preclearance, and in that sense, having a full complement of preclearance letters becomes

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82; North Carolina, 40 (40 of North Carolina's 100 counties are covered - Anson, Beaufort, Bertie, Bladen, Camden, Caswell, Chowan, Cleveland, Craven, Cumberland, Edgecombe, Franklin, Gaston, Gates, Granville, Greene, Guilford, Halifax, Harnett, Hertford, Hoke, Jackson, Lee, Lenoir, Martin, Nash, Northampton, Onslow, Pasquotank, Perquimans, Person, Pitt, Robeson, Rockingham, Scotland, Union, Vance, Washington, Wayne, Wilson Counties); South Carolina, 46; Texas: 254; and Virginia, 93 (93 of 95 counties are covered see *note 13*).

[234] Of the 431 preclearance letters, 77 of them address multiple plans. The break down is as follows: 62 letters contain two redistricting plans; 12 letters contain three redistricting plans; two letters contain four redistricting plans; one letter addresses five separate redistricting plans; while the remaining 354 letters contain only one redistricting plan.

[235] It is nearly impossible to determine exactly how many redistricting preclearance letters were written between 1965 and 2000. For instance, I have a Justice Department log which contains a record of each letter written to covered jurisdictions and the general nature of the letter (*e.g.* vote dilution, redistricting, annexation, etc.). From that log, I can ascertain that I have in my possession some letters that are not documented, but do not have other letters which are noted by the Justice Department. Additionally, Motomura (1983) cites redistricting preclearance letters in his study that I do not have in my possession. It is believed that because the Justice Department's filing system is notoriously poor, the compliance letters used in this study are not the entire universe of redistricting letters written between 1965 and 2000.

Table 6.1

Preclearance Letters & Redistricting Plans, 1970 to 2000

State	Number of Redistricting Letters From Each State	Number of Redistricting Plans From Each State	Difference (+)
Alabama	29	31	2
Florida	2	3	1
Georgia	41	54	13
Louisiana	93	112	19
Mississippi	129	171	42
North Carolina	18	27	9
South Carolina	36	40	4
Texas	70	75	5
Virginia	13	15	2
Total	**431**	**528**	**97**

essential to investigate the principals associated with a denial of preclearance; therefore, I have not sought to examine the characteristics of precleared redistricting plans.[236] In general terms, suffice it to say that the Justice Department grants preclearance when it concludes that the plan is not guilty of retrogression, which the Justice Department has always considered.

Table 6.1 provides an assessment of the number of available redistricting letters the Justice Department sent to each of the nine states, the number of redistricting plans extrapolated from those respective letters and the difference between the two figures. The different number of preclearance letters and redistricting plans is possible once each individual preclearance letter is de-constructed. After the letter is reduced to a set of redistricting plans, the number of redistricting plans each letter addresses is noted and coded separately while the content of each

[236] The demarcation between what the Justice Department deems acceptable and unacceptable is impossible to determine without a complete set of letters.

redistricting plan is organized and analyzed in the next chapter.[237] Although each preclearance letter serves as the major vehicle in which to analyze redistricting preclearance decisions, individual redistricting plans are treated as separate units of analysis;[238] therefore, the content analysis and subsequent discussion of preclearance principals is directed at individual redistricting plans. Relying on the available set of preclearance letters ensures that data at the individual level are presented while simultaneously providing indirect information about the Justice Department's decisions about the implementation of Section Five of the Act.

Table 6.1 signifies that the state of Mississippi has the largest number of letters sent to its covered jurisdictions, at 129 letters. Other states receiving a large number of compliance letters are Louisiana, with 93 letters, Texas, with 70 letters, which is followed by Georgia (41 letters), South Carolina (36 letters) and Alabama (29 letters). The states of Florida, North Carolina and Virginia had fewer than 35 letters amongst them, from 1970 to 2000.

Taking into consideration the difference in the number of preclearance letters and redistricting plans extrapolated from those letters, the investigation shifts to an assessment of the individual redistricting plans from each state. Tables 6.2 and 6.3 illustrate a breakdown of the number of redistricting plans accepted and denied preclearance by the Justice Department for each state, respectively. The separation of redistricting plans from each letter allows for individual redistricting plans to be used as the unit of analysis when detailing the set of principles discussed in the next chapter.

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[237] See Appendix D for a detailed discussion about the content analysis techniques utilized in this study.

[238] Throughout, detailed information is provided about the letters and the redistricting plan(s) discussed in each letter. When the total number of letters and total number of redistricting plans are tackled together, great care is taken to ensure that both sets of details are presented in a clear manner.

Table 6.2

Redistricting Plans Granted Preclearance, 1970 to 2000

State (Total Number of Redistricting Plans)	**Plans Granted Preclearance**	**Percentage of Plans Precleared**	**Percentage of Plans Granted Preclearance (76)**	**Preclearance as a Percentage of All Plans (528)**
Alabama (31)	4	12.9	5.3	.76
Florida (3)	2	66.7	2.6	.38
Georgia (54)	10	18.5	13.2	1.9
Louisiana (112)	12	10.7	15.8	2.3
Mississippi (171)	30	17.5	39.5	5.7
North Carolina (27)	6	22.2	7.9	1.1
South Carolina (40)	5	12.5	6.6	.95
Texas (75)	10	13.3	13.2	1.9
Virginia (15)	4	26.7	5.3	.76

* Due to rounding to the first decimal place, the percentages may not add up to 100%.

While taking into consideration the various political jurisdictions submitting redistricting plans, Table 6.2 indicates that the state of Mississippi has the largest number of redistricting plans accepted by the Justice Department between 1970 and 2000, while two other Deep South states, Georgia and Louisiana, have less than half of the number of redistricting plans precleared, 10 and 12 respectively. The state of Texas has the same number of precleared redistricting plans as the state Georgia, while the remaining five states have only 21 of their redistricting plans precleared since 1970.

Table 6.3 details the number of redistricting plans denied preclearance from the nine covered states. As shown, 141 redistricting plans from the state of Mississippi are denied preclearance, while the state of Louisiana and its sub-state jurisdictions had a total of 100 redistricting plans denied preclearance. This is a considerable number of redistricting plans, especially since the total number of plans submitted from both of these two states is only marginally larger.

Table 6.3

Redistricting Plans Denied Preclearance, 1970 to 2000

State (Total Number of Redistricting Plans)	**Plans Denied Preclearance**	**Percentage of Plans Denied Preclearance**	**Percentage of Plans Denied Preclearance (452)**	**Denials of a Percentage of All Plans (528)**
Alabama (31)	27	87.1	6.0	5.1
Florida (3)	1	33.3	.22	.19
Georgia (54)	44	81.5	9.7	8.3
Louisiana (112)	100	89.3	22.1	18.9
Mississippi (171)	141	82.5	31.2	26.7
North Carolina (27)	21	77.8	4.6	4.0
South Carolina (40)	34	85.0	7.5	6.4
Texas (75)	65	86.7	14.4	12.3
Virginia (15)	11	73.3	2.4	2.1

* Due to rounding to the first decimal place, the percentages may not add up to 100%.

Table 6.3 also demonstrates that Texas, captured by the Act's 1975 language amendments, had 65 of its 75 redistricting plans denied preclearance, but is a distant third in terms of the number of redistricting plans denied preclearance by the Justice Department when compared to the states of Mississippi and Louisiana. The political jurisdictions in the state of Texas, however, also submitted a smaller number of redistricting plans. A better gauge to compare non-compliant determinations is through the use of percentages. The middle column of Table 6.3 indicates that all of the states, except for Florida, had over 70% of their submitted redistricting plans denied preclearance by the Justice Department.

As shown in Table 6.3, the state of Florida had one of its three plans denied preclearance, while the remaining states had a varying number of plans denied preclearance; from 44 denials of preclearance for political jurisdictions in the state of Georgia, 34 redistricting plans denied preclearance from the state of South Carolina and a total of 21 and 27 redistricting plans denied preclearance in North Carolina and Alabama, respectively. Excluding Florida, Virginia, with 11 of its 15 redistricting plans denied preclearance, had the largest percentage of redistricting plans

accepted by the Justice Department (*i.e.* 4 of 15 plans accepted, see Table 6.2). When Florida is removed from the descriptive analysis, it is easy to see that the eight other states in this study had more plans denied preclearance than precleared by the Justice Department between the years 1970 and 2000.

Tables 6.2 and 6.3 provide an overall assessment of the number of redistricting plans precleared and denied preclearance by the Justice Department in nine southern states. Although interesting, using the states as the main basis for a descriptive analysis misses the finer details about the types of redistricting plans reviewed by the Justice Department. Therefore, Tables 6.4 and 6.5 are more detailed and present information about the types of jurisdictions that submitted redistricting plans and the number of those plans that are denied preclearance or accepted by the Justice Department.

Table 6.4 reveals that there are eight different types of political jurisdictions that submitted redistricting plans to the Justice Department for Section Five preclearance. Table 6.4 includes a breakdown of the corresponding states from which the individual redistricting plans originated. Most of the redistricting plans submitted for preclearance involve county governments, with a total of 180 out of the 528 redistricting plans. Cities had the next highest number of redistricting plan submissions, with 91. Several other political jurisdictions submitted a comparable number of plans, and there is almost an equal number of state house and state senate redistricting plans submitted for preclearance. Police jury redistricting plans, all from the state of Louisiana, are submitted at about the same rate as statewide plans while congressional plans are submitted at the lowest rate. The remaining two jurisdictions, judicial jurisdictions and school boards, fall somewhere in-between the high of 180 submissions and the low of 20.

Table 6.4

Redistricting Plans and Their Corresponding Jurisdictions

Jurisdictional Redistricting Plans	Number of Submissions	State(s) of Origin
City	91	AL, GA, LA, MS, NC, SC, TX, VA
County	180	AL, GA, LA, MS, NC, SC, TX, VA
School Board	79	AL, GA, LA, MS, NC, SC, TX
U.S. House	20	AL, GA, LA, MS, NC, SC, TX, VA
State House	36	FL, GA, LA, MS, NC, SC, TX, VA
State Senate	35	FL, GA, LA, MS, SC, TX, VA
Judicial	52	AL, MS, TX
Police Jury	35	LA

Of the 528 redistricting plans and their respective jurisdictions attempting to obtain preclearance, there are a total of 91 (17.2%) statewide plans, which includes plans for the U.S. House or Representatives, State House and State Senate; of these 91 statewide redistricting plans 68 (77.7%) are denied preclearance, leaving 23 (25.3%) of them considered acceptable by the Justice Department. The remaining 437 redistricting plans are from a variety of sub-state jurisdictions, and include city, county/parish, school boards, judicial districts (judges and constables), as well as police jury redistricting plans.

Of the 437 sub-state redistricting plans submitted to the Justice Department for preclearance, 385 (88.1%) of them are denied preclearance, leaving 53 (12.1%) sub-state redistricting plans deemed acceptable by the Justice Department. Overall, the vast majority of Section Five submissions are precleared (see Posner, 1998), but in the case of the 528 redistricting plans studied, there are a total of 452 denials of preclearance (85.2%) leaving only 76 of the plans (14.8%) receiving approval (see Crowell, 1986). The sample of letters only include a small fraction of total approvals, and it seems obvious that the set of preclearance

Table 6.5

Jurisdictional Redistricting Plans & Preclearance Decisions

Jurisdictional Redistricting Plans	Number of Submissions	Precleared Plans	Plans Denied Preclearance
City	91	13 (14.3%)	78 (85.7%)
County	180	16 (8.9%)	164 (91.1%)
School Board	79	5 (6.3%)	74 (93.7%)
U.S. House	20	8 (40%)	12 (60%)
State House	36	7 (19.4%)	29 (80.6)
State Senate	35	9 (25.7%)	26 (74.3%)
Judicial	52	18 (34.6%)	34 (65.4%)
Police Jury	35	3 (8.6%)	32 (91.4%)

letters used in this study does not include the vast bulk of them, since the number of redistricting plans precleared and granted approval for implementation comes nowhere close to equaling the number of objections. Although every instance of an objection should be followed by a resubmission and a subsequent letter stating that the plan is precleared, that is not the case with the set of preclearance letters in this study.[239]

Table 6.5, using the same classification configuration as is used in Table 6.4, describes the number of submissions and the types of jurisdictions, but also adds columns to display the percentage of redistricting plans precleared and denied preclearance for each kind of covered jurisdiction. Displayed in both Tables 6.4 and 6.5, the majority of submitted plans are county and city redistricting plans; with 180 and 91 respective districting plans submitted for Section Five review. The reality of Section Five review is that these jurisdictions, as well as school

[239] Most changes submitted under Section Five are inconsequential and are unlikely to draw objections from the Justice Department; however, major changes that have a great potential for affecting minorities, like those involving redistricting, are more likely to receive close examination (Crowell, 1986). It is important to note that redistricting submissions make up only a small percentage of the overall total of submissions under Section Five, which is applicable to all voting and election changes in covered jurisdictions.

boards, state house plans and police juries, are denied preclearance over 80% of the time (displayed in the last column on the right hand side of Table 6.5). Only congressional redistricting plans, state senate districts and judicial districts have a smaller percentage of redistricting plans denied preclearance; the margins are within 20% points, ranging from 60 to 74.3%. The number of redistricting plans denied preclearance is in stark contrast to the number of redistricting plans precleared; the sheer number of redistricting plans precleared dominates this discussion. The percentage of plans precleared by the Justice Department ranges from a low of 6.3% for school boards to a high of 40% for congressional districts, with varying degrees of preclearance for the other covered political jurisdictions, while denials of preclearance range from 60% to over 90%.

Table 6.6 provides an assessment of the types of jurisdictions, which submitted redistricting plans, by decade, and how often certain types of jurisdictions that obtained preclearance or were denied preclearance. Table 6.6 indicates that all of the covered jurisdictions submitted more redistricting plans for preclearance in the 1990s, especially when compared to the first decade of Section Five implementation, the 1970s; and except for counties and judicial districts, there is an increase in the number of submissions from the 1980s to the 1990s. The increase in the number of submissions is also matched by an increase in the percentage of objections handed out by the Justice Department.

The 1970s, with the lowest number of submissions (97/528 = 18.4%) and the highest percentage of objections (85/97 = 87.6%), though there is very little difference between the1970s and 1990s (199/228 = 87.3%), provides some initial support for the notion that the implementation of Section Five was slow to take root in covered jurisdictions; yet, after

Table 6.6

Jurisdictional Redistricting Plans Precleared or Denied Preclearance

Jurisdictional Redistricting Plans (Total Number of Plans)	Number of Submitted Redistricting Plans			Number of Plans Precleared			Number of Plans Denied Preclearance		
	1970s	1980s	1990s	1970s	1980s	1990s	1970s	1980s	1990s
City (91)	11	39	41	1	10	2	10	29	39
County (180)	35	80	65	4	9	1	31	71	64
School Board (79)	20	29	30	1	3	1	19	26	29
U.S. House (20)	3	5	12	2	1	5	1	4	7
State House (36)	9	11	16	0	1	6	9	10	10
State Senate (35)	8	8	19	1	2	6	7	6	13
Judicial (52)	3	25	24	1	9	7	2	16	17
Police Jury (35)	8	6	21	2	0	1	6	6	20
TOTALS:	**97**	**203**	**228**	**12**	**35**	**29**	**85**	**168**	**199**

examining the rate of submissions, the overall number of submissions increases in the 1980s and 1990s. The increased number of submissions is matched by an increase in the number of objections, but the overall percentages of acceptances and objections between the 1970s and 1990s is relatively the same, with 88% objection rate in the 1970s compared to an objection rate of 87% in the 1990s. The 1980s had an objection rate of 82.8% (168/203). The 1980s saw a greater number of jurisdictions become subject to Section Five, as single-member districts began to replace at-large and multi-member districts, increasing the number of Justice Department submissions from the 1970s to the 1980s.

All of the political jurisdictions, except for county and judicial jurisdictions, which saw an increase in the 1980s and a decrease from the 1980s to the 1990s, saw an increase in the number of plans submitted for Section Five review from the 1970s to the 1990s. The number of county submissions declined by 15 when comparing the 1980s to the 1990s, while judicial plans decreased by only one from the 1980s to the 1990s. While the number of redistricting plans

denied preclearance from decade to decade increased, the number of redistricting plans precleared declined from the 1980s to the 1990s. The reasons for the differences are many.

The number of redistricting plans submitted for review tended to start slow and pick up in the 1980s and then peak in the 1990s. Five of the eight jurisdictions submitting redistricting plans to the Justice Department submitted the same number or more plans in the 1980s and 1990s than they did in the 1970s. The descriptive data analysis supports the notion discussed in Chapters Two, Three and Four that as time passed, covered jurisdictions understood the requirements and repercussions of Section Five, and subsequently increased their number of submissions. The increased number of counties submitting their plans in the 1980s could be reflective of the change from at-large electoral systems to single-member districts, though why the number of submissions decreased in the 1990s is harder to pinpoint.

The potential reasons could include a small increase in the number of court-ordered redistricting plans. The sea change in voting rights law in the 1980s, however, made clear that if minority voters were prevented from electing a candidate of choice through racial gerrymanders, they could go to the federal courts under Section Two for redress (see Hagens, 1998). This is not to say that redistricting plans in covered jurisdictions did not require Section Five preclearance, because they did, but the increased litigious environment may have either delayed Section Five preclearance, as covered jurisdictions dealt with Section Two concerns, or jurisdictions were approved by the federal courts instead of the Justice Department.

The litigious atmosphere of the 1990s saw an increase in court cases and legal challenges to new districts, prior to their arrival at the Justice Department for review, which could be another reason for the dip in the number of submissions in the 1990s. The findings in Table 6.6 also suggest that regardless of the level of government involved in submitting redistricting plan

to the Justice Department for Section Five review, from the U.S. House down to city plans, the Justice Department treats each submission the same way, oftentimes denying it preclearance. Overall, Table 6.6 demonstrates a wide-disparity in the number of submissions from different jurisdictions and from decade to decade, but that there was really little difference in the rate of objections, regardless of the jurisdiction reviewed by the Justice Department. The rate of acceptances in the 1980s was about 5 percentage points higher than in the 1970s and 1990s.

The final table, Table 6.7, captures a break down of acceptances and objections of redistricting plans by the Justice Department, for each decade and for each state. Again, this broad assessment of redistricting plans offers some interesting facts. The largest number of redistricting plans was submitted in the 1990s, with a total of 228 redistricting plans. During the decade of the 1980s, 203 redistricting plans were submitted for preclearance, while only 97 plans were submitted for preclearance in the 1970s. As such, it is not surprising that the largest number of plans denied preclearance were submitted in the 1980s and 1990s. What is interesting is that slightly more redistricting plans were accepted in the 1980s when compared to the 1990s, but that the 1990s had over 30 more redistricting plans denied preclearance. Even the 1970s show a disproportionate number of redistricting plans denied preclearance than plans accepted by the Justice Department. Table 6.7 indicates that four states submitted more redistricting plans with each passing decade, while four states submitted more plans in the 1980s than the 1990s. The lone state, Louisiana, submitted more plans in the 1970s than the 1980s, but increased its number of submissions in the 1990s.

The one glaring and consistent issue demonstrated in Tables 6.1 to 6.7 is the evidence of "missing" redistricting preclearance letters. The breakdown of the various types of covered

Table 6.7

Redistricting Plans Precleared or Denied Preclearance, By Decade

State (Total Number of Redistricting Plans)	Number of Redistricting Plans			Number of Plans Precleared			Number of Plans Denied Preclearance		
	1970s	1980s	1990s	1970s	1980s	1990s	1970s	1980s	1990s
Alabama (31)	3	16	12	0	4	0	3	12	12
Florida (3)	0	1	2	0	1	1	0	0	1
Georgia (54)	9	21	24	2	1	5	7	20	19
Louisiana (112)	31	25	56	4	2	4	27	23	52
Mississippi (171)	19	77	75	1	17	11	18	60	64
North Carolina (27)	1	16	10	0	2	3	1	14	7
South Carolina (40)	8	14	18	2	3	0	6	11	18
Texas (75)	22	25	28	1	4	4	21	21	24
Virginia (15)	4	8	3	2	1	1	2	7	2
TOTALS:	**97**	**203**	**228**	**12**	**35**	**29**	**85**	**168**	**199**

jurisdictions and the total number of redistricting plans submitted from the eight categories of political jurisdictions is lower than expected (see Table 6.4). Each state has a minimum of three statewide plans to submit (congressional, State House and Senate), plus a varying number of local elected boards, such as counties and cities. The numbers reflect, perhaps, the reality that not all of the covered jurisdictions in the South submitted redistricting plans to the Justice Department for preclearance. As discussed in Chapter Two, the implementation of Section Five did not get off to a roaring start, and as described earlier in this chapter, it is likely the total number of redistricting plans in this study is not the universe of letters.

The total number of letters is smaller than what one would expect. Considering the Act was passed in 1965, and even contemplating that not all of the existing preclearance letters are in the data set, it is reasonable to conclude that there are dozens of missing redistricting plans from this study. There are over 800 covered counties in the nine states studied, and each county has numerous cities and school board districts which use single member districts, and all of them

would have had to redraw their district lines at some point after 1965. Even the large number of at-large electoral systems, which could plausibly have kept the number of redistricting submissions below expectations, would not contribute to the low number of letters in this study.

Prior to *Allen v. State Board of Elections,*[240] it was likely that many electoral changes were not submitted for preclearance by the Justice Department, and perhaps even the Justice Department thought it was not necessary;[241] but now, two generations after the passage of the Act, significant changes have unfolded regarding non-submissions, and if non-submissions are an issue, it is usually brought to the attention of the Justice Department, either via its own review of subsequent changes or by interested parties who challenge the fairness of a plan. Another reason for a smaller than anticipated set of letters and subsequent redistricting plans, is that further back in time one goes the greater the number of at-large jurisdictions existed and these electoral arrangements would not need to secure periodic review from the Justice Department because there were no districts to be drawn; however, following *Gingles* in the mid-1980s, most jurisdictions shifted to single member districts, which would insinuate that virtually every local government covered by Section Five has had to redistrict following each Census. Furthermore, the hundreds of objection letters should be matched with an equal number of approval letters, which is not the case.

Since 1965, it is my estimation that covered jurisdictions simply did not submit redistricting plans to the Justice Department for review. The numbers presented here support that notion, for if every covered jurisdiction from the nine states submitted a plan for Section

[240] 393 U.S. 544 (1969).

[241] The delay in the Justice Department's implementation of the Act was established earlier, as it waited for direction from one or more of its principals.

Five review, then the total number of redistricting plans would be far greater in every category (see Table 6.4). Yet, even though it is acknowledged that this study does not include a large number of redistricting preclearance letters, it still does contain a reasonably good sample of objection letters, but only a tiny sample of the entire universe of letters granting preclearance.

The result is that I am working with a lopsided sample, which I cannot do anything about at this time. I acknowledge that there are some potential problems with an asymmetrical data set, and though the absence of letters granting preclearance may be worrisome to statisticians, the unbalanced data set should not cause any substantive difficulties. This is the case because after reading the set of acceptance letters carefully, it is easy to surmise that they do not tell very much about Justice Department decisions regarding the implementation of Section Five.

Approval letters are important, however, in that they provide final approval to a redistricting plan submitted for Section Five preclearance. Acceptance letters indicate that the covered jurisdiction in question remedied and cured the problems noted in an earlier objection; however, acceptance letters do not go through the detailed process of describing the submitted plan and its related jurisdiction, nor do acceptance letters indicate what it is about the redistricting plan that the Justice Department found acceptable. Acceptance letters may be helpful to ensure that objected plans are eventually approved, and through the matching of each approval letter with its corresponding objection letter ensures that an approval was ultimately issued, but even with this "matching process," acceptance letters do not contain the type of information and data which indicates the reasons why the Justice Department approved a redistricting plan. Acceptance letters do not provide the underlying reasons behind an acceptance nor what is necessary to gain approval from the Justice Department.

For every objection letter, there should be a subsequent letter granting preclearance, but this is not the case. Every submission, no matter the initial decision by the Justice Department, eventually must be precleared. The reason for the lack of preclearance letters, both acceptances and objections, could have several explanations, in addition to the ones mentioned above. For instance, the role of the federal courts drawing new districting plans for covered jurisdictions accounts for some of the missing data. Except when a plan is imposed by a federal court,[242] each objection letter should be matched with an acceptance letter; however, the number of federal court redistricting plans is substantially fewer than the total number of objections that are in this study, so a federal court redrawing a redistricting plan cannot account for every missing acceptance letter.

Another reason could be Justice Department record keeping, which I alluded to earlier in this chapter. It is very possible that the Justice Department, because of the very nature of acceptance letters and the lack of information that they do contain, does not keep an accurate record of their whereabouts. Regardless of the reasons, though, Table 6.5 in particular, fuels further suspicion that it is the Justice Department's record keeping that could be problematic. Table 6.5 shows only 20 submissions for the U.S. House. Taking this information and extrapolating over the three decades in this study, seven of the nine states have been covered from 1965 and subject to preclearance, and if each of those states submitted only one congressional plan for the 1970s, 1980s and 1990s, there would be at minimum, 21 congressional plans. Adding in the states of Texas and Florida, covered by the 1975 Amendments to the Act, an additional 4 congressional maps should be added to 21, two each for 1980 and 1990, for a total of 25 congressional maps. Taking into consideration that some of the

[242] See Appendix E for a list of federal court imposed redistricting plans.

nine states in this study have never managed to draw a congressional map would reduce the overall number of submissions, while on the other hand, some states had to make multiple submissions to the Justice Department before having their congressional plans finally approved. Thus, Georgia made two submissions in the 1970s and 1980s and another three in the 1990s, for a total of 7 congressional redistricting maps submitted to the Justice Department for preclearance. Therefore, if this study contained the universe of redistricting plans submitted, the total number of redistricting letters dealing with just congressional plans would be larger. Accordingly, while I do not know the total number of congressional redistricting plans submitted to the Justice Department for preclearance from 1970 to 2000, I feel fairly certain that it exceeds the 20 for which I can report.

When this same logic is extended to the 812 covered counties and other local governing bodies in the nine states, I, again, feel fairly certain that there are more than 180 counties in the South that elect their governing bodies using single member districts. Taking into consideration the county submissions and the 35 police jury plans, the equivalent of county board of commissioners, there are only 215 submissions for county governing bodies, of which 164 are denied preclearance. Again, most all of these governing bodies would have taken correction action so there should be almost as many letters approving subsequent plans, even before accounting for plans approved without an objection. The missing preclearance letters do not prevent the analysis of how the Justice Department implemented Section Five in nine southern states and the creation of a set of preclearance principles. The missing data is problematic, but acceptance letters would not necessarily detail what portion of a submitted redistricting plan is preventing a covered jurisdiction from obtaining Justice Department preclearance.

Preclearance Letters of the 1970s[243]

The experience the Justice Department gained in the first decade and a half following the passage of the Act was critical for the implementation of Section Five. This is the case because by the time the Justice Department had a firm grasp of the extent with which covered jurisdictions would go to ensure that minorities did not gain access to coveted boards and elected assemblies, it had the means to address most of these issues. Even though the Justice Department was relatively new at implementing the Act and Section Five in the early 1970s, there was initially a lot of confusion over what kinds of changes had to be submitted under Section Five (Crowell, 1986); however, the Justice Department still reviewed plans addressing an assortment of topics related to how districts lines were drawn, including fragmentation,[244] vote dilution,[245] non-contiguous districts,[246] the absence of any reasonable governmental justification for unusual voting requirements designed to exclude a large proportion of Black residents[247] and failing to consider viable alternative plans.[248]

Another observation about the earliest redistricting preclearance letters are that they tend to be short and to the point, and are inclined to have an apologetic tone, almost beseeching the covered jurisdiction to "please understand that this objection is based on information presently available to us, and the Attorney General's action does not bar you from bringing additional facts

[243] See Appendix F for a sample of a typical 1970s redistricting preclearance letter.

[244] August 9, 1973, letter for the redistricting plan for Grenada County, Mississippi.

[245] September 3, 1974, letter dealing with the redistricting plan for Attala County, Mississippi.

[246] December 28, 1971, letter referring to the redistricting plan for East Feliciana Parish, Louisiana.

[247] November 13, 1972, letter for the redistricting plan for the Hollywood School District, Saluda County, South Carolina.

[248] February 18, 1975, letter for the redistricting plan for the City of Charleston, South Carolina.

to his attention that would warrant reconsideration of the decision to object."[249] In some instances, it is as if the Justice Department wanted the covered jurisdiction to be aware of the fact that an objection is "fixable" and that it comprehends the challenges that the jurisdiction faces when drawing new district plans. Examples include several letters which point out that the U.S. Attorney General is aware of the impediments faced by a legislature when devising an inclusive redistricting plan and readily admits that some of the conclusions resulting in a denial of preclearance are made reluctantly by the Justice Department.

Focusing awareness on the circumstances and obstacles covered jurisdictions operate under, the Justice Department acknowledges the difficulties which surround devising a plan that satisfies the state, its citizens and simultaneously complies with the mandates of the federal constitution and laws:[250]

> We are aware of the inherent difficulties faced by a legislature in devising comprehensive reapportionment plans.… For that reason, and insofar as time limitations have allowed, we have studied both plans in every detail.[251]

Generally the apologetic language ends with a statement such as, "We are persuaded, however, that the Voting Rights Act compels this result."[252]

Preclearance letters from the 1970s have a propensity to recite the bare minimum of background facts associated with the submitted plan and then proceed directly to the actual

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[249] July 23, 1971, preclearance letter addressing the reapportionment plan for Ascension Parish, Louisiana.

[250] Examples include the March 3, 1972 letter for the redistricting plan for Georgia's House of Representatives and Senate and the June 25, 1974 letter for the redistricting of the Evangeline Parish School Board and Police Jury.

[251] March 3, 1972, preclearance letter focusing on the redistricting plans for the Georgia State House and Senate.

[252] August 20, 1971, letter dealing with the reapportionment of districts for the Louisiana State House and Senate.

decision (see Motomura, 1983). There are some exceptions to this, of course, but for the most part the early letters are limited to very general references, indicating that the plan has a discriminatory effect. Such responses are understandable when submissions received by the Justice Department were incomplete. In such instances, the Justice Department focuses on collecting any additional and necessary information from covered jurisdictions. There are repeated attempts made by covered jurisdictions to try and circumvent the requirements of Section Five, including not providing the required documentation, forcing the Justice Department to inform the covered jurisdiction of its responsibilities under the Act:

> ….we advised you that the information received …was not sufficient to complete your submission and requested additional information to enable us to properly evaluate the change…. The information we requested was never received.[253]

One last major observation about preclearance letters written during the 1970s is the lag time between the passage of the Act and covered jurisdictions adhering to its provisions. This lag time is clearly evident by simply examining the first redistricting plan submitted to the Justice Department for preclearance – March 5, 1970. This first letter was submitted to the Justice Department from a county government in the state of Mississippi; nevertheless, there were still only a small number of jurisdictions that submitted their redistricting plans for preclearance. Shortly after Mississippi's first submission, Virginia followed with its first redistricting submission in May 1971, which was then followed by individual submissions from the states of Georgia and Louisiana in August of 1971. South Carolina did not submit a redistricting plan for preclearance until November 1972 while Alabama, one of the original seven states covered by the Act, did not submit a redistricting plan until March of 1976. Texas' first redistricting plan was submitted for review before Alabama's, in January of 1976. Texas

[253] April 23, 1976, letter for the redistricting plan for the Hale County Board of Registrars, Hale County, Alabama.

took less than one year to respond to the 1975 Amendments to the Act, while the state of Alabama took over ten years to respond to the statutory requirements of the Act requiring electoral changes, including redistricting changes, to be submitted to the Justice Department for review.[254]

In the late 1960s and early 1970s, the lag time between the passage of the Act and covered jurisdictions adhering to its provisions was not necessarily problematic for the Justice Department because it was focusing its effort on voter registration (see Crowell, 1986), but also the Justice Department had very little statutory guidance and case law to determine under what circumstances a redistricting plan should be precleared under Section Five. Moreover, as covered jurisdictions did not submit redistricting plans for preclearance on a regular basis until after the 1975 Amendments, there was a dearth of redistricting plans with which the Justice Department could even begin to structure its Section Five analysis.

Crowell (1986) asserts that an additional problem in some states was that there was no one single official responsible for Section Five submissions for all of the sub-state political jurisdictions having to obtain preclearance. An early consequence of the inadequate number of officials informed about the Act and its requirements was that a number of years passed when few electoral changes were submitted. For example, in 1969, the Justice Department received only 134 Section Five submissions from all covered political jurisdictions while in 1982 the Justice Department received over 14,000 submissions (Crowell, 1986). The increase in submissions from the early 1970s is due to numerous factors. First, the pre-*Allen* and post-*Allen*[255] climate of voting rights policy played a role, as well as other legal decisions, such as

[254] Covered states did submit other types of electoral changes between the years 1965 and 1970, while the first redistricting plan was not submitted until 1970.

[255] 393 U.S. 544 (1969).

Georgia v. United States,[256] which is comparable to the influence of *Allen* in terms of aspects of Section Five compliance, but not necessarily covered in *Allen*.

Even with the slow start, the Justice Department's implementation of Section Five began a dialogue with a large number of covered jurisdictions. The exchanges created a system where the Justice Department offered advice and direction about possible avenues a covered jurisdiction could take to address any discriminatory influence found in a submitted redistricting plan (see Ball, Krane and Lauth, 1982; Motomura, 1983; Crowell, 1986). The letters of the 1970s may be vague in terms of reasons behind the objection when compared to the letters of the 1980s and 1990s, but the Justice Department does provide contextual clues to the submitting jurisdiction on how to obtain preclearance.

In a general sense, the decade of the 1970s can be loosely characterized as a time in which the Justice Department finds its way through the legal parameters of voting rights policy and reconciles them, to the best of their ability, with the contractual agreement envisioned by Congress. The Justice Department seems to be unsure of what is required,[257] but is very conscious of one of its principals, the federal courts.[258] The Justice Department routinely incorporates legal precedents into its preclearance decisions.[259]

The 1970s letters are vague, brief and inexact, which may be a result of the lack of Justice Department regulations, for the Justice Department does not cite any of its own

[256] 411 U.S. 526 (1973).

[257] January 12, 1972, letter addressing the redistricting plan for the St. Mary Parish School Board, St. Mary Parish, Louisiana.

[258] March 6, 1972, letter in reference to the redistricting plan for the South Carolina State Senate.

[259] July 26, 1974, letter referencing the reapportionment plans for the Evangelina Parish School Board and Police Jury, Evangelina Parish, Louisiana.

regulations in the early 1970s. The 1970s letters provide the foundation with which to study the role of the federal courts, particularly the Supreme Court and its role in defining Section Five and the Justice Department's implementation of such. In fact, the 1970s letters incorporate more legal decisions than Justice Department regulations, and when the letters do mention administrative regulations, it is to indicate the timetable in which a covered jurisdiction is to respond to the Justice Department's denial of preclearance (*i.e.* the 60 day time limit).[260] The 1970s preclearance letters do not mention the 1970 or 1975 Amendments, nor do they discuss the political leanings of any of the applicable administrations, even the Nixon Administration, which put up a political fight against the Act's extension in the early 1970s. The U.S. Supreme Court and relevant U.S. District Courts served as the only principal that orchestrated the Justice Department's decisions and supported the expansion of Section Five. The White House and Congress, as the Justice Department's other principals, were conspicuously absent from preclearance letters in the 1970s, though the two did work to direct the Justice Department's implementation of Section Five in other ways, as is documented earlier.

Preclearance Letters of the 1980s[261]

The Justice Department's focus in the 1970s was directed toward weeding out and denying preclearance to redistricting plans that had a discriminatory effect. The 1980s, on the other hand, focused on discriminatory effect, too, but took a more refined stance. In the 1980s, the Justice Department focused on combating fragmentation and vote dilution, as well as

[260] December 24, 1975, letter for the reapportionment plans for the Rapides Parish Police Jury and School Board, Rapides Parish, Louisiana.

[261] See Appendix G for a sample of a typical 1980s redistricting preclearance letter.

retrogression; even though *Beer v. United States*[262] was decided in the mid-1970s, the concept of retrogression took on a more prominent role in the 1980s. The 1970s letters do not mention retrogression, by name, but do reference evidence of redistricting plans "going backwards."[263]

The 1980s witnessed a large number of local jurisdictions shifting from at-large election systems to single-member districts, and the move from one electoral system to another was widespread. Mainly in response to the Act's 1982 Amendments, which followed the Supreme Court's decision in *City of Mobile v. Bolden*,[264] the change from one electoral system to another resulted in an increase in new redistricting plans submitted for preclearance, which brought with it a change in focus by the Justice Department. The change resulted in continued application of the retrogression standard articulated in *Beer*[265] and an accompanying change in the details and tone of the letters.

The 1980s set of letters are more apt to offer thorough jurisdictional details and are much less apologetic than the ones written in the 1970s. The 1980s preclearance letters can best be characterized as a time when covered jurisdictions were still trying to determine what was required under the Act and what types of changes would pass muster with the Justice Department's review process, as well as an adherence to relevant legal decisions. The Justice Department continued to review a wide variety of issues related to how districts were drawn in the 1980s, including instances of (1) fragmenting the Black community; (2) carving out all-Black and all-White areas; and (3) unnecessarily splitting Census Enumeration Districts:

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[262] 425 U.S. 130 (1976).

[263] June 7, 1972, letter for the reapportionment plan for school board districts in Pointe Coupee Parish, Louisiana.

[264] 446 U.S. 55 (1980).

[265] 425 U.S. 130 (1976).

> Our analysis shows that even though the districts in the new proposal appear to be contiguous, some continue to be drawn in a manner designed to fragment Black population concentrations…. [and boundaries] are drawn in a convoluted and distorted fashion that "carves out" of the district three virtually all-Black areas while drawing into the district elsewhere two all-White areas…. This fragmentation also results in what seems to be an unnecessary splitting of a Census Enumeration District….[266]

This quote suggests an interesting difference across decades. In the early 1980s, as evidenced by this quote, the Justice Department is concerned about district contiguity and convoluted district lines. What we will see from the set of letters from the 1990s, is that the Justice Department's requirements change, and that maximizing the number of majority-minority districts was the prominent goal, often prompting jurisdictions to draw new districts that were barely contiguous and had extraordinarily convoluted boundaries; thus, the Justice Department's concern in the 1980s was about the way districts look and in the 1990s that concern is not so much about the way districts look but the reasons behind the formation of a new district plan.

A large number of preclearance letters from the 1980s, however, depict covered jurisdictions taking on a philosophy that can be best described as a "least-change approach." A least-change approach involves covered jurisdictions making conscious and calculated decisions to either restrict the ability of minorities to elect candidates of their choice or to ensure that minority voting strength was sustained at the current levels.[267] Covered jurisdictions taking a least-change approach ensured that minority voting strength experienced no increases, and that regardless of the changes in the racial make-up of the jurisdiction's population, White candidates

[266] November 16, 1981, letter referring to the redistricting plan for the Barbour County Commission, Barbour County, Alabama.

[267] May 18, 1982, letter for the reapportionment of the Monroe City School Board, Monroe County, Louisiana.

were protected by the new redistricting plans.[268] As long as plans are not retrogressive, the Justice Department is likely to grant preclearance; however, when minority voting strength is restricted due to racial discrimination, and the Justice Department's analysis finds evidence of such, it is likely the Justice Department will deny preclearance. Another consequence of covered jurisdictions drawing redistricting plans that did not reflect accurately the Black voting strength by making a conscious decision to maintain minority voting strength at a level established years before,[269] the Justice Department spent a great deal of its time reviewing proposed plans that were ultimately objected.

When the Justice Department is not informing covered jurisdictions about the rules and procedures of redistricting, it points out or indicates specific areas of the submitted plan that raise concerns regarding violations of the Act:

> Application of [the] state formula to the cleared supervisory districts raises two relevant preclearance problems. First, there appears to be retrogression with respect to Black voting opportunities when the proposed county board plan is compared with the plan in effect on November 1, 1964. Second, this apparent retrogression is cause for greater concern since both the 1964 plan and the current proposal are, by operation of the state law, dramatically at variance with the one-person/one-vote requirements of the Fourteenth Amendment.[270]

In addition to the above challenges that the Justice Department dealt with in the 1980s, the letters from that decade also introduce Section Two of the Act and the Justice Department's incorporation of Section Two with its Section Five review process. Although it was not a continuous or common theme in the 1980s set of letters, Section Two violations prevented the Justice Department from granting Section Five preclearance. It was found that "[u]nder Section

[268] July 21, 1981, letter for the Barbour County Commission redistricting plan, Barbour County, Alabama.

[269] December 12, 1983, letter addressing the redistricting plan for the City of College Park, Clayton and Fulton Counties, Georgia.

[270] February 9, 1987, redistricting letter for Pike County's Board of Education, Pike County, Mississippi.

5 of the Voting Rights Act, a submitted change may not be precleared if we find that the plan clearly violates Section 2 of the Voting Rights Act, as amended, 42 U.S.C. 1973."[271]

As well as Section Two concerns, the first instance of the 65% Rule making its way into the language of preclearance letters is introduced in the 1980s, and though the 65% Rule is discussed, its existence is summarily denounced by the Justice Department: "Contrary to your resubmission, it is not the Attorney General's position that the county must produce a third district having a black population of at least 65-percent in order to obtain preclearance."[272] The Justice Department does not shy away from asking some jurisdictions to draw majority-minority districts at 70% Black, and in fact will encourage the creation of majority-minority districts when the political and social realities warrant it so as to ensure that Black voters have equal access and opportunity to elect a candidate of their choice to respective boards, councils and courts.[273] In other covered jurisdictions, with different political, social and racial differences, the Justice Department may encourage the creation of districts that are 55% Black for Black voters to have a reasonable chance of electing a candidate of their choice.[274]

In some letters during the 1980s, even though legal proceedings and court cases, as well as Justice Department regulations, tend to dominate and be a consistent part of the language of the preclearance letters, the congressional record is referred to sparingly. When it is discussed, however, the congressional record is used in much of the same manner as legal decisions, and

[271] August 1, 1988, letter for the districting plan for the board of education in Granville County, North Carolina.

[272] August 22, 1983 letter for the redistricting plan for the Board of Supervisors of Bolivar County, Mississippi.

[273] July 18, 1983, letter addressing the proposed redistricting plans for supervisor and justice court districts in Copiah County, Mississippi.

[274] April 19, 1982, letter detailing the redistricting plans for the North Carolina State House and Senate.

used bolster, validate or rationalize specific Justice Department actions and subsequent decisions. When the Justice Department began to incorporate Section Two with Section Five preclearance, it references the congressional record, suggesting that its principal, Congress, directs it to deny preclearance, under Section Five, to any submitted redistricting plan that violates Section Two.[275] Or, the Justice Department references the congressional record when it is justifying an increased level of scrutiny directed at a particular covered jurisdiction;[276] and yet, the discussion of the congressional record and Congress is largely absent from preclearance letters.

As political and legal events unfolded in the 1980s, Justice Department preclearance decisions and their corresponding letters reflected that covered jurisdictions continued to try and minimize the voting strength of minorities; however, there was also evidence that some covered jurisdictions attempted to correct some of the deficiencies that the Justice Department found in submitted redistricting plans that were previously denied preclearance. Although this "correction" phase was accompanied by an increase in the amount of attention the Justice Department paid to legal doctrine and using the federal courts to justify its preclearance decisions, while also prudently referencing the congressional record, the Justice Department continued to address discriminatory tactics used by covered jurisdictions via preclearance.[277] The Justice Department's use of legal decisions and the congressional record to buttress its decisions lends some support for the development of a principal-agent model; however, the

[275] August 1, 1988, letter referencing the districting plan for the board of education in Granville County, North Carolina. See Senate Report No. 97-417, 97th Congress, 2d. Session, page 12, note 31 (1982).

[276] March 30, 1982, letter describing the reapportionment plan for congressional districts for the state of Mississippi. See Senate Report No. 94-295, 94th Congress, 1st Session, page 19 (1975).

[277] February 10, 1989, letter for the redistricting plan for the City of Greenville in Washington County, Mississippi.

Justice Department's primary principal, the federal courts, are referenced regularly, while the Justice Department's other two principals are basically not present.

Preclearance Letters of the 1990s[278]

The 1990s review process can be characterized as one that further protects minority voting rights, and that Section Five preclearance is granted if a new redistricting plan "fairly reflects" the voting strength of the minority community. The letters of the 1990s tend to make no apologies for any decisions, and most of the letters written in this decade are business like, stating that after a thorough analysis of the submitted plan and in light of judicial, statutory and demographic considerations, the Justice Department can not conclude that the submitting jurisdiction has met its burden under the Voting Rights Act; therefore, on behalf of the Attorney General, the proposed redistricting plan is denied preclearance.[279] This business-like tone continues with the Justice Department describing what the Voting Rights Act demands, such as it:

> requires the U.S. Attorney General to determine whether the submitting authority has sustained its burden of showing that each of the legislative choices made under a proposed plan is free of racially discriminatory purpose or retrogressive effect and that the submitted plan will not result in a clear violation of Section Two of the Act.[280]

The above quote is also an indication of the Justice Department's incorporation of Section Two into its Section Five review process, beginning in the 1980s and extending into the 1990s. Section Two concerns are not mentioned in the 1970s, referenced only a few times in the

[278] See Appendix H for a sample of a typical 1990s redistricting preclearance letter.

[279] October 18, 1993, letter for the City and Parish of Lafayette, Louisiana.

[280] July 15, 1991, letter addressing the redistricting plan for the House of Representatives for the State of Louisiana.

1980s preclearance letters (19 of 203 redistricting plans) but increase to 41 instances out of the 228 redistricting plans submitted in the 1990s, which demonstrates the Justice Department's continued incorporation of Section Two with Section Five preclearance. Of the 60 total redistricting plans that reference Section Two concerns, four are granted preclearance, three of which are in the 1990s.[281]

The three plans in the 1990s that reference Section Two concerns, but are granted preclearance under Section Five, involve situations where on-going litigation and legal challenges complicate the Justice Department's Section Five determinations.[282] Section Two was not a dominant theme in the 1990s set of preclearance letters. The content of the 1990s letters was very similar to what was discussed in the 1980s set of preclearance letters; however, the one main difference between the 1990s and the 1980s set of preclearance decisions is that the federal courts found more districts in violation of Section Two. To address Section Two concerns, remedial plans were proposed but these Section Two remedial plans were submitted to the Justice Department for Section Five preclearance.

When a plan is challenged in court, the Justice Department seems to limit its Section Five review and direct its resources to determining the racial influence of the submitted plan[283] rather than delving into the specific areas being litigated, such as when there is evidence of vote

[281] July 18, 1988, letter for a redistricting plan for School District No. 4, Dorchester County, South Carolina. The Justice Department determines that it "cannot find a basis under Section 5 to object," but goes on to cite problems that are objectionable under Section Two of the Voting Rights Act, and that any future questionable behavior by the county council will warrant close scrutiny by the Justice Department, which then goes ahead and preclears the plan.

[282] November 18, 1991, letter for the congressional redistricting plan for the State of Texas.

[283] September 17, 1993, letter addressing the redistricting plan for county supervisor and justice court/constable districts in Monroe County, Mississippi.

dilution to protect Anglo incumbents.[284] The blurring between the federal courts' Section Two decisions and the Justice Department's implementation of Section Five, and ensuing remedial Section Two plans, is convoluted, but provides evidence of how it was possible for Sections Two and Five to be incorporated by the Justice Department. Just prior to the beginning of the 1990s round of redistricting, the federal courts were asked to address a violation of Section Two,[285] and even though it was a Section Two decision, the Justice Department used it to justify some of its Section Five determinations in the 1990s,[286] which is another example of the courts playing a role as the Justice Department's principal.

The federal district court in Mississippi ruled that Monroe County's 1982 redistricting plan for the board of supervisors violated Section Two of the Act. In 1990, the county proposed a remedial plan to address the Section Two violations but instead of going back to court, the county submitted its plan for Section Five preclearance. The county did not go back to the district court because a court-appointed special master had drawn an interim plan, as mandated by *Ewing*. The county, however, did not change the interim plan and submitted it to the Justice Department as a "new" plan. According to the Justice Department, the interim special-master plan may have remedied Section Two issues, but it violated Section Five; hence, the Justice Department objected to the interim plan in 1991. In 1993, the Justice Department stated, "Since the Section 5 status of the proposed redistricting plan is a matter before the court in *Ewing v. Monroe County*, we are providing a copy of this letter to the court and counsel of record in the

[284] June 16, 1992, letter which refers to the redistricting plan for the U.S. House of Representatives and the State Senate plan for the State of Florida.

[285] *Ewing v. Monroe County*, 740 F. Supp. 417 (N.D. Miss. 1990).

[286] September 17, 1993, letter for the 1992 redistricting plans for county supervisor and justice court/constable districts in Monroe County, Mississippi.

case."[287] This quote illustrates how legal proceedings and subsequent preclearance decisions direct Section Five decisions, but also how it was possible for the Justice Department to integrate Section Two into its Section Five determinations.

In addition to Section Two concerns related to Section Five assessments, common themes from the 1970s and 1980s are seen well into the 1990s; however, the main difference between the first two decades and the 1990s, is that the Justice Department takes more time in describing its review process and the sorts of things that covered jurisdictions may do to get a particular map precleared. For instance:

> After a careful examination of the information you have furnished and a review of all the facts available, I find that portions of the boundary lines for districts 2, 3, 4 and 5 of the reapportionment plan are drawn in a manner which unnecessarily fragments two cognizable Black neighborhoods in the city…[288]

This level of specificity communicated from the Justice Department to covered jurisdictions is not seen in the first two decades of redistricting preclearance letters, and indicates that there is a certain level of growth in the Justice Department's understanding of its role and the sophistication of its review process, but the 1990s set of preclearance letters also reflect the growing level of involvement of a multitude of issues. The Justice Department not only reviews the overall influence of the plan on minority voters, but moreover attempts to understand the reasons for and how each of the legislative choices influence the adoption of any particular redistricting plan.[289] In making its judgments, the Justice Department applies the legal rules and precedents established by its principal, the federal courts, and enforces its own administrative

[287] September 17, 1993 objection letter for the 1992 redistricting plans for county supervisor and justice court/constable districts in Monroe County, Mississippi.

[288] August 9, 1993, letter for the redistricting plan for City of Grenada, Grenada County, Mississippi.

[289] April 1, 1997, letter for the redistricting plan for the South Carolina Senate.

guidelines.[290] To a large degree, the letters of the 1990s dealt with issues that involved deviations from race-neutral guidelines[291] or findings of invidious racial purpose.[292] There are many instances of covered jurisdictions departing from standard procedures and guiding principles, decades after the Act's passage,[293] and if covered jurisdictions were not deviating from standard practices, they were drawing new district lines for the exclusive purpose of protecting incumbents[294] or excluding minorities from the process.[295]

The Justice Department dealt with each of these issues, as they were presented by covered jurisdictions, and a common theme running through all of the 1990s letters is that the Justice Department had to explain the requirements of Section Five, decades after the Act's passage: Section Five of the Voting Rights Act requires the submitting authority to demonstrate that its proposed changes have neither a discriminatory purpose nor a discriminatory effect and that the review is guided by the principle that the Act ensures minorities fair election opportunities but does not guarantee racial or ethnic proportional results in any jurisdiction.[296]

The preclearance letters demonstrate that throughout each decade the preclearance process changed, but that the Justice Department maintained a consistent approach in its concern

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[290] October 1, 1991, letter for the redistricting plan for the Board of Elementary and Secondary Education for the State of Louisiana.

[291] July 15, 1991, letter for the redistricting plan for the State House in the State of Louisiana.

[292] February 8, 1993, letter addressing the redistricting plan for the county council and county school board in Lee County, South Carolina.

[293] March 15, 1996 letter, which refers to the redistricting plans for the Georgia State House and Senate.

[294] September 27, 1991, letter for the redistricting plan for the police jury in Morehouse Parish, Louisiana.

[295] December 20, 1991, letter for the redistricting plan for the police jury and board of education in East Carroll Parish, Louisiana.

[296] July 15, 1991, letter referring to the redistricting plan for the House of Representatives of the State of Louisiana.

for protecting the electoral strength of minorities, as the 1990s continued to witness the Justice Department explaining to each covered jurisdiction what it finds to be a violation of the Act, and although it does not tell the jurisdiction exactly what to do, it points out some useful context clues and is inclined to provide a lot more detail and information. While pointing out important information and details about the submitted plan, the Justice Department also is inclined to proscribe what the submitting jurisdiction should avoid doing to obtain preclearance: do not fragment Black populations and do not unnecessarily limit the opportunity of Black voters from electing their preferred candidate of choice:

> …the plan fragments the Black population concentration in the northern portion of the city, among Districts 2, 3, and 5, with Black voting age populations of 60 percent, 31 percent, and 34 percent, respectively. We understand that when concerns about this fragmentation and the district configurations in this area were raised, city officials contended that the fragmentation was necessary to comply with one person, one vote requirements…. In light of the election results over the last ten years and the apparent pattern of racially polarized voting that occurs in city and county elections, it appears that the proposed plan unnecessarily limits the opportunity of Black voters to elect their preferred candidates.[297]

Another common theme found in the 1990s set of letters, and established in the 1970s, is the Justice Department's continual reliance on the federal courts and how legal decisions are weighed during the implementation of Section Five. Like the two previous decades, the 1990s continued to see the Justice Department reinforce its Section Five verdicts based on related legal decisions and how the Justice Department is responding to one of its principals.[298] The Justice Department's response to its principal is found in the correspondence sent to covered jurisdictions, as legal decisions from the previous decades continue to show up in the 1990s set

[297] June 4, 1993, redistricting letter dealing with the redistricting plan for the City of Charleston, Tallahatchie County, Mississippi.

[298] November 12, 1991, letter for the redistricting plan for the State House of Representatives for the State of Texas.

of letters, as well as new court mandates, and all of them combine in helping the Justice Department make its Section Five decisions.

One last note to make about the 1990s set of preclearance letters is the prominent and continual use of basing Section Five decisions on the administrative regulations. Although present in the 1980s set of letters[299] they begin to become a regular part of the preclearance language in the letters from the late 1970s,[300] but the administrative procedures are clearly evident throughout the set of 1990s letters. The administrative regulations contribute to understanding some of the Justice Department's Section Five determinations.[301]

An Overall Assessment of Preclearance Letters

As the qualitative analysis demonstrates, there is a wide discrepancy in the number of letters addressed to individual states or states' sub-jurisdictions. Five reasons are offered here as to why there are a disproportionate number of plans addressed to some states in comparison to others and why particular jurisdictions have more submissions compared to other covered jurisdictions. The first and most obvious factor is the degree of racial conflict in each state. Mississippi has a long and violent history of preventing and discouraging Blacks from participating in the political process (see Parker, 1990). The large number of letters addressed to that particular state is most likely because the Justice Department reacted to the state's political

[299] The administrative regulations that govern the implementation of Section Five are cited frequently in the set of 1980s preclearance letters, and increase in the last half of that decade, although they are not cited in every single letter, which are predominantly acceptance letters.

[300] Justice Department regulations are mentioned sparingly from 1970 to 1976, and it was not until 1977 that they were consistently cited in preclearance letters.

[301] Like the 1980s, administrative regulations are referenced repeatedly in the 1990s, with some letters citing over 6 different sections of the code, but three or four are more common.

jurisdictions' repeated attempts at preventing Blacks from casting a meaningful vote, which was documented in Chapter Two. Although other southern jurisdictions were openly opposed to allowing Blacks to vote, the instances of such actions diverged greatly across each state.

The second reason for the imbalance in the number of letters written by the Justice Department to each state is the Justice Department's focus on the implementation of Section Five. The Justice Department did not implement the Act in a consistent manner until the latter part of the 1970s. It is believed that if the Justice Department forced some states and jurisdictions to comply and submit acceptable redistricting plans for preclearance, then the surrounding states and jurisdictions would also comply with the Act, and do the same. This worked in part within states, but an examination of preclearance letters indicates that this did not necessarily work across state lines; there are wide degrees of variation between the number of submissions and number of acceptances with states that share a border to support this notion.

A third reason for the imbalance in the number of letters from each state is because the number of covered jurisdictions varies from state to state. Section Five applies to portions of three states in this study, Florida, North Carolina and Virginia, and only district lines drawn within certain designated counties are subject to preclearance.[302] On the other hand, Section Five covers the entire states of Alabama, Georgia, Louisiana, Mississippi, South Carolina and Texas.

Closely related to the number of covered jurisdictions in each state, is the number of political units in each state, which also vary from state to state, and could be another reason for the difference in the number of preclearance letters across states. For example, Georgia has 159 counties, Texas has 254 counties while South Carolina only has 46 counties. Furthermore, the varying number of political units in each state is not just found in the number of counties, but

[302] Chapter Four references three of Virginia's political subdivisions that have "bailed out" pursuant to Section Four of the Act.

also in the number of school districts, with Florida only having one per county while North and South Carolina and Texas have multiple school districts within a single county.

In addition to the differences in the number of jurisdictions and political units covered by the Act, a fifth reason for the disparity in the number of preclearance letters is that states complied with the Act at differing rates. The state of Texas and parts of Florida did not become covered jurisdictions until 1975, at which time covered jurisdictions within the state of Alabama and the state itself had not yet even submitted its first redistricting plan for preclearance. Furthermore, because only five counties in Florida are covered by Section Five this automatically reduces the number of redistricting plans needing to be precleared by the Justice Department from that state.

Several interesting details emerge from this descriptive analysis showing that the three decades in this study vary in terms of submissions and ultimately Justice Department decisions. As the descriptive analysis of available redistricting preclearance letters portrays, the Justice Department does not grant redistricting preclearance at the same rate, decade-to-decade, between the years 1970 and 2000. In addition to applying the relevant legal decisions and the natural progression of understanding what Section Five means and how it was to be implemented, the Justice Department endeavors to evaluate many issues in the context of the demographic and political realities of each covered jurisdiction, its electoral history, as well as the issue of race and how race effects political decisions. The entire review process is guided by the assumption that the Act ensures fair election opportunities for minorities, but does not require that a jurisdiction must guarantee minority voters racial or ethnic proportional results.[303]

[303] December 18, 1991, letter referring to the redistricting plan for the North Carolina House of Representatives and Senate, as well as North Carolina's congressional plan.

In order to make its Section Five determinations, the Justice Department uses a combination of principles to determine whether or not a plan is acceptable and should be granted preclearance. Preclearance letters provide ample evidence that there are a number of factors that the Justice Department takes into consideration during its review process and that it examines a host of variables to determine whether or not a redistricting plan submitted from southern jurisdictions complies with Section Five. Chapter Seven, surveys several of these preclearance principles, all of which are based in the redistricting and legal literature. The examination of preclearance letters in this chapter serves as a guide to establish the baseline of factors that the Justice Department uses to preclear redistricting plans submitted for Section Five, and described in detail in the next chapter.

CHAPTER SEVEN

PRINCIPLES THAT GOVERN THE PRECLEARANCE PROCESS

The pure and simple truth is rarely pure and never simple.

~ Oscar Wilde ~

The Justice Department frequently relies on multiple factors to determine whether an electoral change will harm the political strength of minority communities or if the submitted redistricting change does not fairly or adequately reflect the voting strength of protected communities. To make its determinations, the Justice Department relies on data from a variety of sources, including information provided by the jurisdiction under review, Census data, comments and information from interested individuals, as well as its own files. The content analysis of preclearance letters in the previous chapter demonstrates that the Justice Department is concerned with different factors from decade to decade in its quest to ensure that redistricting plans having a discriminatory purpose or effect are denied preclearance.

Continuing along the same lines, this chapter focuses on developing a set of preclearance principles, derived directly from the set of preclearance letters used in this study and answers the research questions presented in Chapter One:

> *When does the Justice Department deny preclearance to covered jurisdictions that have submitted a redistricting plan for Section Five review?*
>
> *What principles does the Justice Department use to determine if a covered jurisdiction is not in compliance with the Act?*

What techniques and methods do covered jurisdictions engage in to circumvent minorities' ability to elect a candidate of their choice?

Does the Justice Department deny preclearance to covered jurisdictions that impede minorities' equal electoral opportunities? Or does the Justice Department deny preclearance for other reasons? If so, what are those reasons?

Does the Justice Department pay attention to federal court decisions? And if so, what influence do the federal courts have on the preclearance process?

Is there any variation in the implementation of Section Five since the passage of the Act? Have the principles that may lead to a denial of Section Five preclearance changed?

In order to answer these research questions, several preclearance principles are extrapolated from the preclearance letters via an in-depth content analysis. A set of principles are catalogued and described. The introduction of these principles presents an opportunity to analyze which variables contribute to and subsequently lead to the Justice Department's denial of preclearance. The development of a set of principles of preclearance is followed by a cross-tabulation of the 528 redistricting plans, by decade, to determine which principles are more prominent in the 1970s, 1980s and 1990s and how they differ in prominence from 1970 to 2000. The chapter then concludes with a discussion focused on answering the remaining research questions.

Preclearance Principles

The Justice Department is concerned with much more than simply the racial make-up of new districts, and as this research has unfolded, the examination is based on specific issues related to preclearance and most often found in redistricting literature, law review articles and applicable court cases. As mentioned earlier, the set of letters used in this study does not contain the vast bulk of preclearances and only includes the Justice Department's perspective.

Additionally, because I do not have the full compliment of preclearance letters, the sample of letters includes only a tiny fraction of the approvals and is nowhere close to the universe of objection letters. Even with these challenges, however, it is still possible to mine the available data and present some of the richness found in Justice Department documents concerned with preclearing southern redistricting plans. In order to show the patterns and relationships within this data set and help the reader understand the broader context of this research and its relationship to redistricting and preclearance, a set of factors are relied upon to demonstrate some of the issues that the Justice Department must contend with when it is determining whether or not a redistricting plan has a discriminatory purpose or effect.

As discussed in Chapters Four and Five, a covered jurisdiction is able to receive the requested Section Five preclearance if it demonstrates that its reapportionment plan is free of both discriminatory purpose and effect. To discern whether a plan is free of discriminatory purpose and effect, an examination by the Justice Department includes several factors. The following set of principles are routinely discussed in the majority of the preclearance letters and are extrapolated directly from the set of letters in this study, but are firmly based in the literature reviewed in Chapter Two, the multiple-principal-one-agent theoretical model developed in Chapter Three, the contractual agreement established by Congress and outlined in Chapter Four, as well as the legal decisions discussed in Chapter Five. The following section details the most prevalent principles to illustrate what the Justice Department considers when reviewing a Section Five submission. These principles are developed, coded and based on the presence of language in preclearance letters indicating that the Justice Department has mentioned the existence of one of the following principles when reviewing a submitted redistricting plan. The purpose is to demonstrate broad trends throughout the preclearance letters in this study.

In an attempt to make the presentation of the qualitative data accessible and understandable, I have grouped the principles into four broadly defined categories: (1) *Adverse Behavior*, which refers to observable actions taken by elected officials and other individuals who are involved in influencing how redistricting plans are drawn in covered jurisdictions. Such actions catalogued for this study include Vote Dilution, Fragmenting Minority Populations (Cracking), Retrogression, Packing, Use of Alternative Plans and Incumbency Protection; (2) *Political Realities*, which takes into account circumstances that are not necessarily tied directly to the actions of any one or set of elected officials, but includes Polarized Voting and Section Two related concerns; (3) *Institutional Influence,* which refers to two of the Justice Department's principals, which have directed the Justice Department's preclearance process, the federal courts, Congress and the Administration; and (4) the last category is *Other Factors*, which includes the 65% Rule, the presence of a History of Noncompliance, Malapportionment and Public Interest.

The elements listed, by no means, represent a comprehensive list of every factor the Justice Department may have contemplated or considered during the three decades analyzed in this study; when the Justice Department reviewed southern redistricting plans submitted for Section Five preclearance, it could have denied preclearance for reasons not stated here. As it is impossible to know the mindset of Justice Department lawyers or the intentions behind every single plan submitted for review, this study offers an assessment of the most prevalent topics and elements and which are discussed in a majority of the preclearance letters, based in the literature and found in the case law. Because it is possible that the Justice Department denied preclearance based on issues not mentioned here, this descriptive examination of preclearance letters and redistricting plans, is an aggregate analysis focused on discerning broad trends in Justice Department preclearance decisions from 1970 to 2000.

Adverse Behavior

Elected officials and other individuals participating in the redistricting process, for a host of reasons, make calculated decisions and plot out particular political positions in order to enact and implement redistricting plans that may serve their own interests, both now and into the future. These same officials also attempt to implement redistricting plans that maintain the current political structure and power base to prevent others in the community from gaining political power. Collectively, I refer to these actions as adverse behaviors or tactics, and each tactic is described below.

VOTE DILUTION:[304] In the context of preclearance letters, vote dilution is referred to as drawing districting plans in such a way that entire Black neighborhoods or clearly designated minority communities are "moved" into majority-White districts. Mainly, this can be accomplished in two ways, either by submerging a Black population into a district with a White voting age population majority[305] or adding a significant number of White residents to a district in which the resulting configuration "dilutes minority voting strength."[306] When a proposed districting plan draws only one majority-minority district when two can easily be drawn or Blacks constitute a majority of the jurisdiction's population but only constitute a majority of the population in a small number of districts from which they can plausibly elect a candidate of choice, it is likely that the Justice Department will deny preclearance to this submitted plan. The Justice Department indicates that such instances are likely to have the effect of diluting the

[304] The concept of vote dilution is a broad concern that has the capability to subsume a number of other elements discussed; however, I contend that vote dilution is treated as a separate element of concern by the Justice Department in its preclearance analysis.

[305] November 25, 1991, letter referring to the police jury districting plan for Franklin Parish, Louisiana.

[306] March 29, 1992, letter addressing the redistricting plan for Georgia's State House and Senate.

voting strength of Black residents.[307] Karlan and Levison (1996) note that a lone voter cannot suffer from vote dilution, but a group of voters can. As such, evaluating the existence of vote dilution is based on an assessment of group behavior and the plan's overall consequences; hence, plans do not necessarily have to split up or divide cohesive minority populations to be dilutive because simply manipulating district lines can submerge minority voters into majority-White districts.

Vote dilution is a common tactic used by jurisdictions to submerge concentrations of Black voters into White majority districts.[308] Proposed plans that disperse or reduce the voting strength of minorities are examined by the Justice Department to determine if the plan unnecessarily dilutes minority-voting strength.[309] Therefore, vote dilution occurs if the overall representative nature of the submitted plan dilutes the voting strength via a combination of single-member and large multi-member districts.[310] The Justice Department identifies vote dilution in 137 redistricting plans (25.9%), and each one of these plans is denied preclearance.[311]

FRAGMENTED POPULATION: Fragmentation refers to the process of splitting, cracking or dividing cohesive minority populations amongst several districts or can occur when an easily discernable community of interest is divided between one or more districts or when a

[307] November 22, 1982, letter for the districting plan for councilmanic districts in the City of McDonough in Henry County, Georgia.

[308] December 18, 1991, letter referring to the North Carolina's redistricting plan for the House of Representatives, Senate and congressional maps.

[309] May 10, 1993, letter referring to the commissioner court districts in Castro County, Texas.

[310] May 18, 1993, letter for the districting plan for the Town of St. Francisville in West Feliciana Parish, Louisiana.

[311] Commonly, vote dilution is caused by fragmenting communities of interest or packing minority populations into districts and diluting Blacks in the overall redistricting plan (see Davidson, 1994); however, in this context, these two issues are treated separately for descriptive and substantive purposes because the Justice Department treats them as separate concerns in its preclearance letters.

visible and cohesive minority neighborhood is split between districts.[312] Fragmentation can occur when proposed plans effectively disperse groups of minorities amongst several districts in a proposed plan, or needlessly fragments Black population concentrations to produce only a small number of majority-minority districts when more could be drawn.[313] The fragmentation of Black population centers is a common practice throughout the South, but especially in areas where the Black population is the majority or almost a majority of the population in a covered jurisdiction.

When covered jurisdictions purposely divide, portion or splinter minority communities, the intent is to reduce the ability of minorities to elect a candidate of their choice. Fragmenting is often accompanied by evidence demonstrating that the majority in power is attempting to diminish the voting strength of the minority population in a particular jurisdiction. A Section Five analysis by the Justice Department reveals the unnecessary division of Black population concentrations in several submitted districting plans.

The finding of fragmentation is oftentimes accompanied by supporting documentation demonstrating that the covered jurisdiction configured boundary lines with the express purpose of restricting the number of majority-minority districts to a predetermined level.[314] In the Iberville Parish School District, a proposed plan had several significant concentrations of Black population in and around the City of Plaquemine fragmented into majority-White districts.[315]

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[312] June 4, 1993, letter referring to the redistricting plan for the county commission for McCulloch County, Texas.

[313] July 11, 1983, redistricting letter for Caddo Parish, Louisiana.

[314] January 3, 1994, letter referring to the districting plan for the City of Greensboro, Hale County, Alabama.

[315] June 21, 1993, letter for the Iberville Parish School District in Iberville Parish, Louisiana.

The fragmentation of minority populations is identified in 221 districting plans (41.9%), and of these 221 plans, only four of them are granted preclearance (1.8%).

RETROGRESSION: The courts addressed the issue of retrogression and determined how to measure retrogression in *Beer v. United States:*[316]

> In *Beer*, the Supreme Court made clear that a voting change that diminishes 'the ability of minority groups to participate in the political process and to elect their choices to office' is retrogressive and should not be precleared under Section Five. The benchmark for determining whether a redistricting plan will have a retrogressive effect under Section Five is the plan 'in effect at the time of the submission,' unless the existing plan is legally unenforceable under Section Five.[317]

The concept of retrogression, "as applied to a redistricting plan, must consider the plan as a whole rather than as individual districts and thus a reduction in the racial composition of one district does not necessarily violate the Voting Rights Act."[318] Even though the federal courts addressed the issue of retrogression in *Beer*, covered jurisdictions continued to submit retrogressive plans for preclearance well into the 1990s.

The Justice Department is able to measure for the existence of retrogression in two different ways. The first way is by examining the entire redistricting plan and then comparing it to the previous plan to see if there is a reduction in the total number of majority-minority districts. If there is a reduction, then the covered jurisdiction must justify the reasons behind the reduction in the number of majority-minority districts. The second way that the Justice Department can determine if a plan is retrogressive is by measuring the level of minority population in each district; if the minority population, based on a district-to-district analysis, has

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[316] 425 U.S. 130 (1976).

[317] May 20, 1998, letter referring to the redistricting plan for the county council for Horry County, South Carolina. Secondary quote found at 425 U.S. 130 at 141 (1976) and 28 C.F.R. 51.54(b).

[318] April 9, 1986, letter for the redistricting plan for supervisor districts in Sunflower County, Mississippi.

decreased, resulting in the deterioration of minority-voting strength, then the plan is considered retrogressive. If a change in the minority population in one district is offset by an increase in one or more other districts, and results in the overall enhancement of the opportunity for effective political participation by minority voters, then the plan is not retrogressive, and is granted preclearance.[319] When retrogression is a result of adhering to a court's mandate or to correct population inequalities and population deviations between districts, then the redistricting plan is deemed acceptable by the Justice Department and the submitted plan is granted preclearance.[320] When retrogression of either kind is found, however, the Justice Department evaluates the entire circumstances surrounding the redistricting plan and the reasons why a plan is retrogressive in order to determine whether the plan goes farther than is necessary to address constitutional and/or statutory concerns.[321]

Although covered jurisdictions do a fairly good job of reconciling federal and state laws, court decisions and the Act, the ones that redistrict and annex surrounding areas create a complex situation and tend to be treated differently by the federal courts and the Justice Department.[322] When annexations are absent, however, retrogression can easily occur when covered jurisdictions attempt to reduce or limit the overall number of minorities elected. As detailed above, retrogression can occur without reducing the number of minority districts. In the case of the 528 redistricting plans in this study, the Justice Department found evidence of retrogression

[319] April 9, 1986, letter for the redistricting plan for supervisor districts in Sunflower County, Mississippi.

[320] May 14, 1997, letter reconsidering the redistricting plan for the South Carolina Senate.

[321] May 20, 1998, letter referring to the redistricting plan for the county council for Horry County, South Carolina.

[322] See Chapter Five and the discussion about the *City of Richmond v. United States*, 422 U.S. 358 (1975) and *Beer v. United States*, 425 U.S. 130 (1976).

in 135 (25.6%), and 130 (95.6%) of these plans are denied preclearance. The five plans granted preclearance consist of one state house plan in 1992[323] and four local redistricting plans, which were granted preclearance in 1986.[324]

In 1985, Madison County, Mississippi, submitted to the Justice Department four redistricting plans, one each for the board of supervisors, county board of education, constables and county election commission.[325] During its review process, the Justice Department determined that retrogression was present in each of the four redistricting plans and denied preclearance. In June of 1986, Madison County, Mississippi, re-submitted their four redistricting plans, but instead of using the older 1980 Census figures, the County relied on new population estimates, from 1985. When the estimated 1985 population data was utilized, the Justice Department found that the new submissions were no longer retrogressive; in light of the demographic changes captured by the new estimated population figures, the Justice Department withdrew its objection and granted preclearance.[326]

PACKING: The concept of packing or over-concentrating Blacks into a handful of districts (or fewer) is considered a conscious decision to reduce the overall number of opportunities Blacks have to elect a candidate of their choice. This concept and principle captures instances when the Justice Department's analysis mentions the term packing or provides information that a submitted plan contains one or more districts in which minority populations

[323] July 20, 1992, letter referring to the redistricting plan Texas' State House. In a previous submission, described in the preclearance letter, five problem areas are identified as being retrogressive, but that this new submission remedied the objectionable features, satisfying Section Five standards.

[324] June 13, 1986, letter referring to four redistricting plans in Madison County, Mississippi.

[325] September 10, 1985, letter from Madison County, Mississippi.

[326] June 13, 1986, letter requesting that the Justice Department reconsider its September, 1985 submission.

are over-concentrated. Although the phenomenon of packing minorities into only a few districts became part of the language surrounding redistricting in the early 1990s, the idea is not just a product of the post-*Gingles* redistricting environment or the Justice Department's incorporation of Section Two into its Section Five preclearance criteria; rather, the incidence of "consolidating in one district as many Black residents as possible" (*i.e.* packing) is present in preclearance letters dated as early as 1971.[327] In fact, the pervasiveness of packing is seen throughout the 1980s, and reaches well into the 1990s.

Oftentimes, covered jurisdictions are able to minimize the representation of minorities by drawing plans that ignore or limit minority concentrations. For example, the City of Quitman, placed an arbitrary ceiling on the number of majority Black districts, limiting the overall number, and unnecessarily packed Blacks into a single district, even though the city's demographics appeared to allow for the creation of a second district from which Black voters would have an opportunity to elect candidates of their choice.[328] Some covered jurisdictions will purposely over-concentrate Blacks into a few districts in order to reduce the overall number of districts from which minorities can be elected; creating districts with Black population figures of 99 or 84 percent reduces thereby limiting the overall voting strength of minorities.[329] There are numerous examples that indicate that the Justice Department objected to plans that packed minorities into as few districts as possible.[330] Instances of packing suggest to the Justice Department that the

[327] August 20, 1971 letter for the reapportioned districts for the Louisiana State House and Senate.

[328] April 7, 1995, letter to the City of Quitman in Clarke County, Mississippi.

[329] October 6, 1997, letter referring to the redistricting plan for the City of St. Martinville in St. Martin Parish, Louisiana.

[330] March 15, 1993, letter referring to the redistricting plan for city council for the City of Selma, Dallas County, Alabama.

proposed redistricting plan was developed, at least in part, to limit unnecessarily the opportunity for Black voters to elect their candidates of their choice.[331]

Repeatedly, the Justice Department reviews redistricting plans and compares portions of the plan to the larger community, taking into consideration demographic changes; when it discovers exceedingly high minority population percentages in an abnormally low number of districts, the Justice Department challenges why these districts exist.[332] Indications derived from preclearance letters demonstrate that the Justice Department objected to such plans because Black residents were over-concentrated into as few districts as possible.[333] Of the 528 redistricting plans, 114 (21.6%) mention packing minorities; all of them were denied preclearance.

ALTERNATIVE PLANS: During the redistricting process, competing political factions regularly draw multiple plans. Professionals or the politicians themselves draw plans, and they are usually displayed in a public place for comment and review. In a perfect world, elected officials choose one of the publicly displayed plans and submit it to the Justice Department for Section Five review; however, some jurisdictions adopt a plan that fits political goals and ambitions, and which tends to minimize the electoral opportunities of minorities, even when there are alternative plans supported by the minority community.[334]

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[331] November 24, 1993, letter for the redistricting plan for the Iberville Parish School District, Iberville Parish, Louisiana.

[332] July 11, 1983, redistricting letter for Caddo Parish, Louisiana.

[333] March 15, 1993, letter referring to the redistricting plan for city council for the City of Selma, Dallas County, Alabama.

[334] Oftentimes, the minority community supports a plan that would increase their political opportunities or plans that are designed to alleviate any unnecessary packing or fragmentation of the Black community.

When the minority community has submitted a plan for consideration, Justice Department objections tend to be connected to the availability of alternative plans during the redistricting process.[335] When overt and subtle actions are taken to avoid implementing a plan that accurately reflects the voting strength of the minority population in the jurisdiction, the Justice Department is more likely to investigate to determine the reasons for this decision. The Justice Department is interested in determining the reasons behind the decision to select a particular plan over an alternative one.[336]

Other jurisdictions take blatant actions to adopt a plan that fits their own criteria by rejecting the publicly debated alternative plan and offering no satisfactory legal explanation for why such a plan was adopted over a publicly-supported redistricting plan.[337] The Justice Department is more likely to object to a submitted plan if there is evidence indicating that alternative plans were accessible at the time of the adoption of the submitted plan, especially if one of those alternative plans is sponsored and supported by the minority community.[338] When evidence of alternative redistricting plans exist, they become an important part of the review process because the Justice Department is concerned with the *entire* process by which

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[335] Prior to 2001, Justice Department regulations did not state that the existence of an alternative plan would immediately result in a denial of preclearance; however, in January of 2001, Justice Department guidelines changed, reading that if it is determined a reasonable alternative plan exists, and that plan is nonretrogressive or less retrogressive than the submitted plan, an objection must be interposed on the submitted plan [66 Fed. Reg. No. 12 (January 18, 2001)]. Although the rule change was not implemented until 2001, outside the parameters of this particular study, the mention of alternative plans is found throughout the set of preclearance letters. Prior to 2001, the Justice Department considered the existence of alternative plans, and reviews indicate that the existence of alternative plans can play a key role in the preclearance process (see Crowell, 1986).

[336] September 3, 1985, letter for the reapportionment of councilmanic districts in Orangeburg County, South Carolina.

[337] January 3, 1994, letter referring to the districting plan for the City of Greensboro in Hale County, Alabama.

[338] March 30, 1993, letter for the redistricting plan for the school board in West Carroll Parish, Louisiana.

redistricting plans are implemented and tries to uncover whether or not deals were made without public discourse.

If the Justice Department uncovers information related to those in power supporting one plan over another, and the adopted plan does not recognize minority-voting strength, it is likely the Justice Department is not going to tolerate such behavior. If the Justice Department finds evidence that redistricting plans are adopted behind closed doors or are a result of political deals are more likely to be denied preclearance.[339] In one Louisiana parish, there was evidence that a school board made a backroom deal prior to a publicly scheduled hearing; White members on the school board agreed to adopt a redistricting plan that did not contain a majority-minority district. Even though an alternative plan was available which contained a single majority-minority district, the school board rejected it for no apparent reason, and the Justice Department's subsequently denied preclearance.[340]

While not every preclearance letter mentions the existence of an alternative plan, there is no indication that the Justice Department would object to a submitted redistricting plan because of the absence of an alternative plan; however, when alternative plans are present, the Justice Department can measure them against the plan that is passed to answer questions related to whether or not minorities are better off or worse off by the passed plan. In total, 238 redistricting plans (45.1%) mention the availability of alternative plans, of which all of them were denied preclearance.

INCUMBENCY PROTECTION: Several dozen covered jurisdictions use various techniques to prevent minorities from gaining elected positions on boards, councils, assemblies

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[339] February 6, 1998, letter referring to the redistricting plan for Tallapoosa County, Alabama.

[340] August 19, 1994, letter to the Superintendent of Schools, East Carroll Parish, Louisiana.

and legislatures, and one common theme which emerges from the set of preclearance letters is incumbency protection. An analysis of Justice Department correspondence demonstrates that the protection of incumbent interests plays a significant role in the decision making processes of several covered jurisdictions, and although the desire to protect incumbents is not in and of itself an inappropriate consideration, it cannot be accomplished at the expense of minority voting potential.[341]

To accomplish the goal of incumbency protection, covered jurisdictions utilize tactics that oftentimes purposely diverge from traditionally accepted redistricting practices and procedures to preserve existing boundary configurations. This is done in an attempt to not recognize Black-voting strength in the community.[342] Protecting incumbents can include tactics and "rules" limiting the scope in which lines can be changed, moved or altered or disregarding any concerns raised by the minority community regarding the strategies employed to draw new districts.[343] Covered jurisdictions may implement incumbency protection plans in an effort to maintain White political control, and these actions are oftentimes witnessed in covered jurisdictions that are usually on the verge of becoming a majority Black jurisdiction.[344]

When incumbent interests are protected at the expense of minority voters, covered jurisdictions must demonstrate that its choice of protecting incumbents is not tainted by an

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[341] December 13, 1993, letter for the reapportionment of the City of LaGrange in Troup County, Georgia.

[342] October 1, 1991, referring to the redistricting plan for the Board of Elementary and Secondary Education in the State of Louisiana.

[343] November 17, 1995, letter for the redistricting plan for the city council for the City of Greenville in Washington County, Mississippi.

[344] August 17, 1998, letter referring to the redistricting plan for the City of Grenada in Grenada County, Mississippi.

invidious racial purpose, and must make obvious to the Justice Department that its actions are not intended to limit the ability of Blacks to get elected.[345] Oftentimes, when incumbency protection is the driving force behind the drawing of new district lines, it is a not so subtle way to keep minorities from gaining political office. The Justice Department tends not to preclear plans when the elected body has deferred to the interests of incumbents while refusing to accommodate the community of interests shared by insular minorities. When incumbent protection controls the redistricting process, plans are likely to be objected to because such departures from established redistricting criteria indicate discriminatory purpose.

Several instances suggest incumbent protection is not an unusual mechanism used to protect the status quo. A case in point is found in Bladen County, North Carolina, where the county officials adopted a plan that would maintain White political control to the maximum extent possible while minimizing the opportunity for effective political participation by Black citizens.[346] Another example is when local jurisdictions decide to increase the number of board members or other elected members to ensure that no White incumbent is placed in a new majority Black district.[347] The Justice Department found 83 (15.7%) instances in which covered jurisdictions chose to protect its incumbents rather than protecting the voting rights of minorities. The Justice Department found that the driving force behind the passage and attempted implementation of these plans was based on incumbent protection and not minority voting rights, and as such, all 83 redistricting plans were denied preclearance.

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[345] October 25, 1991, letter referring to police jury redistricting plan, as well as the school board redistricting plan, in St. Martin Parish, Louisiana.

[346] November 2, 1987, letter for the districting plan for Bladen County, North Carolina.

[347] June 21, 1993, letter referring to the increase in the number of school board members in Washington Parish, Louisiana.

Political Realities

POLARIZED VOTING: Polarized voting is rampant throughout the South and it is hard to find a covered jurisdiction that does not experience racially polarized voting. Its occurrence is related to when the electorate is politically divided along racial lines, and the existence of racially polarized voting can be used in an effort to limit the opportunity of Black voters by creating districts that confine Black population concentrations into a predetermined number of districts, ensuring the continuation of a White majority.[348] If, after a detailed analysis, the Justice Department determines that there is a persistent pattern of racially polarized voting, with Black-sponsored candidates facing consistent defeat other than in electoral districts with substantial Black majorities,[349] or that White candidates continually defeat Black candidates,[350] its presence provides evidence to analysts that minority candidates are not likely to be elected outside of a majority-majority district.[351] Although polarization is a political reality which covered jurisdictions must contend with, there are few options available to ameliorate the problem; however, the Justice Department considers polarized voting as an important element when reviewing redistricting plans under Section Five.

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[348] March 15, 1993 letter referring to the redistricting plan for the City of Selma in Dallas County, Alabama.

[349] January 5, 1993 letter for the redistricting plans for the county council and county school board in Marion County, South Carolina.

[350] November 12, 1992 letter for the redistricting plan for the city council districts for the City of Selma in Dallas County, Alabama.

[351] December 13, 1993, letter for the redistricting plan for the City of LaGrange in Troup County, Georgia.

When the Justice Department reviews a submitted plan, polarized voting is one of several underlying issues taken into consideration when measuring the plan's overall influence on minorities. Polarized voting (used interchangeably with the phrase racial bloc voting) is centered around an analysis of patterns of group-level behavior and the ability to participate in the political arena based on being a member of a particular group (see Canon, l999). Polarized voting, then, is a group phenomenon, as a lone voter cannot cast a polarizing vote; rather, to determine if it exists, an analysis of aggregate voting behavior must take place (see Pildes, 2002).

One factor used to assess polarized voting is measuring whether or not Black voters overwhelmingly support one candidate while the majority of White voters support a different candidate (see Canon, 1999).[352] Oftentimes, in jurisdictions where voting is racially polarized, reducing the minority population in a district raises serious doubts about whether minorities would continue to have an equal opportunity to elect a candidate of their choice.[353] If a pattern of racially polarized voting appears to characterize elections in a given jurisdiction, the Justice Department takes an additional step and scrutinizes the electoral history of the jurisdiction, such as Black and White voter registration rates and electoral turnout rates, studies previous election results, examines related court findings and reviews the jurisdictions' past Section Five submissions.[354] There are a select set of studies that indicate that polarized voting is on the

[352] Although beyond the scope of this study, factors relevant to a Section Two assessment include the following: examining voter registration data, examining the turnout rates between Blacks and Whites, recognizing the racial identity of candidates, assessing the number of minority candidates elected and considering the history of discrimination and historical patterns of racial bloc voting in the jurisdiction under review. Although related to a racial polarization analysis, they are not components of Section Five review.

[353] January 11, 2000, letter referring to the redistricting plan for the Board of Education in Webster County, Georgia.

[354] November 12, 1991, letter providing for the redistricting plan for the House of Representatives for the State of Texas.

decline and that White voters are more inclined to vote for Black candidates (see Black and Black, 1992; Bullock and Dunn, 1999), but this phenomenon is not necessarily widespread.

Polarized voting occurs when the electorate is divided along racial lines, but can only be addressed through limited means, such as changing the placement of district lines or modifying the rules with which redistricting unfolds; however, such adjustments may not necessarily lead to the desired change at the polls. Information related to the existence of polarized voting is evident in 205 redistricting plans (38.8%), of which 204 (99.5%) are denied preclearance. The one redistricting plan granted preclearance is a plan in which the Justice Department reconsiders, taking into consideration previous submissions. Although the Justice Department finds that racial bloc voting exists in the jurisdiction, the newly submitted plan reduces its existence, and therefore is "no longer the phenomenon [that the Justice Department] thought it to be…."[355]

SECTION TWO: An issue that emerged in the 1980s, but took root in the 1990s was how best to address Section Two violations found in Section Five submissions. Considering only the redistricting preclearance letters written between 1970 and 2000, all but one state (Virginia) had Section Two concerns raised during its Section Five submission process, and 60 redistricting plans (11%) refer to Section Two of the Act; 16 of these (33%) are accepted and precleared while the remaining letters are denied preclearance (32 redistricting plans, 67%). In these letters, the Justice Department inserted language that made clear that, "a submitted change may not be precleared if its implementation would lead to a clear violation of Section Two of the Act."[356]

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[355] April 25, 1983, letter for the redistricting plan for councilmanic districts in Marion County, South Carolina.

[356] June 21, 1993, letter referring to the increase in the number of school board members in Washington Parish, Louisiana.

In instances when there is a clear violation of Section Two, the Justice Department objects to the redistricting plan under Section Five.[357] "In light of the considerations discussed above, the implementation of Act No. 96 would clearly violate Section Two. I cannot conclude, as I must under the Voting Rights Act, that Section Five preclearance is warranted."[358] Section Two is also mentioned in letters when a Section Two suit has been filed and the subsequent submission under Section Five is based on the jurisdiction changing its method of election.[359] As detailed in Chapter Five, the federal courts treat the two sections of the Act separately; however, that does not necessarily mean that the Justice Department does the same. As detailed in Chapter Six, the Justice Department can act as an independent agent and determine which court decisions to implement within the framework of Section Five. Following the 1990s, although impossible to say without analyzing the post-2000 preclearance letters, it would be plausible to argue that the Justice Department has implemented the *Bossier II*[360] decision. This is the case because of the court's different interpretation of Section Two and Section Five is evident in how the Justice Department preclears redistricting plans. The Justice Department grants preclearance based on Section Five standards of review and not on Section Two violations.[361]

Institutional Influence

[357] November 17, 1989, letter referring to a new redistricting plan for Jefferson Parish, Louisiana.

[358] August 12, 1996, letter referring to Act No. 96 providing for a new district plan for the United States House of Representatives from the State of Louisiana.

[359] The issue of the merging of Sections Two and Five is addressed in Chapter Six with the description of the 1980s and 1990s set of preclearance letters, as well as the *Bossier Parish II* case in Chapter Four.

[360] *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000) [*Bossier Parish II*].

[361] See the related discussion in Chapter Five about to the incorporation of Sections Two and Five.

This dissertation examines the phenomenon of an agent with multiple principals. The principal-agent model developed in Chapter Three and discussed throughout suggests that the Justice Department has three principals – the federal courts, Congress, and the White House. Even though it is recognized that the Justice Department potentially has three principals, it is acknowledged that the role of each of the Justice Department's likely principals is not equal, as the preclearance letters fail to mention the White House and only sparingly refer to Congress.[362] When the preclearance letters do mention Congress, the language of the letters tends to quote and/or refer to a particular set of congressional amendments to the Act, in particular the 1982 Amendments. Congress may have a role as one of the Justice Department's principals, but as I acknowledge repeatedly, Congress is an infrequent player in directing its agent's behavior. In terms of the White House, its influence as one of the Justice Department's principals is more political than institutional. Regardless, there is ample evidence indicating that the Justice Department does have three principals.

THE FEDERAL COURTS: Evidence interspersed throughout Chapters Three, Four and in particular, Five, indicate that the Justice Department pays particular attention to the federal courts and uses the federal courts' decisions to determine the scope and applicability of Section Five. When relevant court decisions are made, Justice Department analysis is informed and influenced by the court's rulings as preclearance letters cite text from related cases.[363] Throughout the preclearance letters used in this study, federal court decisions and specific cases are referred to on numerous occasions. The courts' decisions are not simply referred to in name

[362] The institutions that have the power to act as the Justice Department's principals are described in detail throughout. The data used for this study, preclearance letters, mention neither the White House nor the President.

[363] An example of this can be found in the November 17, 1995, letter addressing the city council redistricting plan for the City of Greenville in Washington County, Mississippi.

only, but rather they are an integral part of the review process, and at times the Justice Department, in view of recent court decisions, feels obligated to give great weight to these legal decisions.[364]

Routinely, the Justice Department adheres to its principals' directives; beginning in the 1970s and extending all the way to the present, the Justice Department is very conscious of the federal courts and their proceedings.[365] An example of the Justice Department's deference to the federal courts is found in the majority of the preclearance letters, which refer to specific Supreme Court decisions. The Justice Department is sensitive to legal proceedings, and more often than not, feels obligated to give great weight to the courts' decisions and apply them to each submission requesting Section Five review.[366] The use of court decisions in the preclearance process provides clear evidence that the Justice Department is not merely just aware of its principal; rather, a large number of decisions made by the federal courts provide the basis for the Justice Department to withhold preclearance.

Preclearance letters frequently reference key federal court decisions as a way to incorporate legal principles into the analysis. The legal decisions vary, but are oftentimes accompanied by a short discussion of how the submitted plan violates a legal doctrine or principle. Further evidence that the Justice Department is keenly aware of the federal courts and their decisions is that of the 469 redistricting plans which discuss the federal courts, 88 plans (18.8%) refer to at least one court case; 142 plans (30.3%) mention two court cases; 90 plans

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[364] April 16, 1976, letter for the redistricting plan for the Frio County Commissioner's Court, Frio County, Texas.

[365] March 6, 1972, letter referring to the redistricting plans for the South Carolina State Senate and the June 28, 1999, letter to the City of McComb, Mississippi.

[366] March 5, 1976, letter for the reapportionment of Pickens County, Alabama.

(19.2%) mention three court cases; 74 redistricting plans (15.8%) mention four cases; 27 redistricting plans (5.8%) mention 5 court cases; 20 plans (4.3%) refer to six cases; and 27 redistricting plans reference seven or more court cases (5.8%).[367] Of the 59 redistricting plans that do not reference a court case or legal decision, 30 plans are denied preclearance while 29 are precleared.

CONGRESS: As discussed in Chapters Three and Four, Congress has a distinct and unique role in determining the scope and applicability of Section Five of the Act. Through the amendment process, it has the authority and power to change the framework with which Section Five is implemented. The 1970, 1975 and 1982 Amendments to the Voting Rights Act demonstrates Congress' ability to respond to its agent, the Justice Department. It also indicates the opportunity for Congress to write "corrective" legislation to instruct its agent on how to perform its duties; however, Congress has used this "corrective" power sparingly since the Act's passage in 1965, only directing its agent's actions when the temporary measures of the Act were set to expire. Congress may have created and amended the contractual agreement between itself and the Justice Department, but it has never actually monitored what the Justice Department has done nor has it ever given its agent much guidance when it has.

In fact, Congress and congressional hearings are mentioned rarely in the set of preclearance letters examined in this study. As detailed in the previous chapter, when the congressional record is mentioned in the text of the letters, it is used to rationalize Justice Department decisions, just as court decisions are used to validate a denial of preclearance.

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[367] The most frequently cited cases are *United States v. Georgia* (265 letters), *Beer v. United States* (98 letters) and *Clark v. Roemer* (150 letters). Several other cases are referred to numerous times in the text of letters, such as *Mississippi v. United States*, *Busbee v. Smith*, *City of Richmond v. United States*, *City of Petersburg v. United States*, *Miller v. Johnson*, *Shaw v. Reno* and *City of Rome v. United States*.

Preclearance letters also cite the congressional record to support the Justice Department's interpretation of a legal decision.[368] The discussion of the congressional record is largely absent in the content of preclearance letters; legal decisions and Justice Department regulations serve as the foundation in which the Justice Department relies on to determine whether or not a redistricting plan negatively influences the minority community in any given covered jurisdiction.

Yet, without the legislation in 1965, there would be no preclearance requirement; however, in the succeeding 38 years, Congress has done little to provide continuing guidance to the Justice Department. The amendments to the legislation expanded the reach of Section Five in 1970, and again in 1975. The 1982 Amendments renewed Section Five, and Congress apparently, with no intention of expanding the Justice Department's preclearance activities under Section Five, did not change the substantive reach of Section Five; instead, Congress bolstered Section Two, which the Justice Department attempted to use as a tool in its Section Five preclearance decisions before the federal courts ultimately invalidated the Justice Department's actions. If one interprets congressional inaction as supporting the judiciary's interpretation of the Act, then Congress' failure to overturn any of the court's decisions is indicative that it agrees with the federal courts interpretation of the Act and the Justice Department's implementation of such. This may suggest that the federal courts operate as an agent of Congress, which is an interesting idea but beyond the scope of this study.

ADMINISTRATION: In terms of the White House and various administrations, both Democratic and Republican, there is a strong set of circumstantial evidence supporting the notion that the White House is one of the Justice Department's principals, as described in Chapters

[368] March 15, 1996, letter dealing with the redistricting plans for the Georgia State House and Senate. See House of Representatives Report No. 94-196, page 60 (1975).

Three and Six. As discussed, some Republican Administrations weighed into the preclearance arena for partisan purposes, in particular when congressional plans were considered by the Justice Department for Section Five preclearance. The same cannot be said for local redistricting plans, which happen to make up the bulk of the data examined. The Administration is more concerned with congressional plans than local government councils and legislative bodies, which may very well be nonpartisan, because the White House would have little desire to alter the make-up of local and community elected boards; rather, the interest of the White House, it is appropriate to conclude, focuses on the make-up of the House of Representatives and the corresponding congressional plans from which Representatives are elected.

Other Factors

65% RULE: The 65% Rule was developed in the late 1970s in conjunction with drawing districts allowing minorities an effective opportunity to elect a candidate of their choice. The actual percentage, sixty-five, is derived from several factors and are mainly based on the socioeconomic differences between Blacks and Whites, as population statistics alone do not necessarily predict political influence or outcomes.

> ….[S]tatistical data show that because the State's Black population is generally younger than its White population a Black majority in a legislative district does not imply a Black majority in voting age population in such a district. Furthermore, because of the effects of discrimination and because of the low socio-economic status of Blacks in Mississippi compared to Whites (itself in part the result of discrimination), the registration and voting rates among Blacks are lower than such rates among Whites. Finally, demographic changes since the 1970 Census render less reliable any conclusion that a particular district has in fact the Black population percentage that the available statistics suggest. As a result, caution must be used in the analysis under Section 5 of the submitted plans. The political influence of Blacks in a district cannot be predicted from population statistics alone.[369]

[369] July 31, 1978, letter addressing the redistricting plan for Mississippi's Senate and House of Representatives.

This simple statistical argument developed into the rationale to use 65% Black population as a base line when creating majority-minority districts: 50% Black voting age population serves as the foundation needed to draw a majority-minority district, but an additional 5% should be added for age differences between Blacks and Whites, another 5% for registration disparities between Blacks and Whites and another 5% for lower turnout rates between Blacks and Whites.[370] In cases when covered jurisdictions create majority-minority districts, the issue surrounding their creation focuses on the percentage of minority population sufficient to provide an opportunity to elect someone from that community.[371] That percentage varies from state to state, but is referred to as the "effective majority" (see Brace et al., 1988). Following the 1982 Amendments and Thornburg v. Gingles,[372] covered states chose to create majority-minority districts to ensure that minorities were able to elect a representative of their choice.[373]

Although the 65% Rule garnered a lot of attention in the 1990s, the suggestion of using the figure of 65% can be traced back to the late 1970s, beginning with *Kirksey* in 1977 and evolving through several court cases, including *UJO*,[374] *State of Mississippi v. United States*[375]

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[370] The federal courts have recognized that political participation by minorities tends to be lower in areas where minorities suffer the effects of prior discrimination, which can include inferior education, poor employment opportunities and low incomes [(See, e.g., *White v. Regester*, 412 U.S., at 768-769, 93 S.Ct., at 2340-2341; *Kirksey v. Board of Supervisors of Hinds County, Mississippi*, 554 F.2d 139, 145-146 (CA5), cert. denied, 434 U.S. 968, 98 S.Ct. 512, 54 L.Ed.2d 454 (1977); and see *Thornburg v. Gingles*, 478 U.S. 30 (1986).)].

[371] See *Kirksey v. Board of Supervisors of Hinds County, Mississippi*, 554 F.2d 139 (5th Cir. 1977).

[372] 478 U.S. 30 (1986).

[373] See *Johnson v. De Grandy*, 512 U.S. 997, 1014 (1994) ("The ultimate right of Section 2 is equality of opportunity….").

[374] 430 U.S. 144 (1977). *United Jewish Organizations v. Carey* is referred to as *UJO* in the text.

[375] 490 F. Supp. 569, 575 (D.D.C. 1979).

and *Ketchum v. Byrne*.[376] Brace et al. (1988) argue, however, that the assertion that the 65% Rule was the "law of the land" is based on shaky empirical grounds and rough approximations. In *State of Mississippi* and *Kirksey*, there was ample statistical evidence supporting the notion that 65% minority population was needed, but this notion was not necessarily appropriate for all times and places (see Brace et al., 1988; Lublin, 1997). Even though the District Court of the District of Columbia referred to the 65% Rule, it did so in the context of Mississippi's electoral history. The *Mississippi* Court suggested that 65% Black population was necessary for Black voters to elect a candidate of choice in the state of Mississippi. Additional supporting evidence suggests that the Justice Department did not place a great amount of weight on that particular figure, for it never created rules or regulations implementing such a baseline percentage for all majority-minority districts. In fact, shortly after the decision in *Mississippi*, the Justice Department denies the existence of such:

> Contrary to your resubmission, it is not the Attorney General's position that the county must produce a third district having a Black population of at least 65-percent in order to obtain preclearance. Our focus is less on percentages and much more on the redistricting process as a whole.[377]

Brace et al. (1988) argue that the "65 percent rule has become enshrined in court lore when in fact it was all along only a first approximation based on almost no hard evidence. Moreover, few seem to know the dubious origins of the rule..." (44), but rather it developed into a rough estimate to guide those redrawing district lines in areas with a large minority population (see Brace et al. 1988). Research has shown that no single number is appropriate for every jurisdiction (see Brace et al., 1988; Bullock and Dunn, 1999; Lublin, 1997). The Voting Section

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[376] 740 F.2d 1398 (7th Cir. 1984).

[377] August 22, 1983, letter for the redistricting plan for the Board of Supervisors, Bolivar County, Mississippi.

of the Justice Department does not rely on statistical analysis alone in its determinations (see Brace et al., 1988); rather it takes into consideration the rules, practices and standards used in the creation of the plan. Lublin (1997) argues that an absolute threshold of 65% Black is wrong, and that "instituting a blanket national percentage of Blacks for the creation of a Black district ignores crucial differences between individual states and regions" (47). Parker (1990) suggests the 65% Rule is a rough guide or rule of thumb, and that the threshold for Black electoral success may be higher or lower, depending on local characteristics such as registration and turnout rates.

Due to the well-publicized federal court decisions of the 1990s in the state of Georgia, many believe and continually assert that the Justice Department has a 65% Rule. Those who criticize the Justice Department and argue that the Justice Department has such a rule generally look to *Johnson v. Miller*[378] for their supporting evidence or the *Gingles* test.[379] Although the *Gingles* test does not advocate proportional representation, Canon (1999) argues that the Justice Department and state legislatures interpreted the court's actions as a mandate to create majority-minority districts.[380] Even though the Supreme Court ruled that the Justice Department imposed a goal of black maximization on several covered jurisdictions, the Justice Department continually denies it has such a policy.[381]

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[378] 864 F. Supp. 1354 at 1363-1368 and 1383-1386 (S.D. Ga. 1994), aff'd 115 S. Ct. 2475 (1995).

[379] *Thornburg v. Gingles*, 478 U.S. 30 (1986).

[380] Canon (1999) argues that there was a strong sense within state legislatures that *Gingles* required the creation of majority-minority districts wherever possible. This idea was based on a belief that failing to create majority-minority districts when the three prongs of *Gingles* were met could result in Section Two lawsuits (see Canon, 1999, 73-77).

[381] March 15, 1996, letter referring to the Georgia State House and Senate redistricting plans. This decision was post-*Shaw* and post-*Miller*, and having lost two Supreme Court cases, of course the Justice Department is going to deny it ever required Black maximization – its letters to Georgia, not withstanding.

When the issue of the 65% Rule is mentioned in any of the preclearance letters, the Justice Department vigorously opposes the existence of such a rule:

> It is averred that the alternative plan would not add meaningfully to the electoral opportunity of Black voters because the Black percentage of the total population in the third Black majority district (District 7) would not satisfy the so-called "65 percent rule," which the parish attributes to the Department of Justice. Of course, this Department has assiduously disavowed the use of any such mechanistic measurement of electoral opportunity and, quite understandably, the parish offers no citation to any formulation or promulgation of such a rule by us.[382]

Of the instances in which the 65% Rule is mentioned, it is evident that the Justice Department may deny a covered jurisdictions' submission preclearance, but it does not mandate the drawing of districts with at least 65 percent Black population to obtain preclearance. The Justice Department routinely denies that there are regulations governing the implementation of Section Five that contains a 65% Rule:[383]

> …. I cannot conclude, as I must under the Voting Rights Act, that that burden has been sustained with regard to purpose. It should be made clear that this conclusion has little to do with the actual percentage of Blacks…. There is no 65 percent rule utilized by the Department in connection with our Section 5 analysis.[384]

In fact, the correspondence between the Justice Department and covered jurisdictions strongly suggests that the Justice Department does not give special significance to the 65% Rule, but rather judges each submission on the merits, based on verifiable documentation and supporting data. Based on the Justice Department's analysis, it sometimes may suggest drawing

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[382] *September 27, 1991, letter for the redistricting plan for the Police Jury in Bienville Parish, Louisiana.*

[383] The sample of letters in this study is far from complete, but the earliest mention of the 65 percent rule in this set of preclearance letters is an August 22, 1983 letter directed to the Board of Supervisors of Bolivar County, Mississippi.

[384] January 12, 1988, letter for the redistricting of Supervisor Districts for the South Aberdeen Precinct, Monroe County, Mississippi.

alternative districts with approximately 70% Black[385] or even districts that are 55% Black[386] to enable voters to elect a candidate of their choice, but the Justice Department does not mandate that these percentages are required for preclearance.

For all of the attention given to the 65% Rule, it cannot be implemented in every instance unless the following conditions exist: racial bloc voting occurs in a jurisdiction that contains a sufficiently cohesive, geographically compact and large enough minority population in which a district can be drawn. Although the 65% Rule and its related arguments are rooted in the *Gingles* test and Section Two, the districts that are created in covered jurisdictions to adhere to *Gingles* must also withstand Section Five review. The Court stressed in *Johnson v. De Grandy*[387] that covered jurisdictions must draw districts that take a functional perspective[388] to achieve a district that affords minorities an equal opportunity to elect a candidate of their choice and not rely solely on rigid formulas (see Evangelis, 2002). There is conflicting information about the role the Justice Department took regarding the creation of majority-minority districts and whether its decisions were driven by partisan politics or whether it had an actual maximization agenda/policy or not (see Grofman, 1993; Weber, 1995; Blissman, 1996; Canon, 1999). As described at length in Chapter Six, when the 65% Rule is mentioned in preclearance letters, the Justice Department refutes its existence,[389] and although the 65% Rule is mentioned as early as

[385] July 18, 1983, letter for the redistricting plans for supervisor and justice court districts in Copiah County, Mississippi.

[386] April 19, 1982, letter referring to the redistricting plan for the State House and Senate for the State of North Carolina.

[387] 512 U.S. 997 at 1014-1024 (1994).

[388] A functional perspective takes into consideration the overall opportunity for minority groups to elect a candidate of choice, including the political realities of crossover voting by other racial groups and voter turnout.

[389] September 27, 1991, letter for the redistricting plan for the Police Jury in Bienville Parish, Louisiana.

1982, there are only a few instances and a small number of covered jurisdictions in which the 65% Rule was even discussed in Section Five reviews.

In fact, from an analysis of the 431 preclearance letters, only 8 of them mention the 65% Rule, and oftentimes when the 65% Rule is discussed, it is referred to as merely a rough estimate to be used to guide the drawing of majority-minority districts (see Brace et al. 1988) and that the Justice Department relies on more than just statistical determinations to reach its preclearance decisions (see Brace et al. 1988). From the content analysis, it is reasonable to conclude that the 65% Rule violates the rules and practices of preclearance that the Justice Department established. Furthermore, the written procedures outlined in Justice Department regulations fails to mention implementing a 65% Rule.

HISTORY of NONCOMPLIANCE: Although a past objection does not necessarily lead to a future objection, there is some anecdotal evidence suggesting that the same issues arise time and time again in any given jurisdiction, and as such, past decisions by the Justice Department have some influence on how covered jurisdictions draw future redistricting plans. In light of a history of noncompliance, it is important for the Justice Department to review all available information, including what is contained in past submission files.[390] This information can include apparent departures from long-standing neutral guidelines adopted by the elected body or anomalous treatment of only a portion of the covered jurisdiction. In addition, one factor that the Supreme Court has found to be useful in the assessment of whether a jurisdiction acted with discriminatory purpose is the historical background of proposed voting changes.[391]

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[390] March 12, 1982, letter for the redistricting plan for the Virginia House of Delegates.

[391] August 17, 1998, letter for the City of Grenada in Grenada County, Mississippi.

One difficulty that the Justice Department runs into and must watch out for is when covered jurisdictions provide a bare minimum accounting of how their redistricting plan was formulated or supply a limited amount of the necessary documentation surrounding the requirements for a Section Five submission, such as failing to supply transcripts or records, or doing so in a piecemeal fashion or simply withholding critical details so that its submission is purposely incomplete. The Justice Department bases its initial review on submitted documents but also can review information obtained in connection with previous redistricting submissions to determine whether or not the jurisdiction in question has a history of noncompliance. The records from past submissions may provide enough evidence to confirm an established pattern of noncompliance. The Justice Department is then able to review current proposals in light of past submissions, which provide a baseline to review the newly submitted plan.[392]

When initial submissions do not contain a sufficient accounting of the proceedings under investigation to enable the Justice Department to determine if the proposed redistricting plan has neither a discriminatory purpose nor a discriminatory effect, the plan is denied preclearance. In such instances, the Justice Department allows the jurisdiction to submit additional material at a later date, and when the Justice Department requests further information or documentation from the submitting jurisdiction and the response is inadequate or fails to provide any of the specified reports, the plan is denied preclearance.[393] Some jurisdictions provide "virtually none of the information required and explicitly described in the published administrative guidelines for a

[392] February 6, 1998, letter for the redistricting plan for Tallapoosa County, Alabama.

[393] May 24, 1993, letter referring to the redistricting plan for the Evangeline Parish School District, Evangeline Parish, Louisiana.

submission of a redistricting voting change."[394] Under these circumstances, the Justice Department has no recourse but to object to a plan and deny preclearance.[395] Determining if a history of noncompliance exists, the Justice Department's analysis of the submitted change(s) is informed by constitutional, statutory, court mandated and previous Justice Department submissions. Of the 528 redistricting plans, 123 (23.3%) mention a history of noncompliance, of which 16 are accepted (13%) by the Justice Department, leaving a total of 107 plans with a history of noncompliance (87%) denied preclearance.

MALAPPORTIONMENT: Malapportionment was a major concern in the 1970s because districts were grossly malapportioned after decades of neglect,[396] and because the Justice Department is concerned with the treatment of minorities, malapportioned districts are carefully examined because they can negatively influence minority electoral opportunities. Yet, even after districts are reapportioned and brought into conformity with the "one person, one vote" doctrine established by the Supreme Court, some covered jurisdictions continue to use the excuse of malapportionment to draw districts unfavorable to Blacks into the 1980s and beyond. Covered jurisdictions may claim that a proposed redistricting plan was adopted to reduce malapportionment in an existing plan, even though the opposite was true.

To address issues surrounding the overpopulation of certain districts, covered jurisdictions oftentimes choose to remove predominantly Black areas from a district instead of

[394] October 1, 1991, referring to the redistricting plan for the Board of Elementary and Secondary Education in the State of Louisiana.

[395] October 26, 1993, letter for the redistricting plan for the Town of Johnston in Edgefield County, South Carolina.

[396] See Chapter Five and the discussion about the development of the "one person, one vote" doctrine established by the Supreme Court in the 1960s.

keeping the Black communities together.[397] Some covered jurisdictions use the excuse of malapportioned districts to draw new district lines that purposely dilute minority voters or reduce minority voting strength and base their arguments on attempting to rectify the malapportionment. Covered jurisdictions may also fail to consider or consult Census figures and related data when drawing new districts, resulting in the malapportionment of districts in a poorly concealed attempt to reduce the number of districts Black candidates can be elected.[398]

For example, in Webster County, Georgia, the number of malapportioned districts actually increased after new lines were drawn, instead of decreasing, as it should have.[399] There are some instances when the Justice Department compares Census data to figures submitted by a covered jurisdiction, and oftentimes the numbers are interpreted in highly different ways, sometimes resulting in plans that reveal large population deviations among districts.[400] Of the 92 redistricting plans that mention the issue of malapportionment, 9 are granted preclearance (9.8%), suggesting that although malapportionment is an issue that the Justice Department is concerned with, evidence indicates its presence does not necessarily prevent a plan from being precleared;[401] however, in a limited number of cases, the Justice Department does object to a

[397] September 13, 1993, letter referring to the redistricting plan for Randolph County's board of education in Randolph County, Georgia.

[398] June 28, 1993, letter for a redistricting plan for the Randolph County Commission in Randolph County, Georgia.

[399] January 11, 2000, letter referring to the redistricting plan for the Board of Education in Webster County, Georgia.

[400] July 31, 1992, letter referring to the Del Valle Independent School District in Travis County, Texas.

[401] February 18, 1975, letter for the redistricting plan for the City of Charleston, South Carolina.

submitted redistricting plan simply because the population deviations are too great and inconsistent with the one-person, one-vote requirement.[402]

Covered jurisdictions that draw malapportioned districts oftentimes have to explain to the Justice Department why district populations vary so much. The degree of specificity regarding population data has only gotten more refined over the years, and combined with sophisticated computer programs designed to draw district maps based on the Census' smallest building blocs, malapportionment belies the now available redistricting techniques and tools. Under the Act, the Justice Department is not required to object to plans that are grossly malapportioned; however, it did take on the role of enforcing the legal decisions related to malapportioned districts.[403] In addition to malapportionment, the Justice Department also ensured that the effects standard of Section Five was enforced, which is related to the existence of severely malapportioned districts threatened.[404] The Justice Department also took on the role of enforcing the Fourteenth Amendment's requirement of equal protection[405] and Supreme Court cases related to the line of "one-person, one vote" cases developed in the early 1960s.[406]

PUBLIC INTEREST: The Justice Department is mindful that its responsibilities under Section Five involve determining how a submitted redistricting plan will influence and impinge upon the political opportunities of racial and/or language minorities in a covered jurisdiction. A

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[402] December 3, 1971, letter referencing the reapportionment for Tate County, Mississippi.

[403] *Forte v. Barbour County Commission*, Civil Action No. 79-537-N (M.D. Ala., December 17, 1979).

[404] July 26, 1982, letter for the proposed redistricting plan for the Board of Directors in Conecuh County, Alabama.

[405] See July 21, 1981 letter referencing the Barbour County Commission redistricting plan, Barbour County, Alabama.

[406] See the April 1, 1997, letter for the redistricting plan for the South Carolina Senate: The principle found in the Equal Protection Clause and Supreme Court holdings regarding the constitutional requirement of one-person, one-vote requirement were upheld on a regular basis in the 1980s and 1990s.

result of this particular responsibility, the Justice Department considers several factors. One of those factors is the public. During its analysis, the Justice Department relies on interested persons or groups to notify the Justice Department of events leading up to and involving the submission of a new redistricting plan. Formalized in its administrative regulations, the Justice Department solicits public feedback and information and incorporates all of it into its analysis and review process. Although the generic term, "interested parties," is used in preclearance letters (individuals are not identified), such language in a letter refers to the fact that someone in the public domain has an interest in a particular redistricting plan. Public interest, although prevalent throughout the set of preclearance letters, is merely evidence that the public has an interest in the design of a new redistricting plan and is not necessarily related to whether a redistricting plan is precleared or denied preclearance. It is a simple indication of the amount of public interest related to how districts are drawn in particular jurisdictions

As part of the submission process, the general public is encouraged to contact the Justice Department to voice its concerns about a submitted map and offer possible alternatives, and any interested person may comment to the Justice Department about a submission (see Crowell, 1986).[407] The Justice Department maintains a mailing list of individuals wishing to be notified of Section Five submissions and will even solicit written comments from the minority community.[408] Using the letters to determine the level of public interest, 391 redistricting plans (74.1%) mention that interested parties contacted the Justice Department during its review period. The generic term "interested parties" is used to keep an individual's identity private. The nature and scope of the public's interest is not necessarily related to whether a redistricting

[407] 28 C.F. R. 51.27 and 51.49.

[408] *Id*. 51.36.

plan is precleared or denied preclearance, but rather is a simple indication of the amount of public interest related to how districts are drawn in particular jurisdictions; however, of the 391 redistricting plans that garnered public attention and interest, only 38 redistricting plans were granted preclearance, leaving 353 (90%) of those redistricting plans denied preclearance.

Preclearance Principles in Perspective

Several interesting details emerge from the content analysis in Chapter Six and the development of preclearance principles in this chapter; together, they answer two of the research questions stated at the beginning of this chapter:

> *What principles does the Justice Department use to determine if a covered jurisdiction is not in compliance with the Act?*
>
> *What techniques and methods do covered jurisdictions engage in to circumvent minorities' ability to elect a candidate of their choice?*

The principles that the Justice Department uses to determine if a covered jurisdiction is not in compliance with the Act and the techniques and methods covered jurisdictions engage in to circumvent minorities' ability to elect a candidate of their choice include the following: Vote Dilution, Fragmenting Minority Populations (Cracking), Retrogression, Packing, Use of Alternative Plans and Incumbency Protection. In addition to these principles, which are based on the actions taken by elected officials, covered jurisdictions and the Justice Department must also deal with the political realities of each jurisdiction, which includes issues related to Polarized Voting, but also how to manage Section Two related concerns and potential legal challenges while complying with Section Five. Other factors that the Justice Department may consider when reviewing a submitted redistricting plan Malapportionment and the level of Public Interest shown by the community. The content analysis also demonstrates that the Justice Department

must contend with at least two institutional actors, which direct the Justice Department's preclearance process, and include the federal courts and Congress.[409] The content analysis determines that there are several principles that the Justice Department uses to determine if a covered jurisdiction is in compliance with Section Five.

These principles include an approximate indication of the types of problems that the Justice Department is interested in when it assesses submitted redistricting plans; the principles described above are the criteria that received the most attention from the Justice Department. Furthermore, they also include certain measures that are not necessarily discussed when the topic of redistricting arises. These criteria do not include the traditional redistricting principles, such as contiguity, compactness, respect for political subdivisions and communities of interest because the focus is not on how new districts are drawn or the consideration of how these concepts are applied; rather, the illustrated principles are operationalized to apply to Justice Department preclearance decisions from 1970 to 2000, not on how the covered jurisdictions drew the maps they submitted for preclearance.

The starting point for the formation of each of the principles began with a systematic evaluation of Justice Department preclearance letters. The operational definitions employed for each principle is derived from the extensive record, which comprises of legal decisions, scholarship and Justice Department regulations, but each one of the principles is also based on the presence of language from the preclearance letters used in this study. The specific examples extrapolated from individual preclearance letters, and which are described, indicating that the Justice Department's Section Five review process is extensive. The Justice Department's review

[409] As mentioned before, there is no evidence in the preclearance letters that the Justice Department is concerned with neither the White House nor the President, as neither is ever mentioned in the body of any of the 431 preclearance letters.

includes scrutinizing elected officials and their motivations, looking for the existence of discriminatory actions and poring over documents, provided by the covered jurisdiction under investigation, to see if its actions were designed to subvert minority-voting rights.

It is important to note that the principles used in this study are not mentioned in every single preclearance letter and do not apply to every single redistricting plan submitted for review and that the existence of one principle, such as an alternative plan, does not lead directly to an objection. Each principle is a separate factor in the Justice Department's analysis of submitted redistricting plans; thus, it is possible that the Justice Department would find a redistricting plan that does not protect incumbents may nonetheless be found objectionable for other reasons, while a submitted redistricting plan that provided no evidence of an alternative plan may have drawn an objection based on a Section Two violation. The possible mix of reasons that lead to a Justice Department objection are many, and to determine which of the ones articulated here are more likely to lead to an objection, by decade, a cross-tabulation of the identifiable preclearance principles is offered.

A Decade-By-Decade Analysis: Cross-Tabulations

Chapter Six details the 431 redistricting preclearance letters and 528 redistricting plans in this study. A part of that discussion focuses on how the content and language of the letters evolved from the 1970s through the 1990s. The decade-by-decade analysis demonstrates the various issues that the Justice Department dealt with in the 1970s, 1980s and 1990s, and how the process of reviewing submitted redistricting plans for Section Five compliance became more complicated over time. This chapter introduces several important preclearance principles that direct the Justice Department's implementation of Section Five of the Act. One way in which

the earlier decade-by-decade analysis of the content of the letters can be examined in conjunction with the preclearance principles derived from the preclearance letters and the redistricting plans described in this chapter is using cross-tabulations. The use of cross-tabs is one way to establish which of the many preclearance principles play a more significant role compared to the other factors and the corresponding decade in which that variable is significant. Each principle is assessed, by decade, against Justice Department objections. All of the variables in each cross-tab relationship are nominal, and statistical significance is determined using the value of the Pearson Chi-Square measurement.

RETROGRESSION: Retrogression, articulated in *Beer* in 1976, was not a major principle in the 1970s, as only 5.2% of the submitted redistricting plans were denied preclearance for "going backwards." This number, however, increased considerably in the 1980s, as the Justice Department implemented the retrogression standard, denying preclearance to 37.4% of the submitted redistricting plans during that decade, based on retrogression. In the 1990s, the number of redistricting plans denied preclearance due to retrogression decreased by 15.9%, to 21.5%. The decrease in the percentage of redistricting plans denied preclearance because of retrogression from the 1980s to the 1990s could be due to several factors, including covered jurisdictions understanding that they had (1) to maintain the status quo in terms of the number of majority-minority districts to obtain preclearance; (2) to configure new district plans that did not reduce the number of majority-minority districts; or (3) to draw districts that did not reduce the voting strength of minorities. The introduction of "max-black plans" and the creation of the maximum number of majority-minority districts in the 1990s were more likely to increase minority-voting opportunities and not decrease them. Yet, even though retrogression was not as

much of a concern in the 1990s as it was in the 1980s, there is a significant relationship between retrogression and Justice Department objections in the 1990s (.01) as well as in the 1980s (.000).

VOTE DILUTION: Based on the content analysis of the language of preclearance letters, the percentage of Justice Department objections to redistricting plans that contained evidence of vote dilution after the Justice Department's analysis in the 1970s (45.4%) was more than twice the number of redistricting plans objected to in the 1980s (22.7%), while the difference between the 1980s and the 1990s decreased 2.1 percentage points, to 20.6%. Even though the total percentage of plans objected to by the Justice Department decreased from the 1970s to the 1980s and again from the 1980s to the 1990s, there is a statistically significant relationship between the presence of language indicating that a submitted redistricting plan diluted minority voters and Justice Department objections in all three decades (.000 in the 1970s and 1980s and .003 in the 1990s).

INCUMBENT PROTECTION: Incumbency protection, in the 1970s, was not a significant issue concerning Justice Department objections, as only 3.1% of the redistricting plans were denied preclearance. The 1980s saw a small increase in the percentage of redistricting plans denied preclearance, to 5.4%, for protecting incumbents over the interests of minority voters. The 1990s, on the other hand, saw a 6-fold increase, as the Justice Department objected to 30.3% of the total plans submitted for Section Five review in the 1990s for protecting incumbents. Incumbent protection and Justice Department objections have a weak statistical relationship in the 1980s (.10) but a stronger one in the 1990s (.000) while there is no statistical relationship between incumbent protection and Justice Department objections in the 1970s.

ALTERNATIVE PLANS: The percentage of redistricting plans that are objected to by the Justice Department due to evidence that one or more alternative redistricting plans were

available that would have increased the opportunity for minorities to elect candidates of their own choice, increased with each passing decade. In the 1970s, 20.6% of the total redistricting plans were objected to that had alternative plans available. The decade of the 1980s saw 37.4% of the submitted redistricting plans denied preclearance, while the number from the 1970s to the 1990s tripled, to 62.3% of the submitted redistricting plans denied preclearance by the Justice Department because the Section Five review produced evidence related to the availability of alternative redistricting plans. The statistical relationship between alternative plans and Justice Department objections in the 1990s and the 1980s is strong (.000) while in the 1970s the relationship is still significant, but the relationship is not as strong between Justice Department objections and the availability of alternative redistricting plans (.059).

FRAGMENTATION: Cracking minority population concentrations was common in the 1970s, with 23.7% of submitted redistricting plans denied preclearance. In the 1980s, 36.5% of the submitted redistricting plans were denied preclearance because minority populations were fragmented. That number increased to 52.6%, a difference of 16.1% percentage points, in which submitted redistricting plans were objected to by the Justice Department in the 1990s. There is a statistically significant relationship between fragmenting minority communities and Justice Department preclearance decisions in the 1990s and 1980s (.000) and again in the 1970s (.039).

PACKING: The concept of packing was not a significant factor in the 1970s, as only 9.3% of redistricting plans objected to by the Justice Department cited this factor. The issue, as a reason for objection, increased in the 1980s by 5 percentage points, to 14.3%. In the 1990s, the percentage of redistricting plans denied preclearance because of the presence of language indicating that minorities were packed into only a few districts, more than doubled, to 33.3%.

Packing and Justice Department objections are related and statistically significant in the 1990s (.000), the 1980s (.008) but not in the 1970s (.237).

POLARIZED VOTING: From the 1970s to the 1990s, each decade saw an increase in the frequency of mentions by the Justice Department of polarized voting which was mirrored by an increase in the percentage of redistricting plans denied preclearance. In the 1970s, 14.4% of the submitted plans were objected to while that number almost doubled, to 27.6% in the 1980s, and more than doubled in the 1990s, to 66.7% of the submitted redistricting plans being denied preclearance because of the presence of polarized voting. The relationship between Justice Department objections and polarized voting is statistically significant in the 1980s and 1990s (.000), but not in the 1970s (.129).

SECTION TWO: In the 1970s, Section Two is not mentioned, and as a constant measure could not be analyzed. The 1980s saw 8.9% of submitted plans denied preclearance and that number jumped to 16.7% in the 1990s. Section Two, as mentioned earlier, was not a dominant concern for the Justice Department in any of the three decades, and the statistical relationship reflects this, as there is no statistically significant relationship between Section Two violations and Justice Department objections in the 1980s or the 1990s.

PUBLIC INTEREST: Public interest, and its presence in the language of preclearance letters, has a statistically significant relationship to Justice Department objections in all three decades. In the 1970s, 47.4% of plans were denied preclearance that contained evidence of the public's interest. This percentage increased to 66.5% in the 1980s and jumped again in the 1990s, to 76.3%. Public interest and its relationship with Justice Department objections are strongest in the 1990s (.000) but still significant in the 1980s (.086) and the 1970s (.059).

MALAPPORTIONMENT: It is interesting to note that in the 1970s, when districts were just beginning to be drawn in compliance with Supreme Court cases mandating population equity, only 14.4% of submitted redistricting plans were objected to by the Justice Department due to malapportionment. The percentage of redistricting plans objected to by the Justice Department did not increase much from one decade to the next, as there was a small increase of .4 percentage points in the 1980s, to 14.8% of the plans denied preclearance due to malapportionment. The percentage of redistricting plans denied preclearance due to malapportioned districts increased again in the 1990s, to 17.5% of submitted redistricting plans being denied preclearance because of malapportionment. There is a significant relationship between malapportionment and Justice Department objections in the 1990s (.008), but not in the 1980s (.354) or the 1970s (.467).

HISTORY of NONCOMPLIANCE: In the 1970s, the Justice Department objected to 20.6% of the redistricting plans submitted for Section Five review by covered jurisdictions with a history of noncompliance. That percentage increased slightly in the 1980s, to 23.6%, but fell to 17.1% in the 1990s. The history of noncompliance and Justice Department preclearance decisions do not have a relationship and do not reach statistical significance in the cross-tabulation for any of the three decades studied.

From the cross-tabulations between preclearance principles and Justice Department objections, it is possible to answer the third question presented in this chapter:

> *Is there any variation in the implementation of Section Five since the passage of the Act? Have the principles that may lead to a denial of Section Five preclearance changed?*

There was variation in the implementation of Section Five since the Act's passage in 1965, as a relationship between Justice Department objections and the presence of several

preclearance principles changed over time. Of the factors tested, in the 1970s, the following are statistically significant and related to Justice Department objections, and include public interest, vote dilution, alternative plans and fragmentation of minority communities. These four principles are statistically significant in the 1980s, as well as three others, retrogression, polarized voting and packing. In the 1990s, two additional variables are statistically significant and include malapportionment and protecting incumbents. The only variable that does not reach statistical significance in the cross-tabulation relationships, for any of the three decades, is Section Two. Substantively, these findings indicate that the Justice Department's review process went through a maturation process. In the 1970s, there are only a handful of issues that, statistically speaking, led to a denial of preclearance while change took place in the 1980s, with the increasing presence of several principles leading to a denial of preclearance by the Justice Department, which continued into the 1990s.

Preclearance Denied: A Discussion

The qualitative investigation offers some interesting findings. The lopsided nature of the data, in terms of objections versus acceptances, did not necessarily prevent finding several important preclearance principles that the Justice Department basis its Section Five decisions. It is believed that to answer adequately the research questions the analysis should accommodate the characteristics of the redistricting process, preclearance principles and the Justice Department's principals. This research accomplishes that, and is a valid first attempt at generating a comprehensive and longitudinal study of Justice Department preclearance principles.

If the Justice Department objects to a plan, it must provide a rationale for its decision and then communicate the grounds for that decision to the covered jurisdiction. When the Justice

Department approves of a redistricting plan, it need provide no rationale or basis for its grant of preclearance; thus preclearance letters denying preclearance will have to give some reason for the decision, and in the absence of an objective measure of conditions in a covered jurisdiction, there is no independent basis for knowing whether redistricting plans that drew an objection were any worse than those that were approved by the Justice Department.

When a covered jurisdiction submits a plan for preclearance, two responses can occur – the Justice Department can accept the plan and grant instantaneous preclearance, allowing the covered jurisdiction to implement the precleared plan immediately or the Justice Department can deny preclearance because the submitted plan violates at least one preclearance principle. The purpose of the content analysis is to simulate the decisions made by the Justice Department regarding submitted redistricting plans to determine under what conditions the Justice Department will object to a redistricting plan submitted for preclearance.

As evidenced through the content analysis, it was a challenge to catalogue and organize the preclearance letters and related redistricting plans in a manner that was coherent; the presentation, however, articulates a set of standards drawn from traditional redistricting scholarship, court decisions related to the redistricting process, the Act and the preclearance letters themselves. With this information, it is possible to discern which principles explain the Justice Department's denial of preclearance to redistricting plans submitted from covered jurisdictions in the South between 1970 and 2000.

The content analysis from Chapter Six and the introduction of several preclearance principles in this chapter provides the foundation upon which to answer the remaining research questions:

> *When does the Justice Department deny preclearance to covered jurisdictions that have submitted a redistricting plan for Section Five review?*

As discussed in Chapter Six and here, there are fifteen preclearance principles, including the Justice Department's three principals. Taking into consideration the remaining twelve principles, the Justice Department is more likely to deny preclearance to a covered jurisdiction when there is evidence of one of the adverse behaviors. The other nine principles are important, but their relationship to Section Five is contextual, except for the federal courts, which continually perform as the Justice Department's primary principal.

> *Does the Justice Department deny preclearance to covered jurisdictions that impede minorities' equal electoral opportunities? Or does the Justice Department deny preclearance for other reasons? If so, what are those reasons?*

The content analysis demonstrates that covered jurisdictions have a host of measures at their disposal to circumvent the electoral opportunities afforded minorities, and the techniques and methods covered jurisdictions engage in to evade the Act's provisions may vary, but the Justice Department must react to all of them. The Justice Department denies Section Five preclearance based on a host of issues, but when covered jurisdictions take certain actions, it is more likely that the Justice Department will object to the submitted plan. Those actions include the adverse behavior principles, such as purposely diluting the Black vote, needlessly fragmenting minority populations (*i.e.* cracking), submitting retrogressive redistricting plans for Section Five review, packing an extraordinary percentage of minorities into as few districts as possible, failing to use alternative plans, especially when it is supported by the minority community and protecting incumbents over minority interests. Furthermore, the Justice Department is likely to object to a submitted redistricting plan under Section Five if there is a Section Two violation, at least according to the data in this study.

> *Does the Justice Department pay attention to federal court decisions? And if so, what influence do the federal courts have on the preclearance process?*

The federal courts do influence the Justice Department's Section Five preclearance decisions. It is believed that federal court cases provide direction to the Justice Department, but also provide some foundation for objecting to a redistricting plan. The Justice Department can defer to the federal courts and point to the court record as evidence to support its decision to deny preclearance.

An underlying assumption applied to the Justice Department is that it performs as a surrogate court within the redistricting policy sphere, and while some politicians and academics claim that the Justice Department is an independent executive agency that operates *without* consultation with the other branches of government, this investigation points out that the Justice Department, as an agent of the federal courts, relies on court findings to determine its preclearance decisions. The idea that the Justice Department is guided by one of its institutional principals is supported by the content analysis of 528 redistricting plans and may remove some of the ambiguity associated with the Justice Department's decisions. The analysis demonstrates that the federal courts influence the Justice Department, and as one of its principals it does so on a regular basis.

The Letters Talk: An Analysis of Preclearance Decisions

The previous seven chapters have developed the theoretical model, framework and basis for the analysis of Justice Department preclearance letters, as well as introduced the main principles that govern those decisions. The Justice Department is depicted as operating in the voting rights arena as an agent of three principals – the federal courts, Congress and the Administration – and it is argued that all three institutions have a role in directing the Justice Department and its preclearance decisions. Conceptually, past redistricting and Section Five

scholarship have not developed a preclearance model that incorporates multiple principals directing the Justice Department's implementation of the Act. Furthermore, the content analysis displays the number and array of preclearance objections the Justice Department has made since the passage of the Act, and this was possible because of the sheer number of preclearance letters in this study, which allowed for an examination of general patterns.

At the time of Motomura's (1983) examination of preclearance letters, there was no comprehensive published analysis of the substantive law of Section Five or what factors were included in the Justice Department's review of submitted changes. This research presents information and insights into the preclearance process by providing a perspective similar to Motomura's but one that is concentrated on preclearing redistricting plans. This research provides an analysis of Section Five preclearance decisions not previously attempted. The content analysis is an important step in understanding Justice Department preclearance review. Here, an emphasis was placed on finding good predictors of Justice Department preclearance decisions, but theory testing was also part of the analysis. Through a variety of perspectives, institutional, historical, and statutory, we now know more about preclearance than we did before, filling the void left by the electoral and legal dominated approaches.

CHAPTER EIGHT

CONCLUSION: THE PRECLEARANCE CONUNDRUM

The Act is itself a political measure, subject to modification in the political process.

~ Miller v. Johnson, 515 U.S. 900 (1995) ~

It might be said that only after a bill is passed do its real troubles begin.

~ Eugene Bardach, 1977 ~

A study about preclearing redistricting plans cannot be accomplished without first determining the contextual aspects involved with redistricting. In this study, institutions take center-stage while preclearance principles demonstrate the complexity involved in preclearing southern redistricting plans by institutions. Using an institutional perspective to study the implementation of the Voting Rights Act is appropriate as the Act is structured by Congress, influenced by the White House, instructed by federal court decisions and implemented by the Justice Department. Providing the theoretical link between the institutions integral to implementing Section Five is principal-agent theory.

The theoretical framework utilized in this dissertation models the Justice Department operating as one agent with a set of multiple principals. The content analysis improves our understanding of Section Five preclearance from the Justice Department's perspective and illustrates how the institutions concerned with preclearing southern redistricting plans are involved in the process and the degree of that involvement. The interrelationships between the Justice Department, Congress, the White House and the federal courts are captured via principal-

agent theory in an attempt to simplify the policy domain and understand how each institutional actor affects the Justice Department's preclearance process.

This study set out to examine the phenomenon of whether the Justice Department had multiple principals directing its actions as it implemented the Voting Rights Act of 1965 from 1970 to 2000. Evidence that was presented suggests that the federal courts, Congress and the White House all play a role in determining how the Justice Department implements Section Five of the Act. One of the most appealing aspects of principal-agent theory and the construction of a multiple-principal-one-agent model is that the implementation of Section Five involves a complex policy environment; however, the configuration of the three federal institutions involved in preclearing redistricting plans has resulted in Section Five's definition changing and altering in myriad ways since the Act's passage in 1965. The Justice Department's implementation of Section Five has changed because of actions taken by its three principals: Congress expanded Section Five in 1970 and 1975 and changed the scope of coverage; the federal courts changed the subsequent application of Section Five through the interpretation of the law; and the White House's involvement, via political appointees at the Justice Department, brought some of the Administration's political ambitions to bear on the implementation of Section Five.

The Justice Department's role in implementing Section Five was influenced by its three principals, but the content analysis suggests that Congress and the White House have not been able to incorporate the Justice Department into its sphere of influence, and instead, the Justice Department continues to control its own agenda; that is until the federal courts step in to re-direct its behavior. One could argue, based on the findings presented in this study that the Justice

Department has only remained true to its initial purposes – or at least its purposes as imposed by the federal courts since the *Allen* decision.

The *Allen* decision is a clear example of one of the Justice Department's principals telling its agent to expand its responsibilities. Another example of one of the Justice Department's principals giving its agent direction involves Congress and the congressional amendments to the Act. Through its creation of the Act, Congress made the Justice Department its agent for implementing voting rights law, giving the Justice Department a set of instructions and goals to achieve. With respect to the White House and a particular Administration acting as a principal and directing its agent, the Justice Department, on how to implement the Act, John Dunne pushed the creation of the maximum number of majority-minority districts while he was in the Bush Justice Department in the early 1990s.

An advantage of drawing on principal-agent theory to study the preclearance process demonstrates that the Justice Department's primary principal can change and has done so since the Act's passage. Initially, Congress was an active principal, changing and altering Section Five's scope and definition, but congressional activity did not continue on a regular basis. Congress acquiesced to the federal courts, allowing them to become essentially Congress' agent. The federal courts stepped into the void created by Congress' silence regarding what was considered appropriate action by the Justice Department under the Act. A result of congressional inaction is that the Justice Department's primary principal, by the early 1980s, was the federal courts. The clearest results are that the Justice Department is the significant actor involved with the implementation of Section Five and that over the course of preclearing plans it may respond to all three of its principals, but it seems that only the federal courts rein in the Justice Department's behavior on a consistent and highly visible basis.

If an agent sees an opportunity, however, to expand its activities, it may unilaterally take action. For instance, following the 1982 Amendments, which extended but did not substantively change Section Five, the Justice Department incorporated Section Two into its Section Five reviews. The Justice Department felt comfortable doing this, secure in the fact that it knew Congress would not likely revisit the issue of Section Five coverage until 2007. Bullock (1995c) noted that following the 1980s round of redistricting in southern states, the results suggested partisan motives of the Reagan Justice Department at work. For instance, Reagan's Justice Department, with the help of the Assistant Attorney General for Civil Rights, William Bradford Reynolds, instructed staff members that portions of the revised Act would be implemented for only a few weeks (see Ball, 1986). The reasons behind these actions were that the White House and its political appointees at the Justice Department wanted to implement the Act for political gain (see Bullock, 1983, 1995c). Some scholars contend that the President has the power and ability to pressure the Justice Department to "view" the preclearance process in a particular light favoring the White House's vision and political leanings (Ball, 1986). Thus, with the latent principal out of the picture, the agent's only concern was the active principal; in this case the federal courts. The Justice Departments' power grab succeed for several years until finally the federal courts first in the *Shaw* line of cases and then more explicitly in the *Bossier Parish* line of cases, chastised the Justice Department for its headstrong behavior and reined it in.

Additionally, Wood and Waterman (1994) argue that bureaucracies respond to external actors, as well as events in and outside of their policy domain; therefore, the challenges concerned with the implementation of the Voting Rights Act may lead to goal conflict between the agent and one or three of its principals. This is demonstrated through a legal analysis of related court cases, for when the federal courts disagreed with the Justice Department's

implementation of the Act, they stepped in and directed the Justice Department to implement the Act in a certain way. The interrelations between the respective institutions involved with preclearance illustrate the types of concerns the Justice Department is focused on when reviewing redistricting plans submitted by southern jurisdictions from 1970 to 2000.

This dissertation argues that implementing Section Five is complicated because the Justice Department, at varies times, is obliged to satisfy one of its three principals while at the same time incorporating a set of complex preclearance principles into its review process. The institutional dynamics described in the earlier chapters portray how the Justice Department works within the guidelines provided by Congress, via the Act, while at the same time having the federal courts interpreting the Act in a manner that may differ from the Justice Department's interpretation. A consequence of institutional decision making creates a unique situation where the relationships between the Justice Department and its main principal change over time. Taken as a whole, this research suggests that with regards to preclearance, the nature of the principal-agent relationship changes over time. It is possible that as the policy arena shifts with political, legal and institutional changes, agents may not be beholden to just one principal. This is demonstrated by the congressional amendments pertaining to Section Five in 1970 and 1975.

Through the systematic analysis of preclearance letters, this study bridges the gap left by traditional avenues of studying the redistricting process. The Justice Department's implementation of Section Five and preclearing redistricting plans submitted for review between 1970 and 2000 are examined in a way that differs from traditional studies. Our understanding of Justice Department Section Five preclearance is much improved, particularly concerning the principles that govern Justice Department decision making. I believe that this work, ultimately, will help move the debate surrounding redistricting from the traditional electoral and legal

approaches to one that includes the administrative decisions and their impact on redistricting plans in the South and assist in the exploration of other multiple-principal-one agent models.

Studying Preclearance: Future Research Questions

Studying the decisions and reactions of a set of institutional actors offers a unique opportunity to better understand the preclearance process while the institutional investigation, the legal analysis and content analysis suggest several theoretical and empirical questions regarding the Justice Department's implementation of the Act and ultimately who controls policy outputs through its implementation. In *Shaw*, the federal courts instructed the Justice Department to tailor its review process to a specific set of changes because it had become too aggressive, overstepping its bounds and was not faithfully executing the law. The federal courts, as the Justice Department's most reliable principal in the sense of giving it constant direction, limited its agent's role and the scope of Section Five. However, the actions of the federal courts came after almost two straight decades of expanding its power and ability to implement Section Five as it saw fit (except for *Beer* and *Lockhart*). Instances when the principal expands its agent's responsibilities and then reins them in lead to some interesting questions for future research: After more than two decades of mostly expanding its agent's responsibilities, under what circumstances does the principal step-in and restrict the efforts of its agent? What are the necessary conditions that lead to a principal reversing the actions of its agent? (*i.e. Shaw*, *Bossier Parish* cases and most recently, *Georgia v. Ashcroft*[410]).

The involvement and decisions of the federal courts, Congress and the White House have directed the Justice Department and its implementation procedures, and lent support for a

[410] 123 S. Ct. 2498 (2003); 539 U.S. ___ (2003).

multiple-principal-one-agent model. One interesting aspect of a principal-agent model can be applied to the notion that a set of principals can, over time, be both a primary principal and then become a secondary principal. Congress began as the Justice Department's primary principal, passing the initial legislation that outlined the contractual agreement and charter for the Justice Department and then amending it in the early years after its passage (*i.e.* in 1970 and 1975). Congress then took a less active role as the Justice Department's principal, revisiting the Act, but not Section Five in 1982, and Congress will not address Section Five again until 2007, 25 years after the last time it was extended and 32 years after the last time any significant changes occurred to the scope of Section Five. Such a change, from being a primary to a secondary principal leads to additional questions: When does a principal go from being a primary to a secondary principal? What leads to such a change? Can a secondary principal become a primary principal again?

As time goes by, Congress' role has taken a less prominent position, as the federal courts have stepped in and taken over as the Justice Department's primary principal, directing and re-shaping the scope of Section Five. Congress amended the Act in 1970, 1975 and again in 1982, but it does little else as the Justice Department's principal, but has an opportunity in 2007 to restructure the Justice Department's implementation of the Act. Will Congress take this opening to re-cast the voting rights policy domain, or simply extend Section Five without change and allow it to expire in 2007? What circumstances would have Congress become a primary principal again? Answering these questions would be helpful in understanding how principals rein in the behavior of their agents, but also how the role of principals can alter, which adds to the dialogue on principal-agent relationships. These questions can also serve as a means to continue the incorporation of multiple-principals who operate through one agent.

Congressional oversight of the Justice Department will come into focus leading up to when portions of the Act are set to expire in 2007. If Section Five is removed from the books, I believe that the federal courts will become more involved in the redistricting process, which is hard to imagine, considering that the federal courts current role basically determines the scope and applicability of Section Five. While the administrative route to preclearance ensures a timely response from the Justice Department, the preclearance process has changed in recent times as the politics of redistricting in Texas.[411] Up to and including the 1991-1992 round of redistricting, states and other covered jurisdictions redrew their plans and submitted them for Section Five review; however, the 2001-2002 round of redistricting continued, which may influence how Section Five is viewed in 2007. A question related to potential congressional action in 2007 concerning the Act raises an additional question: If Section Five is not extended beyond 2007, will Section Two become the prominent section of the Act, increasing the number of challenges brought under that Section?

Although the implementation of Section Five unfolds largely through the Justice Department, it is influenced by the federal courts; for when the Justice Department implements the Act in a way that conflicts with one of its principals, the principal exerts pressure on the Justice Department in order to change its course of action more in the direction desired by the principal. This "tug-of-war" affects the shape, implementation, scope and reach of Section Five and related voting rights policy outcomes. This inquiry into the preclearance process of southern redistricting plans also indicates that the implementation process is much like assembling

[411] Refer to the Republican Party's power grab in Texas. The Republican Party is attempting to re-draw congressional district boundaries, even though they were re-drawn by a court following the 2000 Census. There is no statutory or Voting Rights Act requirement stating that the Texas congressional plans need to be re-drawn. On the other hand, there is no prohibition in the Act either, and on 12/19/03 the Justice Department precleared the Texas plan.

numerous parts that are separate elements in the hands of many different institutional actors, most of whom are independent of each other (see Bardach, 1977).

Most recently, the Supreme Court decision, *Georgia v. Ashcroft*,[412] raises difficult questions about the meaning of political power and the trade offs to pursue it.[413] This case is an additional example of the federal courts and the Justice Department in conflict with one another. The Supreme Court stepped in to criticize the Justice Department's implementation of the Act, and while *Georgia v. Ashcroft* did not involve Section Five administrative preclearance, the Justice Department was nonetheless involved as a defendant in the case. One can also infer that the Justice Department would have taken the same steps had the State of Georgia submitted its plan for administrative preclearance, instead of taking the alternate judicial route to obtain Section Five preclearance.

In conclusion, this dissertation has improved our understanding of Section Five preclearance from the Justice Department's perspective via preclearance letters and the connections between the Justice Department and its three principals, the federal courts, Congress and the White House. Furthermore, it has applied principal-agent theory in a policy area not previously attempted, but one that is deserving of more study. This research describes the various legal constraints placed on covered jurisdictions when they contemplate redrawing their district lines and obtaining preclearance, but also provides a set of measures with which one can study the preclearance process, moving beyond the legal analysis and political aspects of redistricting. This research offers a detailed, but broad, illustration of why redistricting plans are denied preclearance by the Justice Department during the years 1970 to 2000. The research

[412] 539 U.S. ___ (2003).

[413] See op-ed piece entitled, "Less Power, More Influence" by Richard H. Pildes in the *New York Times* on August 2, 2003.

attempts to move the debate of preclearance away from the political and legal approaches and instead focus on the administrative decisions made by the Justice Department and shed light on the nature of preclearance and how the Justice Department operates in a policy domain with multiple principals.

APPENDICES

APPENDIX A

ELECTORAL CHANGES SUBJECT TO SECTION FIVE[414]

Administrative Preclearance

Electoral Changes [As stated in 28 C.R.R. 51.13 (1997)]. The following electoral changes are subject to Section 5 preclearance, but are not limited to:

- Any change in qualifications or eligibility for voting;
- Any change concerning registration, balloting and the counting of votes and any change concerning publicity for or assistance in registration or voting;
- Any change involving the use of a language other than English in any aspect of the electoral process;
- Any change in the boundaries of voting precincts or in the location of polling places;
- Any change in the constituency of an official or the boundaries of a voting unit (through redistricting, annexation, deannexation, incorporation, reapportionment, changing to at-large elections from district elections, or changing to district elections from at-large elections);
- Any changes in the method of determining the outcome of an election (e.g., by requiring a majority vote for election or the use of a designated post or place system);
- Any change affecting the eligibility of people to become or remain candidates, to remain holders of elective offices;
- Any change in the eligibility and qualification procedures for independent candidates;
- Any change in the term of an elective office or an elected official or in the offices that are elective (e.g., by shortening the term of an office, changing from election to appointment or staggering the terms of offices);
- Any change affecting the necessity of or methods for offering issues and propositions for approval by referendum; and
- Any change affecting the right or ability of people to participate in political campaigns that is effected by a jurisdiction subject to the requirement of Section 5.

Contents of Submissions [28 C.F.R. 51.27 (1997)]. Each submission to the Department of Justice should be submitted as soon as possible after they become final, and require certain contents. The required contents includes, but are not limited to:

- A copy of the proposed and existing law;

[414] Source: Department of Justice. 2000. http://www.usdoj.gov/crt/voting.

- An explanation of the difference between the prior and proposed situations with respect to voting;
- The name, title, address and telephone number of the person making the submission;
- The identification of the person or body responsible for making the change and the mode of decision;
- A statement identifying the authority under which the jurisdiction undertook the change and a description of the procedures the jurisdiction was required to follow in deciding to undertake the change;
- The date of adoption and the date the change is to take effect;
- A statement that the change has not yet been enforced or administered or an explanation of why the statement cannot be made;
- A statement of the reasons for the change and the anticipated effect of the change on members of racial or language minority groups;
- Any past or present litigation involving the change;
- A statement that the prior practice and the applicable procedure has been precleared, a statement that preclearance was not required, or an explanation of why the statement cannot be made;
- Other information that the attorney general determines is required for an evaluation of the purpose or effect of the change.

Redistricting Plans and Annexations [28 C.F.R. 51.28 (1997)]. The Department of Justice also requires the following information:

- Demographic information, including the total population, voting age population, any population estimates and number of registered voters in the affected area before and after the change by race and language minority group.
- Maps showing prior and new boundaries of voting units and precincts; location of racial and language minority groups; natural boundaries or geographic features that influenced the selection of boundaries of the prior or new units; and the location of prior and new polling places and registration sites.
- With respect to annexations, the present and expected future use of the annexed land; an estimate of expected population by race and language group when the anticipated development is completed; and a statement that all prior annexations subject to preclearance have been submitted or a statement that identifies which annexations have not been submitted for preclearance.
- Previous primary and general election returns, including name and race of each candidate; position sought by each candidate; number of votes received by each candidate by voting precinct; outcome of each contest; and the number of registered voters, by race and language group, for each precinct. Information with respect to elections held within the past ten years will normally be sufficient.
- Evidence of public notice and participation, including the opportunity for the public to be heard; the opportunity for interested parties to participate in the decision to adopt the proposed change; and an account of the extent to which the participation, especially by minority group members, in fact took place.

- Evidence that the submission has been made available to the public and that the public has been informed about the availability of the submission.
- Minority group contacts, including name, address, telephone number and organizational affiliation, if any.

The Department of Justice encourages interested individuals to comment on submitted plans. [28 C.F.R. 51.29 (1997).] The comments received by the Department of Justice are not required to be publicly released. The Department of Justice will comply with the request of any individual that his or her identity not be disclosed to anyone outside the Department of Justice, to the extent permitted by the Freedom of Information Act. [28 C.F.R. 51.29 (d) (1997).] Note, however, it is the policy of the Department of Justice not to introduce the comments and identity of individuals who request confidentiality as evidence in litigation over the plan, unless the individual waives their prior request for confidentiality or the disclosure is required by the court.

APPENDIX B

REDISTRICTING CRITERIA

1990s Districting Principles Used by Each State (in addition to population equality)

State	Compact	Contiguous	Preserve Political Subdivisions	Preserve Communities of Interest	Preserve Cores of Prior Districts	Protect Incumbents
Alabama	C, L	C, L	C, L	C, L	C, L	
Florida		L				
Georgia		C, L	C, L		C, L	YC, YL
Louisiana	L	L	L		L	
Mississippi	C, L	C, L	C, L			
North Carolina		C, L	C, L		C	YC
South Carolina	C, L	C, L	C, L	C, L	C, L	YC, YL
Texas		L	L			
Virginia	C, L	C, L	L	L		YL

Key:
C = Required in congressional plans
L = Required in legislative plans
NC = Prohibited in congressional plans
NL = Prohibited in legislative plans
YC = Allowed in congressional plans
YL = Allowed in legislative plans

Note: Although the nine southern states followed relatively similar redistricting criteria, a few states outside of the South used additional districting principles, such as "convenience" (Minnesota), "understandability to the voter" (Hawaii, Kansas, Nebraska), and "preservation of politically competitive districts" (Colorado).

Source: www.fairvote.org

APPENDIX C

THE VOTING RIGHTS ACT OF 1965

SECTION 1.
AN ACT To enforce the Fifteenth Amendment to the Constitution of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress [p*338] assembled, that this Act shall be known as the "Voting Rights Act of 1965."

SECTION 2.
No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

SECTION 3.
(a)
Whenever the Attorney General institutes a proceeding under any statute to enforce the guarantees of the fifteenth amendment in any State or political subdivision the court shall authorize the appointment of Federal examiners by the United States Civil Service Commission in accordance with section 6 to serve for such period of time and for such political subdivisions as the court shall determine is appropriate to enforce the guarantees of the fifteenth amendment

(1) as part of any interlocutory order if the court determines that the appointment of such examiners is necessary to enforce such guarantees or
(2) as part of any final judgment if the court finds that violations of the fifteenth amendment justifying equitable relief have occurred in such State or subdivision:

Provided, that the court need not authorize the appointment of examiners if any incidents of denial or abridgement of the right to vote on account of race or color

(1) have been few in number and have been promptly and effectively corrected by State or local action,
(2) the continuing effect of such incidents has been eliminated, and
(3) there is no reasonable probability of their recurrence in the future.

(b)
If in a proceeding instituted by the Attorney General under any statute to enforce the guarantees of the fifteenth amendment in any State or political subdivision the court finds that a test or device has been used for the purpose or with the effect of denying or abridging the right of any citizen of the United States to vote on account of race or color, it shall suspend the use of

[p*339] tests and devices in such State or political subdivisions as the court shall determine is appropriate and for such period as it deems necessary.

(c)
If in any proceeding instituted by the Attorney General under any statute to enforce the guarantees of the fifteenth amendment in any State or political subdivision the court finds that violations of the fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during such period no voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the court finds 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: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced 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, except that neither the court's finding nor the Attorney General's failure to object shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure.

SECTION 4.
(a)
To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been [p*340] made under subsection (b) or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color: Provided, That no such declaratory judgment shall issue with respect to any plaintiff for a period of five years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this Act, determining that denials or abridgments of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff.

An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color.

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment

(b)
The provisions of subsection (a) shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 percentum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 percentum of such persons voted in the presidential election of November 1964.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 6 or section 13 shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

(c)
The phrase "test or device" shall mean 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.

(d)
For purposes of this section no State or political subdivision shall be determined to have engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color if

(1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action,
(2) the continuing effect of such incidents has been eliminated, and
(3) there is no reasonable probability of their recurrence in the future.

(e)

(1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant [p*342] classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.
(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that, in States in which State law provides that a different

level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.

SECTION 5.
Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) 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, 1964, 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, 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, [p*343] 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, except that neither 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.

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 of the United States Code and any appeal shall lie to the Supreme Court.

SECTION 6.
Whenever
(a)
a court has authorized the appointment of examiners pursuant to the provisions of section 3(a), or

(b)
unless a declaratory judgment has been rendered under section 4(a), the Attorney General certifies with respect to any political subdivision named in, or included within the scope of, determinations made under section 4(b) that

(1) he has received complaints in writing from twenty or more residents of such political subdivision alleging that they have been denied the right to vote under color of law on account of race or color, and that he believes such complaints to be meritorious, or

(2) that, in his judgment (considering, among other factors, whether the ratio of nonwhite persons to white persons registered to vote within such subdivision appears to him to be reasonably attributable to violations of the fifteenth amendment or whether substantial evidence exists that bona fide efforts are being made within such subdivision to comply with the fifteenth amendment), the appointment of examiners is otherwise necessary to [p*344] enforce the guarantees of the fifteenth amendment, the Civil Service

Commission shall appoint as many examiners for such subdivision as it may deem appropriate to prepare and maintain lists of persons eligible to vote in Federal, State, and local elections. Such examiners, hearing officers provided for in section 9(a), and other persons deemed necessary by the Commission to carry out the provisions and purposes of this Act shall be appointed, compensated, and separated without regard to the provisions of any statute administered by the Civil Service Commission, and service under this Act shall not be considered employment for the purposes of any statute administered by the Civil Service Commission, except the provisions of section 9 of the Act of August 2, 1939, as amended (5 U.S.C. 118i), prohibiting partisan political activity: Provided, That the Commission is authorized, after consulting the head of the appropriate department or agency, to designate suitable persons in the official service of the United States, with their consent, to serve in these positions. Examiners and hearing officers shall have the power to administer oaths.

SECTION 7.

(a)

The examiners for each political subdivision shall, at such places as the Civil Service Commission shall by regulation designate, examine applicants concerning their qualifications for voting. An application to an examiner shall be in such form as the Commission may require and shall contain allegations that the applicant is not otherwise registered to vote.

(b)

Any person whom the examiner finds, in accordance with instructions received under section 9(b), to have the qualifications prescribed by State law not inconsistent with the Constitution and laws of the United States shall promptly be placed on a list of eligible voters. A challenge to such listing may be made in accordance with section 9(a) and shall not be the basis for a prosecution under section 12 of this Act. The examiner [p*345] shall certify and transmit such list, and any supplements as appropriate, at least once a month, to the offices of the appropriate election officials, with copies to the Attorney General and the attorney general of the State, and any such lists and supplements thereto transmitted during the month shall be available for public inspection on the last business day of the month and, in any event, not later than the forty-fifth day prior to any election. The appropriate State or local election official shall place such names on the official voting list. Any person whose name appears on the examiner's list shall be entitled and allowed to vote in the election district of his residence unless and until the appropriate election officials shall have been notified that such person has been removed from such list in accordance with subsection (d): Provided, That no person shall be entitled to vote in any election by virtue of this Act unless his name shall have been certified and transmitted on such a list to the offices of the appropriate election officials at least forty-five days prior to such election.

(c)

The examiner shall issue to each person whose name appears on such a list a certificate evidencing his eligibility to vote.

(d)

A person whose name appears on such a list shall be removed therefrom by an examiner if

(1) such person has been successfully challenged in accordance with the procedure prescribed in section 9, or
(2) he has been determined by an examiner to have lost his eligibility to vote under State law not inconsistent with the Constitution and the laws of the United States.

SECTION 8.
Whenever an examiner is serving under this Act in any political subdivision, the Civil Service Commission may assign, at the request of the Attorney General, one or more persons, who may be officers of the United States,
(1) to enter and attend at any place for holding an election in such subdivision for the purpose [p*346] of observing whether persons who are entitled to vote are being permitted to vote, and
(2) to enter and attend at any place for tabulating the votes cast at any election held in such subdivision for the purpose of observing whether votes cast by persons entitled to vote are being properly tabulated. Such persons so assigned shall report to an examiner appointed for such political subdivision, to the Attorney General, and if the appointment of examiners has been authorized pursuant to section 3(a), to the court.

SECTION 9.
(a)
Any challenge to a listing on an eligibility list prepared by an examiner shall be heard and determined by a hearing officer appointed by and responsible to the Civil Service Commission and under such rules as the Commission shall by regulation prescribe. Such challenge shall be entertained only if filed at such office within the State as the Civil Service Commission shall by regulation designate, and within ten days after the listing of the challenged person is made available for public inspection, and if supported by
(1) the affidavits of at least two persons having personal knowledge of the facts constituting grounds for the challenge, and
(2) a certification that a copy of the challenge and affidavits have been served by mail or in person upon the person challenged at his place of residence set out in the application. Such challenge shall be determined within fifteen days after it has been filed. A petition for review of the decision of the hearing officer may be filed in the United States court of appeals for the circuit in which the person challenged resides within fifteen days after service of such decision by mail on the person petitioning for review but no decision of a hearing officer shall be reversed unless clearly erroneous. Any person listed shall be entitled and allowed to vote pending final determination by the hearing officer and by the court [p*347]

(b)
The times, places, procedures, and form for application and listing pursuant to this Act and removals from the eligibility lists shall be prescribed by regulations promulgated by the Civil Service Commission and the Commission shall, after consultation with the Attorney General, instruct examiners concerning applicable State law not inconsistent with the Constitution and laws of the United States with respect to
(1) the qualifications required for listing, and
(2) loss of eligibility to vote.

(c)
Upon the request of the applicant or the challenger or on its own motion the Civil Service Commission shall have the power to require by subpoena the attendance and testimony of witnesses and the production of documentary evidence relating to any matter pending before it under the authority of this section. In case of contumacy or refusal to obey a subpoena, any district court of the United States or the United States court of any territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or is domiciled or transacts business, or has appointed an agent for receipt of service of process, upon application by the Attorney General of the United States shall have jurisdiction to issue to such person an order requiring such person to appear before the Commission or a hearing officer, there to produce pertinent, relevant, and nonprivileged documentary evidence if so ordered, or there to give testimony touching the matter under investigation, and any failure to obey such order of the court may be punished by said court as a contempt thereof.

SECTION 10.
(a)
The Congress finds that the requirement of the payment of a poll tax as a precondition to voting

(1) precludes persons of limited means from voting or imposes unreasonable financial hardship upon such persons [p*348] as a precondition to their exercise of the franchise,
(2) does not bear a reasonable relationship to any legitimate State interest in the conduct of elections, and
(3) in some areas has the purpose or effect of denying persons the right to vote because of race or color. Upon the basis of these findings, Congress declares that the constitutional right of citizens to vote is denied or abridged in some areas by the requirement of the payment of a poll tax as a precondition to voting.

(b)
In the exercise of the powers of Congress under section 5 of the fourteenth amendment and section 2 of the fifteenth amendment, the Attorney General is authorized and directed to institute forthwith in the name of the United States such actions, including actions against States or political subdivisions, for declaratory judgment or injunctive relief against the enforcement of any requirement of the payment of a poll tax as a precondition to voting, or substitute therefor enacted after November 1, 1964, as will be necessary to implement the declaration of subsection (a) and the purposes of this section.

(c)
The district courts of the United States shall have jurisdiction of such actions which shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited.

(d)

During the pendency of such actions, and thereafter if the courts, notwithstanding this action by the Congress, should declare the requirement of the payment of a poll tax to be constitutional, no citizen of the United States who is a resident of a State or political [p*349] subdivision with respect to which determinations have been made under subsection 4(b) and a declaratory judgment has not been entered under subsection 4(a), during the first year he becomes otherwise entitled to vote by reason of registration by State or local officials or listing by an examiner, shall be denied the right to vote for failure to pay a poll tax if he tenders payment of such tax for the current year to an examiner or to the appropriate State or local official at least forty-five days prior to election, whether or not such tender would be timely or adequate under State law. An examiner shall have authority to accept such payment from any person authorized by this Act to make an application for listing, and shall issue a receipt for such payment. The examiner shall transmit promptly any such poll tax payment to the office of the State or local official authorized to receive such payment under State law, together with the name and address of the applicant.

SECTION 11.

(a)

No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of this Act or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote.

(b)

No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 3(a), 6, 8, 9, 10, or 12(e).

(c)

Whoever knowingly or willfully gives false information as to his name, address, or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another [p*350] individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than $10,000 or imprisoned not more than five years, or both: Provided, however, That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, or Delegates or Commissioners from the territories or possessions, or Resident Commissioner of the Commonwealth of Puerto Rico.

(d)

Whoever, in any matter within the jurisdiction of an examiner or hearing officer knowingly and willfully falsifies or conceals a material fact, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

SECTION 12.

(a)

Whoever shall deprive or attempt to deprive any person of any right secured by section 2, 3, 4, 5, 7, or 10 or shall violate section 11(a) or (b), shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(b)

Whoever, within a year following an election in a political subdivision in which an examiner has been appointed

(1) destroys, defaces, mutilates, or otherwise alters the marking of a paper ballot which has been cast in such election, or

(2) alters any official record of voting in such election tabulated from a voting machine or otherwise, shall be fined not more than $5,000, or imprisoned not more than five years, or both [p*351]

(c)

Whoever conspires to violate the provisions of subsection (a) or (b) of this section, or interferes with any right secured by section 2, 3 4, 5, 7, 10, or 11(a) or (b) shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(d)

Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 2, 3, 4, 5, 7, 10, 11, or subsection (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, an action for preventive relief, including an application for a temporary or permanent injunction, restraining order, or other order, and including an order directed to the State and State or local election officials to require them

(1) to permit persons listed under this Act to vote and

(2) to count such votes.

(e)

Whenever in any political subdivision in which there are examiners appointed pursuant to this Act any persons allege to such an examiner within forty-eight hours after the closing of the polls that notwithstanding

(1) their listing under this Act or registration by an appropriate election official and

(2) their eligibility to vote, they have not been permitted to vote in such election, the examiner shall forthwith notify the Attorney General if such allegations in his opinion appear to be well founded. Upon receipt of such notification, the Attorney General may forthwith file with the district court an application for an order providing for the marking, casting, and counting of the ballots of such persons and requiring the inclusion of their votes in the total vote before the results of such election shall be deemed final and any force or effect given thereto. The district court shall hear and determine such matters immediately after the filing of such application. The remedy provided [p*352] in this subsection shall not preclude any remedy available under State or Federal law.

(f)
The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether a person asserting rights under the provisions of this Act shall have exhausted any administrative or other remedies that may be provided by law.

SECTION 13.
Listing procedures shall be terminated in any political subdivision of any State (a) with respect to examiners appointed pursuant to clause (b) of section 6 whenever the Attorney General notifies the Civil Service Commission, or whenever the District Court for the District of Columbia determines in an action for declaratory judgment brought by any political subdivision with respect to which the Director of the Census has determined that more than 50 percentum of the nonwhite persons of voting age residing therein are registered to vote,

(a)
that all persons listed by an examiner for such subdivision have been placed on the appropriate voting registration roll, and

(b)
that there is no longer reasonable cause to believe that persons will be deprived of or denied the right to vote on account of race or color in such subdivision, and (b), with respect to examiners appointed pursuant to section 3(a), upon order of the authorizing court. A political subdivision may petition the Attorney General for the termination of listing procedures under clause (a) of this section, and may petition the Attorney General to request the Director of the Census to take such survey or census as may be appropriate for the making of the determination provided for in this section. The District Court for the District of Columbia shall have jurisdiction to require such survey or census to be made by the Director of the Census and it shall require him to do so if it deems the Attorney [p*353] General's refusal to request such survey or census to be arbitrary or unreasonable.

SECTION 14.
(a)
All cases of criminal contempt arising under the provisions of this Act shall be governed by section 151 of the Civil Rights Act of 1957 (42 U.S.C.1995).

(b)
No court other than the District Court for the District of Columbia or a court of appeals in any proceeding under section 9 shall have jurisdiction to issue any declaratory judgment pursuant to section 4 or section 5 or any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of this Act or any action of any Federal officer or employee pursuant hereto.

(c)
(1) 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 Act, 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.

(2) The term "political subdivision" shall mean any county or parish, except that, where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.

(d)
In any action for a declaratory judgment brought pursuant to section 4 or section 5 of this Act, subpoenas for witnesses who are required to attend the District Court for the District of Columbia may be served in any judicial district of the United States: Provided, That no writ of subpoena shall issue for witnesses without the District of Columbia at a greater distance than one hundred [p*354] miles from the place of holding court without the permission of the District Court for the District of Columbia being first had upon proper application and cause shown.

SECTION 15.
Section 2004 of the Revised Statutes (42 U.S.C.1971), as amended by section 131 of the Civil Rights Act of 1957 (71 Stat. 637), and amended by section 601 of the Civil Rights Act of 1960 (74 Stat. 90), and as further amended by section 101 of the Civil Rights Act of 1964 (78 Stat. 241), is further amended as follows:

(a)
Delete the word "Federal" wherever it appears in subsections (a) and (c);

(b)
Repeal subsection (f) and designate the present subsections (g) and (h) as (f) and (g), respectively.

SECTION 16.
The Attorney General and the Secretary of Defense, jointly, shall make a full and complete study to determine whether, under the laws or practices of any State or States, there are preconditions to voting, which might tend to result in discrimination against citizens serving in the Armed Forces of the United States seeking to vote. Such officials shall, jointly, make a report to the Congress not later than June 30, 1966, containing the results of such study, together with a list of any States in which such preconditions exist, and shall include in such report such recommendations for legislation as they deem advisable to prevent discrimination in voting against citizens serving in the Armed Forces of the United States.

SECTION 17.
Nothing in this Act shall be construed to deny, impair, or otherwise adversely affect the right to vote of any person registered to vote under the law of any State or political subdivision.

SECTION 18.
There are hereby authorized to be appropriated such sums as are necessary to carry out the provisions of this Act.

SECTION 19.
If any provision of this Act or the application thereof to any person or circumstances is held invalid, the remainder of the Act and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby.

Approved August 6, 1965.

APPENDIX D

CONTENT ANALYSIS

Introduction

The research design utilized in this study relies on the analysis of several hundred documents. The documents are reviewed and analyzed via a content analysis. A generic content analysis is the study of social artifacts to gain insights about a particular phenomenon (Dantzker and Hunter, 2000). The focus is upon the event being covered by the particular medium evaluated rather than the event itself. The purpose is to extract numerical measures and information from an extensive set of written records that exist in nonnumerical form. To derive numerical measures from nonnumerical records, content analysis is used. A content analysis enables a researcher to use verbal, nonquantitative data and transform it into quantitative data (Johnson, Joslyn and Reynolds, 2001). The content analysis can then be utilized for either qualitative or quantitative analysis, depending upon how the research is conducted.

In this case, a content analysis allows one to learn a great deal about the preclearance process via an examination of the communication patterns between the Justice Department and covered jurisdictions. In this study, internally generated and externally directed documents are analyzed. The documents in question are communications which are purposely molded for a particular purpose and directed towards those institutions who are participating in a Section Five review. Each document provides potential opportunities to further understand the decision-making process of the Justice Department. Through a content analysis – the systematic counting,

assessing and interpreting of a substantive form of communication – it is possible to provide a method by which to summarize in a fairly rigorous manner certain behaviors and relationships between various political institutions (see Manheim and Rich, 1995). Manheim and Rich argue that content analysis can be used to answer research questions wherever there is a physical record of communications and the researcher has access to those records.

Defining the Population of Communications

The research focus is determining what leads to a Section Five preclearance or denial of preclearance. In that, I define the population as all preclearance letters for all submitted changes written by the United States Department of Justice and sent to covered jurisdictions in the South for the years 1965 to 2000. This population of documents is germane to the researcher's subject.

Suitable Sample

A suitable sample of letters is all redistricting preclearance letters written by the United States Department of Justice and sent to covered jurisdictions in nine southern states from 1965 to 2000. The criterion used to define this population of communications is derived from the Voting Rights Act of 1965, redistricting literature and law review journals.

Units of Analysis

The unit of analysis is each single letter, regards of length, and taken as a whole is referred to as the item of communication. The letter as a unit of analysis makes sense as the subtlety of judgment requirements lessons and analysis is generally more manageable (see Manheim and Rich, 1995). Using a letter as the unit of analysis also allows for the

operationalization of variables at a less specific level are often apparent (events of a salient reference are referred to instead of specific words) and on which measurement is often more reliable (Manheim and Rich, 1995).

Substantive Content Analysis

From the population of preclearance letters and redistricting communications, a suitable sample is chosen and the unit of analysis is established, then the substantive content analysis of letters unfolds. In the analysis, words, themes and items that focus on the substantive content of the letters are the main point of interest. A dictionary of words is created, and follows this discussion. Each word and observation is defined. This dictionary is established after a pretest (by the researcher) of the population of communications to be analyzed. This pretest is followed by the reading of a sample of letters so as to identify the types of salient references most likely to be encountered in a subsequent and more thorough analysis. The dictionary and variables are adjusted following the pretest. As the observations of several researchers are preferred over those of one, I relied on intercoders to test the instrument and dictionary.

Intercoder Reliability

There is a fundamental problem in operationalizing variables and there are at least two related challenges to creating measures that do not lead to biased results: nonstandardization and reliability of what is measured. Three alternatives exist for addressing these issues: intercoder (judges), theme or contextual interpretation and the item itself (see Manheim and Rich, 1995).

Intercoders are individuals retained by the researcher to read a sample of preclearance letters to make a determination on how variables are operationalized based on the code sheet and

code book. Intercoders are trained about the code book and code sheet, and after the training, read a sample of communications, looking for the presence or absence of variables that meet the selection criteria and then record or tally the corresponding information on the coding sheet. A relatively high level of agreement among coders is required before a final determination on each variable can be reached.

I invited four friends to read a sample of 5 letters each, for a total of 20 letters. After going over the variable operationalization sheet, also referred to as the dictionary, each coder coded their corresponding letters and then read and coded the other letters in the group. In the end, each coder read a total of 20 letters. After the initial coding, we discussed the differences in how certain variables were defined, found some repetition amongst variables and problems with others. The concerns raised were corrected and incorporated into the final code sheet.

Another possible alternative to addressing the problems of nonstandardization and reliability is to look for the presence of a particular characteristic in context, known as a theme. A theme is a particular set of words or ideas that reoccur throughout the text. A theme approach allows the incorporation of modifiers (adverbs and adjectives) and provides contextual and explanatory clues that accompany the particular variable the researcher is interested in and helps to establish the variables meaning. A theme approach was utilized when individual words were not adequate to measure the desired variable.

A third approach to address nonstandardization and reliability is the item itself. Using a preclearance letter as a whole unit allows judgments or an evaluation to be made on the whole letter, rather than relying on individual variables, which increases the reliability of the measure. This approach mandates the making of summary evaluations and may lose the subtlety of judgment required for smaller units of analysis, but this form of analysis is generally more

manageable as variables are operationalized at a less specific level. After reading each letter, short comments were written providing a sense of the letter and how it was alike or different from other letters.

All three tactics, intercoder, theme approach and item evaluation, are utilized to address issues related to nonstandardization and reliability. A quantifiable instrument is created along with a corresponding code sheet to record observations. The code sheet or summary form for each preclearance letter is used to input data for analysis.

Quantifiable Instrument (System of Enumeration)

The code sheet doubles as a checklist recording the presence or absence of certain aspects of each letter. A mutually exclusive and exhaustive list of categories and definitions are created and then their existence or lack thereof are observed and then recorded. Many details are recorded for each preclearance letter studied, such as the state from which the letter was addressed, the county to which the redistricting plan involves, the date of the actual letter as well as the date of subsequent submissions related to that particular redistricting plan. Further information that was recorded included the recipient of the letter and the individual who signed the letter, the type of plan (sub-state or state wide) as well as the type of information the Justice Department relied on for its review process (Census data, interested parties, Justice Department files, events or other sources). I also created a measure to count the number of words per letter, the instances that the black population or other minority populations are addressed and made a concerted effort to record all of the Justice Department regulations referred to in each letter, as well as record each court case, constitutional amendment, state law, Section Two concerns and city and county ordinances. Additional factors that are analyzed include whether or not the letter

mentions the disregard of traditional political boundaries, if the minority community is excluded from the deliberations, if a remedial plan is adopted by the covered jurisdiction and if the existence of polarized voting and retrogression is detected. There is then room at the end of each code sheet for a caveat or additional comments related to the letter.

Variable Operationalization and Code Sheet: Dictionary of Variables

Format for each Variable: **Variable Name** (in bold), which is followed by an explanation of the variable and its coding structure.

ID: Each letter has a number assigned that corresponds to the letter and state (*e.g.* AL 01, AL 02, AL 03, etc…) for each letter for each state. Each objection letter has a number assigned to it for easy recognition and recording.

State: There are nine states in the study, and each state gets a number

1. AL
2. FL
3. GA
4. LA
5. MS
6. NC
7. SC
8. TX
9. VA

County: Each county in each state has a number (if more than one county is mentioned in the letter, record the first one and record the other ones after it).

Dates: SPSS compatible (month/day/year)

LetDate (mdyear): Letter Date – date of the actual letter
SubDate (mdyear): Submission Date – date DOJ received their submission
AddDate (mdyear): Date in which additional information was received by DOJ from the submitting jurisdiction

Rectype: Who is the recipient of the letter? (The number assigned to each category are arbitrary and used for informational purposes only).

0. Other
1. State Attorney General, Assistant Attorney General, Senior Assistant Attorney General, Special Deputy Attorney General
2. State House Committee, Speaker
3. State Senate Committee, Senate Leader
4. Law Firm (private law firm)
5. City Attorney
6. County (or Parish) Attorney
7. Superintendent or President of Schools
8. Mayor or Town Administrator
9. Tri-S President or Vice President
10. President, Secretary, Treasurer of Police Jury
11. City Clerk or Council Clerk
12. Executive Director or Chairman of State Board of Elections
13. County Judge
14. Secretary of State (of the State)
15. Department of Justice, State of X
16. District Attorney or Assistant District Attorney (local)

Author: Who signed the letter? (The number assigned to each individual are arbitrary and used for informational purposes only).

1. John R. Dunne
2. Bill Lann Lee
3. James P. Turner
4. Wm. Bradford Reynolds
5. Gerald W. Jones
6. Drew S. Days, III
7. J. Stanley Pottinger
8. Loretta King
9. Deval L. Patrick
10. David L. Norman
11. Isabelle K. Pinzler
12. John E. Huerta
13. Brian K. Landsberg
14. Charles Cooper
15. Jerris Leonard

Ltrtype: Is the letter an initial letter addressing a new plan or a follow-up letter readdressing issues raised by the Justice Department?

1 = follow-up/reconsideration of an earlier plan
0 = initial (first letter)

Letter: What is the nature of the letter?

0 = acceptance of a plan or withdrawal of an objection
1 = objection letter or failure to withdraw an earlier objection
2 = mixed letter (part objection, part acceptance of a submitted plan)

DeptVar: Dependent Variable

1 = objection
0 = acceptance
2 = non-decision by DOJ

NewDist: What kind of redistricting plan is submitted for preclearance?

0. regular decennial redrawing of old districts
1. change electoral scheme (appointed to elected; SMD or MMD; at-large to SMD; annexations
2. change in the number of elected officials (increase or decrease)
3. all of the above
4. redrawing old districts the 2nd or 3rd round
5. drawing new districts after 1972, 1982, 1992 (not necessarily tied to decennial census, but unable to make a determination from the letter as to the reason behind the drawing of new district lines)

Length: average number of words in the letter, not including addresses or signatory

Word Count: To obtain a word count for each letter, the total number of words in the first paragraph of each letter is counted (whole numbers and abbreviations are counted as one word). The number of lines in the first paragraph is then counted. The total number of words in the first paragraph is then divided by the total number of lines in that paragraph, generating an average word count per line. The total number of lines for the entire letter is counted, but not including the recipients' address, the salutation or valediction. The total number of lines for each letter is finally multiplied by the average word count per line for that letter. This formula produces an average word count for each letter, and is averaged to the nearest whole number.

Plantype: What type of plan does the letter object to?

0. state-wide
1. individual unit (county or city or district)

What specific type of district is being reviewed?

U.S. House: 1=yes; 0=no
State Senate: 1=yes; 0=no
State House: 1=yes; 0=no
County: 1=yes; 0=no
City: 1=yes; 0=no
School Board: 1=yes; 0=no
Judges: 1=yes; 0=no
Police Juries: 1=yes; 0=no
Other1: if the plan is for a level of government not listed, list _____

Censref: Reference to the Census; 1=yes; 0=no

Which Census does the letter refer to:

Cens90: 1990 Census 1=yes; 0=no
Cens80: 1980 Census 1=yes; 0=no
Cens70: 1970 Census 1=yes; 0=no
Cens60: 1960 Census 1=yes; 0=no

Time: Does the letter mention time or deadlines in any way? 1=yes, 0=no

If so, what kind of deadline does the letter mention?

Crtdead: court deadline 1=yes; 0=no
Legdead: legislative deadline 1=yes; 0=no
Addead: administrative deadline 1=yes; 0=no
Elctdead: election deadline 1=yes; 0=no
Impl: implementation plan 1=yes; 0=no
Exped: submission is expedited due to request from submitting jurisdiction 1=yes; 0=no

Interest: Does the letter mention interested parties? 1=yes, 0=no

If so, what sorts of interest is referred to?

Person/Parties: interested persons 1=yes, 0=no
Minorg: minority group 1=yes, 0=no
PolPart: political party 1=yes, 0=no
GenPub: general public 1=yes, 0=no
Other2: others mentioned, list _____

Info: Does letter mention information? 1=yes; 0=no

SubJur: info provided by submitting jurisdiction 1=yes, 0=no
DOJFile: info used from DOJ Files 1=yes, 0=no

OSources: info garnered from other sources 1=yes, 0=no
Event: info used surrounding the redistricting process or events leading up to the redistricting process 1=yes, 0=no

BlPopRef: Black population is referenced 1=yes, 0=no
BlVap: Black voting age population is mentioned 1=yes, 0=no
Mexpop: Mexican population is mentioned 1=yes, 0=no
Mexvap: Mexican voting age population is mentioned 1=yes, 0=no
BlPopSt: Black population for state is mentioned 1=yes, 0=no
MxPopSt: Mexican pop. for state is mentioned 1=yes, 0=no
BlPopCt: Black population for city or county 1=yes, 0=no
MexPopCt: Mexican pop for city or county 1=yes, 0=no
Whitepop: white population is mentioned (majority) 1=yes, 0=no
BlMex: Black and Mexicans are mentioned together, or minorities are mentioned, as one group 1=yes, 0=no

RegRef: Registration Figures are mentioned 1=yes, 0=no
VtTO: voter turnout is referred to 1=yes, 0=no

CrtRef: reference to the court's proceedings, but do not state a specific case in that instance

CaseRef: reference to court case 1=yes, 0=no
Case1: alpha, name of court case mentioned first
Case2: alpha, name of court case mentioned second
Case3: alpha, name of court case mentioned third
Case4: alpha, name of court case mentioned fourth
Case5: alpha, name of court case mentioned fifth
Case6: alpha, name of court case mentioned sixth
Case7: alpha, name of court case mentioned seventh
Case8**: alpha, name of court case mentioned eighth**
Case9: alpha, name of court case mentioned ninth
Case10: alpha, name of court case mentioned tenth

Stlaws: are state laws mentioned in the letter? 1=yes, 0=no
Stlaw1: alpha, name the law
Stlaw2: alpha, name the law
Stlaw3: alpha, name the law

StConst: is state's constitution mentioned? 1=yes, 0=no
StCon: Name the section of the state's Constitution

USC: U.S. Constitution mentioned 1 0
Amend14: 14th Amendment (1-person, 1-vote requirement) 1=yes, 0=no
Amend15: 15th Amendment 1=yes, 0=no
VRA2: Section Two of the Act 1=yes, 0=no
VRA5: Section Five of the Act 1=yes, 0=no

DOJReg: alpha, record the actual regulation(s) mentioned in the letter

_____
_____
_____
_____

Elect: Is an election mentioned (primary, general, special)? 1=yes, 0=no
AltPlan: an alternative plan 1=yes, 0=no
Polar: racially polarized voting 1=yes, 0=no
FragPop: black population is fragmented 1=yes, 0=no
Retro: retrogression or retrogressive effect 1=yes, 0=no
BlMax: over populated Black districts, packing, the over-concentration of minority populations 1=yes, 0=no
Malp: malapportionment 1=yes, 0=no
Dilute: vote dilution 1=yes, 0=no
TradPol: disregard for traditional political boundaries 1=yes, 0=no
Shape: strange shaped districts or reference to shape of boundaries 1=yes, 0=no
PropRep: proportional 1=yes, 0=no
DescRep: descriptive representation 1=yes, 0=no
PublicN: unit of government failed to provide adequate public notice 1=yes, 0=no
PublicH: unit of government failed to provide public hearings to seek the public's views on the plan in dispute 1=yes, 0=no
MinExcl: black voting strength is impinged (minority population is excluded from the process of redrawing districts).

If MinExcl is excluded, refer to the corresponding decade:
MinEx90; 1=yes, 0=no
MinEx80; 1=yes, 0=no
MinEx70; 1=yes, 0=no

BlackPop: black population is sufficiently numerous and geographically compact that they constitute a majority of the VAP and registered voters 1=yes, 0=no
ElectBlk: black population is able to elect a candidate of their choosing 1=yes, 0=no
WDefeat: white voters defeat black voters choice, except in majority-minority districts 1=yes, 0=no
PastDisc: is past discrimination mentioned in the letter? 1=yes, 0=no
Conflict: incumbency interests are considered over the interests of the minority population's interests 1=yes, 0=no
Describe: the letter describes the history of the governmental unit in question 1=yes, 0=no
Purpose/Effect: purpose and effect are mentioned together, same sentence 1=yes, 0=no
Purpose: plan will have a discriminatory purpose 1=yes, 0=no
Effect: plan will have a discriminatory effect 1=yes, 0=no
AtL: At-large elections are part of the plan 1=yes, 0=no
MVR: majority vote criterion is used 1=yes, 0=no
PRBVS: Plan Restricts Black Voting Strength 1=yes, 0=no

SMD: Single Member Districts 1=yes, 0=no

Impair: plan reduces minority population and impairs its ability to elect a candidate of choice (after the fact, the plan reduces black participation) 1=yes, 0=no

MMD: Multi-Member Districts 1=yes, 0=no

ComInt: Community of Interest, neighborhood or interest or community 1=yes, 0=no

Knowl: letter states submitting jurisdiction of having knowledge that the plan would reduce black political participation and limit its effect 1=yes, 0=no

Negot: negotiation between minority group, unit of government and DOJ takes place 1=yes, 0=no

RemPlan: a remedial plan is adopted at some point prior to new plan (also referred to as interim plan) 1=yes, 0=no

History: the letter mentions a history of non-compliance 1=yes, 0=no

Const: constitutional non-compliance 1=yes, 0=no

Stat: statutory non-compliance 1=yes, 0=no

Court: court sanctioned non-compliance 1=yes, 0=no

DOJ: submitting jurisdiction has a history of not submitting information when requested by the DOJ 1=yes, 0=no

Comments: caveat about the particular letter in question.

Code Sheet:

ID: _____
State: _____
County: _____

Date: (month/day/year)
LetDate (mdyear): _____
SubDate (mdyear) _____
AddDate (mdyear) _____

Rectype: _____(record number)

Author:
1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16

Ltrtype: 1 0
Letter: 0 1 2 3
DeptVar: 0 1 2
NewDist: 0 1 2 3 4

Length: _____

Plantype: 1 2 3
USHse: 1 0 Senate: 1 0
StHse: 1 0 County: 1 0
City: 1 0 SchBd: 1 0
Judges: 1 0 Police Jury: 1 0
Other1: _____

Censref: 1 0
Cens90: 1 0 Cens80: 1 0
Cens70: 1 0 Cens60: 1 0

Time: 1 0
Ctdead: 1 0 Legdead: 1 0
Addead: 1 0 Elctdead: 1 0
Impl: 1 0 Exped: 1 0

Interest: 1 0
Person/Parties: 1 0
Minorg: 1 0
PolPart: 1 0
GenPub: 1 0
Other2: _____

Info: 1 0
SubJur: 1 0 DOJFile: 1 0
OSources: 1 0 Event: 1 0

BlPopRef: 1 0 BlVap: 1 0
Mexpop: 1 0 Mexvap: 1 0
BlPopSt: 1 0 MxPopSt: 1 0
BlPopCt: 1 0 MexPopCt: 1 0
Whitepop: 1 0 BlMex: 1 0

RegRef: 1 0
VtTO: 1 0

CrtRef: 1 0

CaseRef: 1 0
Case1: _____ Case2: _____
Case3: _____ Case4: _____
Case5: _____ Case6: _____
Case7: _____ Case8: _____
Case9: _____ Case10: _____

Stlaws: 1 0
Stlaw1: _____
Stlaw2: _____
Stlaw3: _____

StConst: 1 0 StCon: _____

USC: 1 0
Amend14: 1 0
Amend15: 1 0
VRA2: 1 0
VRA5: 1 0
DOJReg: 1 0

_____
_____
_____

Elect: 1 0 AltPlan: 1 0
Polar: 1 0 FragPop: 1 0
Retro: 1 0 BlMax: 1 0
Malp: 1 0 Dilute: 1 0
TradPol: 1 0 Shape: 1 0
PropRep: 1 0 DescRep: 1 0
PublicN: 1 0 PublicH: 1 0

MinExcl: 1 0
MinEx90; 1 0
MinEx80; 1 0
MinEx70; 1 0

BlackPop: 1 0 WDefeat: 1 0
Conflict: 1 0 PastDisc: 1 0
Describe: 1 0 Purpose/Effect: 1 0
Purpose: 1 0 Effect: 1 0
AtL: 1 0 MVR: 1 0
PRBVS: 1 0 Impair: 1 0
SMD: 1 0 MMD: 1 0
ComInt: 1 0 Knowl: 1 0\
Negot: 1 0 RemPlan: 1 0

History: 1 0
Const: 1 0 Stat: 1 0
Court: 1 0 DOJ: 1 0

Comments:

APPENDIX E

COURT APPROVED REDISTRICTING PLANS, 1990s

(Federal and State)

Name of Case	State	Jurisdiction Involved	Court Involved
Wesch v. Hunt 785 F. Supp. 1491 (S.D. Ala. 1992)	AL	Congressional Plan	U.S. District Court
In re Constitutionality of Senate Joint Resolution 2G 601 S.2d 543 (Fla. 1992)	FL	State House and Senate Plans	Florida Supreme Court
DeGrandy v. Wetherell 794 F. Supp. 1076 (N.D. Fla. 1992)	FL	Congressional Plan	U.S. District Court
Johnson v. Miller 922 F. Supp. 1552 (S.D. Ga. 1995); 922 F. Supp. 1556 [(S.D. Ga. 1995) ("*Johnson II*")]	GA	Congressional Plan	U.S. District Court
Johnson v. Miller No. CV196-040 (N.D. Ga.) *Johnson, III* Case was settled by consent order between the two parties after court ordered mediation.	GA	State House and Senate Plans	U.S. District Court
Hays v. Louisiana 862 F. Supp. 119 (W.D. La. 1994)	LA	Congressional Plan	U.S. District Court
Hays v. Louisiana 936 F. Supp. 369 (W.D. La. 1996) A new complaint was filed and the District Court struck the new plan down, imposing the one it had drawn in 1994. The Louisiana legislature than enacted the court's plan, but the state's submission was denied preclearance by the Justice Department and the court's plan (identical to the state's plan) was implemented as an interim plan for the 1996 elections.	LA	Congressional Plan	U.S. District Court
Burton v. Sheheen 793 F. Supp. 1329 (D.S.C. 1992)	SC	Congressional Plan	U.S. District Court

The District Court drew its own congressional plan after the General Assembly came to an impasse. The U.S. Supreme Court struck down the plan, but did not set aside the 1992 election results.

Smith v. Beasley SC State Senate Plan U.S. District Court
946 F. Supp. 1174 (D.S.C. 1996)

Terrazas v. Slagle TX State House and Senate Plans and Congressional Plan U.S. Supreme Court
789 F. Supp. 828 (W.D. Tex. 1991); 505 U.S. 1214 (1992); 506 U.S. 801 (1992)

Terrazas v. Slagle TX State Senate U.S. District Court
821 F. Supp. 1154 (W.D. Tex. 1992)
The three-judge panel ruled that the State must use the court-drawn plan for the 1992 Senate general election because the state plan for the general election had not received preclearance.

Texas v. United States TX State House and Senate Plans, Congressional Plan and State Board of Education Plan U.S. District Court of the District of Columbia
785 F. Supp. 201 (D.D.C. 1992)
The State of Texas went to the D.C.D.C. for preclearance of its statewide plans, and only the Senate plan was denied preclearance. The Court noted that the *Terrazas* court had ordered a plan and that the legislative version of *Mena v. Richards* [No. C-454-91-F (332nd Dist. Ct., Hidalgo County, 1991)] had to be compared to the court-ordered plan, but that *Mena* did not act as preclearance for the later legislative-enacted version of the same plan.

Vera v. Bush TX Congressional Plan U.S. District Court
933 F. Supp. 1341 (S.D. Tex. 1996), on remand

Vera v. Bush TX Congressional Plan U.S. District Court
980 F. Supp. 251; 980 F. Supp. 254 (S.D. Tex. 1997)
When the legislature failed to enact a permanent plan, the Court ordered its 1996 interim plan to remain in place indefinitely, despite population deviations.

Source: Redistricting Task Force of the National Conference of State Legislatures

APPENDIX F

TYPICAL 1970s PRECLEARANCE LETTER

December 24, 1975

Mr. John Ward
Attorney for the Rapides
Parish School Board and Police Jury
770 North Street
Baton Rouge, Louisiana 70802

Dear Hr. Ward:

This is in reference to the reapportionment plans for the Rapides Parish Police Jury and School Board which were submitted to the Attorney General pursuant to Section .5 of the Voting Rights Act of 1965. Your submission was received on November 3, 1975.

The plans which are the subject of this submission are the plans adopted as a result of the litigation in Le Blanc v. Rapides Parish Police Jury, C.A. No. 13,715 (W.D. La. July 26, 1971). While there may have been some doubt concerning the necessity for these plans to be submitted, for Section 5 review and while this matter has been litigated. United States v. Rapides Parish School Board, C.A. No. 19,209 (W.D. La.), it now appears that regardless of the status of the law in 1973 when the latter case was decided, it is now clear that such plans are subject to review under the provisions of Section 5 of the Voting Right Act. Conner v. Waller, 421 U.S. 656 (1975).

We have carefully considered the submitted plans along with Census Bureau data, information, and comments from interested parties, as well as election results for the two governing bodies since 1971. Our analysis of the election results under the submitted plans which

utilize multi-member districts reveals that the implementation, of the plans impermissively dilute the voting strength of black persons. This is illustrated by the fact that blacks have not been elected under either plan. We also note that under the single-member system implemented by Court order in 1974, two black candidates were elected to each respective body for the first time in modern history.

Recent court decisions suggest that the use of multi-member districts under circumstances such as those existing in Rapides Parish operate to minimize or dilute the voting strength of a minority group, and, thus, have an invidious discriminatory effect. White v. Regester, 412 U.S. 755 (1973); Whitcomb v. Chayis, 403 U.S. 124 (1971); Zimmer v. McKeithen, 485 F. 2d 1297 (5th Cir. 1973).

In view of these court decisions and on the basis of all the available facts and circumstances, I have concluded that the submitted plans have had, and may continue to have a discriminatory racial effect on minority voting rights. Therefore, on behalf of the Attorney General, I must interpose an objection to the school board and police jury re-apportionment plans.

Of course, Section 5 permits you to seek a declaratory judgement from the United States District Court for the District of Columbia that this plan neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color. However, until such, a judgement is rendered by that Court, the legal effect of the objection by the Attorney General is to render these plans unenforceable,

Sincerely,

J. Stanley Pottinger

Assistant Attorney General Civil Rights Division

APPENDIX G

TYPICAL 1980s PRECLEARANCE LETTER

12DEC1983

George E. Glaze, Esq.
Glaze and McNally
120 North McDonough Street
Jonesboro, Georgia 30236

Dear Mr. Glaze:

This is in reference to the redistricting of council-manic districts for the City of College Park in Clayton and Fulton Counties, Georgia, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received the information to complete your submission on October 11, 1983.

We have reviewed carefully the information you supplied, as well as 1980 Census data and comments and information provided by other interested parties. We note that according to the 1980 Census, College Park had a total population of 24,632, of whom 11,886 (48. 3%) were black. From all that appears, this represents a significant increase from the minority percentage of the 1970 Census arid represents a dramatic increase in the minority percentage since the time of the estimation of population by Public Research and Management, Inc. in 1976.

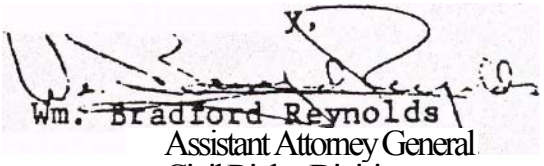
In spite of the enormous increase in minority population, the city appears to have made a conscious effort to maintain effective minority voting strength at the level established in 1976. In doing so, the proposed plan increases the fragmentation of the minority community in a manner that adversely affects minorities by packing black population into one district (District No. 2 at 90 percent black) and dividing the rest of the black population concentration between four other districts. Nor does there appear to be any legitimate reason for the strangely irregular lines that meander throughout Census Block No. 319, a highly concentrated

black community. Such fragmentation and irregularity of shape in the context of the voting patterns that exist in the city and the fact that the city seems not to have welcomed but, rather, to have avoided input from the black community in the reapportionment process, are all probative of racial purpose. See Busbee v. Smith, 549 F. Supp. 494, 517 (D. D.C. 1982), aff'd, 51 U.S.L.W. 3552 (U.S. Jan 24, 1983); Mississippi v. United States, 490 F. Supp. 569, 581 (D. D.C. 1979), aff'd. 444 U.S. 1050 (1980); Terrazas v. Clements. 537 F. Supp. 514. 530-536 (N.D., Tex. 1982).

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has no discriminatory purpose or effect. See Georgia v. United States, 411 U.S. 526 (1973); see also the Procedures for the Administration of Section 5 (28 C.F.R. 51.39(e)). In light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that that burden has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to the redis-tricting of the councilmanic districts for the City of College Park.

Of course, as provided by Section 5 of the Voting Rights Act, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that this change has neither the purpose nor will have the effect of denying or abridging the right to vote on account of race or color. In addition, Section 51.44 of the guidelines permits you to request that the Attorney General reconsider the objection. However, until the objection is withdrawn or a judgment from the District of Columbia Court obtained, the effect of the objection by the Attorney General is to make the redis-tricting plan legally unenforceable. 28 C.F.R. 51.9.

To enable this Department to meet its responsibility to enforce the Voting Rights Act, please inform us of the course of action the City of College Park plans to take with respect to this matter. If you have any questions, feel free to call Sandra S. Coleman (202-724-6718), Deputy Director of the Section 5 Unit of the Voting Section.



Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

APPENDIX H

TYPICAL 1990s PRECLEARANCE LETTER

February 8, 1993

Mr. Herman H. Felix
Chairperson, Lee County Council Courthouse Square
Bishopville, South Carolina 29010

Jacob H. Jennings, Esq.
Jennings & Jennings
P.O. Box 106
Bishopville, South Carolina 29010-0106

Dear Messrs. Felix and Jennings:

This refers to the 1992 redistricting plan for the county council and county school board in Lee County, South Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your responses to our requests for additional information on August 31 and December 10, 1992; supplemental information was received on September 28 and 29, October 7, 15, and 23, 1992, and January 27, 1993.

We have carefully considered the information you have provided, as well as information provided by other interested persons. According to the 1990 Census, blacks comprise 62 percent of Lee County's total population and 57 percent of its voting age population. The county council and school board are comprised "or seven members elected from seven single-member districts; county council and county school board districts are coterminous.

Under the existing redistricting plan, there are two districts with black populations in excess of 74 percent and five districts with black population percentages between 52 and 63 percent. In elections held under this plan, black voters have been able to elect candidates of their choice in the two

districts over 74 percent black in population to both the county council and county school board (Districts 3 and 5). Thus, at the time of redistricting, there were two black persons serving on the county council and county school board; all were elected from Districts 3 or 5.

The redistricting process appears to have been controlled by four of the white councilmembers, without the benefit of substantial input from the black councilmembers or members of the minority community. The self-described goal of the council was to draw a plan that retained Districts 3 and 5 as districts with sizeable black population majorities while drawing two other districts with no more than a 65 percent black share of the population. The proposed redistricting includes two districts with black population percentages of 76 and 77 percent (Districts 3 and 5, respectively), and two districts with 65 percent black population percentages (Districts 1 and 6). The three remaining districts have black percentages of 57, 51 and 47 percent.

Our analysis of the demographics of the county indicates that as a result of the county's choice to limit the black share of the population of Districts 1 and 6 to 65 percent, black population concentrations have been fragmented. The county -contends, however, that black voters will have a realistic opportunity to elect candidates of their choice in the four proposed districts with 65 percent or better black population percentages — which includes Districts *1* and 6. We have considered these contentions in light of the history of racial_ discrimination in the county, the disparate socio-economic conditions between the county's black and white populations, the respective black and white voter registration and turnout rates, and the election results over the past decade. There appears to be a persistent pattern of extremely racially polarized voting in the county, with black-sponsored candidates facing consistent defeat other than in election districts with substantial black population majorities. Moreover, the effects of the polarization in voting are exacerbated by the lower registration and turnout rates of blacks compared to whites which are traceable to the history of discrimination and resulting disparities in socio-economic status. These differences appear, to be particularly severe in proposed District 6.

Concerns with the proposed plan were raised by the black community during the redistricting process but the alternative plan they proposed does not appear to have been given serious consideration by the county council. In addition, the county rejected a proposal for a bi-racial committee to study the county's proposed and the minority-sponsored alternative plans, despite concerns of the minority community that they were not provided a meaningful opportunity to participate in the

development of the county's redistricting proposal, which they ' pointed out was the result of an all-white redistricting committee's efforts. While we do not mean to suggest that the council was required to adopt this alternative plan, we note that the alternative plan demonstrates that it was possible to create more than two districts with substantial black population majorities of at least 70 percent without departing from legitimate, nonracial redistricting criteria.

Finally, it appears that the protection of the interests of incumbents played a significant role in the county council's redistricting efforts, and that these interests may have led to limiting artificially the black population in Districts *1* and 6, and reducing the black population percentages in Districts 2, 4 and 7. While we recognize that the desire to protect incumbents may not in and of itself be an inappropriate consideration, it may not be accomplished at the expense of minority voting potential. Garza v. Los Angeles County., 918 F.2d 763, 771 (9th Ciir. 1990), cert, denied. Ill S. Ct. 681 (1991); Ketchum v. Byrne. 740 F.2d 1398, 1408-09, (7th Cir. 1984), cert, denied. 471 U.S. 1135 (1985). Where, as here, the protection afforded incumbents appears to be provided at the expense of black voters, the county council bears a heavy burden of demonstrating that its choices are not tainted, at least in part, by an invidious racial purpose.

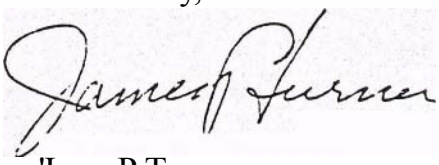
Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. See Georgia v. United States, 411 U.S. 526 (1973); see also the Procedures for the Administration of Section 5 (28 C.F.R. 51.52). In light of the considerations discussed above, *I* cannot conclude, as I must under the Voting Rights Act, that your burden has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to the redistricting plan for the county council and school board.

We note that under Section 5 you have the right to seek a, declaratory judgement from the United States District Court for the District of Columbia that the proposed changes have neither the purpose nor will have the effect of denying or abridging the right to vote on account of race or color. In addition, you may request that the Attorney General reconsider the objection. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the county council and school board redistricting plan

continues to be legally unenforceable. Clark v. Roemer, 111 S.Ct. 2096 (1991); 28 C.F.R. 51.10 and 51.45.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action Lee County plans to take concerning these matters. If you have any questions, you should call Ms. Zita Johnson-Betts (202-514-8690) an attorney in the Voting Section.

Sincerely,



'James P. Turner
Acting Assistant Attorney General
Civil Rights Division

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