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RACIAL GERRYMANDERING AND LEGISLATIVE REAPPORTIONMENT

By Frank R. Parker

THE HISTORY OF GERRYMANDERING

The practice of gerrymandering in America dates from the founding of the Republic. Patrick Henry has been credited with leading an effort to gerrymander the congressional district containing James Madison's home county to prevent Madison's election to Congress because of his alleged opposition to the Bill of Rights.[1] The term "gerrymander" was coined in 1812 by Gilbert Stuart, the portrait painter, after looking at a map of the redistricting of Essex County, Massachusetts, signed into law by Governor Elbridge Gerry. When Stuart sketched a head, wings, and claws on the distorted district, Stuart thought it looked like a dragon, but his companion thought it looked more like a salamander. "Better call it a 'Gerrymander,' " Stuart is alleged to have replied.[2]

Gerrymandering covers any redistricting practice which maximizes the political advantage or votes of one group, and minimizes the political advantage or votes of another. Historic examples include the Mississippi congressional "shoestring district" of 1876–1882, five hundred miles long and forty miles wide, which was designed to make difficult the reelection of black Mississippi congressman John R. Lynch; the Pennsylvania district resembling a dumbbell; the "saddlebag" and "belt line" districts in Illinois; and the district in Missouri which was longer, if measured by its windings, than the state itself.[3]

In response to these abuses, legislative efforts have been made to check excessive gerrymandering. In 1842, for example, Congress passed a reapportionment act requiring the election of members of the House of Representatives from single-member districts composed of compact and contiguous territory.[4] Many states have adopted similar requirements and have added the criterion that districts have equal population. Nevertheless, as political scientist Robert Luce aptly put it in his 1930 study, "Gerrymandering has become so general and familiar a procedure that it may fairly be called a characteristic of American politics."[5]

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The Supreme Court's landmark "one person, one vote" decision, *Reynolds v. Sims*,[6] was designed to check a particular kind of gerrymandering—legislative districts which, because of large population deviations, discriminated against heavily populated urban areas in favor of rural areas and small towns. The goal of that decision was "full and effective participation by all citizens in state government."[7] Although *Reynolds* and subsequent Supreme Court decisions have dealt effectively with the mathematical issue of population disparities among districts, the constitutional requirement that state legislatures and other governing bodies redistrict themselves every ten years has created new opportunities for racial and political gerrymandering. This is not to say that the one person, one vote rule should be abandoned, but rather that the courts must also develop strict standards to ensure that the *Reynolds* goal of "full and effective representation" is not circumvented by other, equally invidious forms of gerrymandering. As the late Prof. Robert G. Dixon has noted:

> A mathematically equal vote which is politically worthless because of gerrymandering or winner-take-all districting is as deceiving as "emperor's clothes."[8]

Even before the *Reynolds* decision, the Supreme Court in the Tuskegee, Alabama, gerrymandering case, *Gomillion v. Lightfoot*,[9] held that racial gerrymandering violated constitutional guarantees and that aggrieved voters could sue for judicial relief. After *Reynolds* and the enactment of the Voting Rights Act of 1965, the United States Commission on Civil Rights reported to Congress, in supporting an extension of the Act, that "gerrymandering and boundary changes had become prime weapons for discriminating against Negro voters."[10]

Racial gerrymandering in legislative reapportionment has implications which extend far beyond the immediate issue of the effective use of the electoral franchise. Almost a century ago, the Supreme Court described the right to vote as "preservative of all rights."[11] Voting rights were a cornerstone of the Court's definition of fundamental rights, the abridgment of which could only be justified by a compelling state interest. Underlying the elevated status of voting rights claims is the realization that voting discrimination not only results in disfranchisement of the victims, but also is closely correlated with racial discrimination in state policy, allocation of state funds, and provision of municipal services.[12] When minorities are deprived of an effective voice in the policy-making bodies of their states or localities, state and local officials are free to disregard their needs and concerns. This combination of political powerlessness and racist victimization has devastated poor black, Hispanic, and other minority communities throughout this country. Thus, the terrain upon which the struggle for voting rights is waged symbolizes the struggle for social justice for America's embattled minorities.

THE TECHNIQUES OF RACIAL GERRYMANDERING

Racial gerrymandering includes any redistricting scheme which minimizes or dilutes the voting strength of racial minorities.[13] Traditionally, gerrymandering has been defined in terms of irregularities in the boundaries and shapes of districts and

lack of contiguity.[14] There is some merit in the traditional view in the sense that odd-shaped districts may be indicative of an intent to discriminate. However, more recent research and experience have revealed that discriminatory racial gerrymandering can be effectuated in regularly shaped districts as well, including districts which are based on political subdivision lines and which follow traditional and natural geographic boundaries.[15]

Rather than concentrating on the shape of the district, the better approach is to examine the impact of a particular districting scheme on the minority community, that is, where the lines are drawn in relation to concentrations of black, Hispanic, and other minority populations. Any districting scheme necessarily involves a political decision concerning the allocation of political power and influence within a given state or community. At stake is the determination of which groups in the political community will elect candidates of their choice to public office, and which will not; who will be elected to public office, and who will not. Reapportionment decisions, therefore, are directly reflected in the resulting distribution of electoral power.

Generally, in legislative reapportionment, there are four categories of racial gerrymandering: at-large voting, "cracking," "stacking," and "packing."[16] Because the focus of this essay is on legislative reapportionment, municipal gerrymandering, such as discriminatory annexations, deannexations (as in *Gomillion v. Lightfoot*), and separate incorporation of predominantly white enclaves are not included. Also not included is county consolidation, which can be used as a gerrymandering device. Legislative reapportionment, as used herein, does include redistricting at the congressional, state legislative, county, and municipal levels.

At-Large Voting

At-large voting constitutes a form of racially discriminatory districting when it submerges minority voting strength in a districtwide white voting majority. Minority voters might constitute a substantial majority in a particular area of the district, or in particular wards or precincts, but a decided minority in the district as a whole. At-large voting schemes discriminate because of their "winner-take-all" feature, permitting the white districtwide majority to elect all the representatives from the district and denying to minority voters representation of their choice.

For example, in Mississippi during the late 1960s and early 1970s, 84,000 black citizens in Hinds County, where Jackson is located, were sufficiently concentrated in particular precincts to permit the creation of five majority black single-member House districts and two majority black single-member Senate districts. Blacks constituted only 40 percent of the population countywide, however. Black citizens were completely shut out of the political process and denied representation of their choice by successive state legislative reapportionment plans which required the election of all twelve Hinds County representatives and all five Hinds County senators in at-large, countywide voting. As a result, black voters in Mississippi's most populous county were denied legislative representation in the Mississippi legislature until 1975, when single-member districts were created in a court-ordered plan and black legislators were elected.[17]

Discriminatory at-large voting can occur at all levels of government. It includes multimember legislative districts, in which more than one legislator is selected from a single legislative district in at-large voting, at-large county elections, and citywide municipal elections. It encompasses retaining discriminatory at-large voting schemes, as well as switches from district to at-large elections.

After the Voting Rights Act was passed in 1965, multimember legislative districts with at-large voting were the primary barrier to black voters gaining representation of their choice in southern state legislatures. Almost every such legislature, from Texas to Virginia, employed multimember districts in both houses (although Georgia and Texas have no multimember senate districts)[18] which consequently remained virtually all white despite dramatic increases in black voting strength. (See Table 5-1.) Even though blacks were now permitted to register and vote, voting was, by and large, a futile exercise when black voting strength was cancelled out in multimember legislative districts.

During the 1970s, multimember legislative districts were eliminated by Voting Rights Act Section 5 objections or by federal court reapportionment litigation in all southern states covered by the Voting Rights Act, except Virginia, North Carolina, South Carolina (state senate), and Florida.[19] Once these discriminatory multimember districtings were replaced by single-member district legislative re-

Table 5-1. Increase in black representation in southern legislatures resulting from elimination of multimember districts

States	Total 1980 population (% black)	Legislature (% black) 1971 House	1971 Senate	1976 House	1976 Senate	1981 House	1981 Senate
Alabama	24.5	1.9	0.0	12.4	5.7	12.4	8.6
		(2)	(0)	(13)	(2)	(13)	(3)
Georgia[a]	26.2	7.2	3.6	11.1	3.6	11.7	3.6
		(13)	(2)	(20)	(12)	(21)	(2)
Louisiana	29.6	1.0	0.0	8.6	2.6	9.5	5.9
		(1)	(0)	(9)	(1)	(10)	(2)
Mississippi	35.1	0.8	0.0	3.3	0.0	12.3	3.8
		(1)	(0)	(4)	(0)	(15)	(2)
South Carolina[b]	31.0	2.4	0.0	10.5	0.0	12.1	0.0
		(3)	(0)	(13)	(0)	(15)	(0)
Texas	12.5	1.3	3.2	6.0	0.0	8.7	0.0
		(2)	(1)	(9)	(0)	(13)	(0)

[a]The Attorney General's 1972 objections to Georgia's legislative reapportionment plan for the state house of representatives objected to discriminatory multimember districts in areas which at that time had black population concentrations. Multimember districts in then predominantly white areas, where they had no discriminatory impact, were also to be retained. Some of these multimember districts, nondiscriminatory in 1972, may now be discriminatory as a result of population changes.

[b]Multimember districts were eliminated in the state house of representatives only; multimember state senate districts were retained.

Source: Joint Center for Political Studies, *National Roster of Black Elected Officials*, vols. 1 (1971), 6 (1976), and 11 (1981).

apportionment plans, black representation in southern state legislatures increased dramatically.

Numerous empirical studies based on data collected from throughout the nation have found a direct causal relationship between at-large elections and underrepresentation of minorities.[20] Discriminatory at-large voting schemes are still widespread at the county and municipal levels in many parts of the South and Southwest. Currently, for example, in Georgia most counties continue to elect county commissioners on an at-large countywide basis,[21] and most school board members in Texas are elected at large.[22] A majority of cities nationwide with populations 25,000 and over elect city council members on an at-large basis, but at-large municipal elections predominate in the South, where 76 percent of cities 25,000 and over have at-large city council elections.[23] In Virginia, for example, all but nine of the state's forty-one independent cities elect all city council members on an at-large basis.[24]

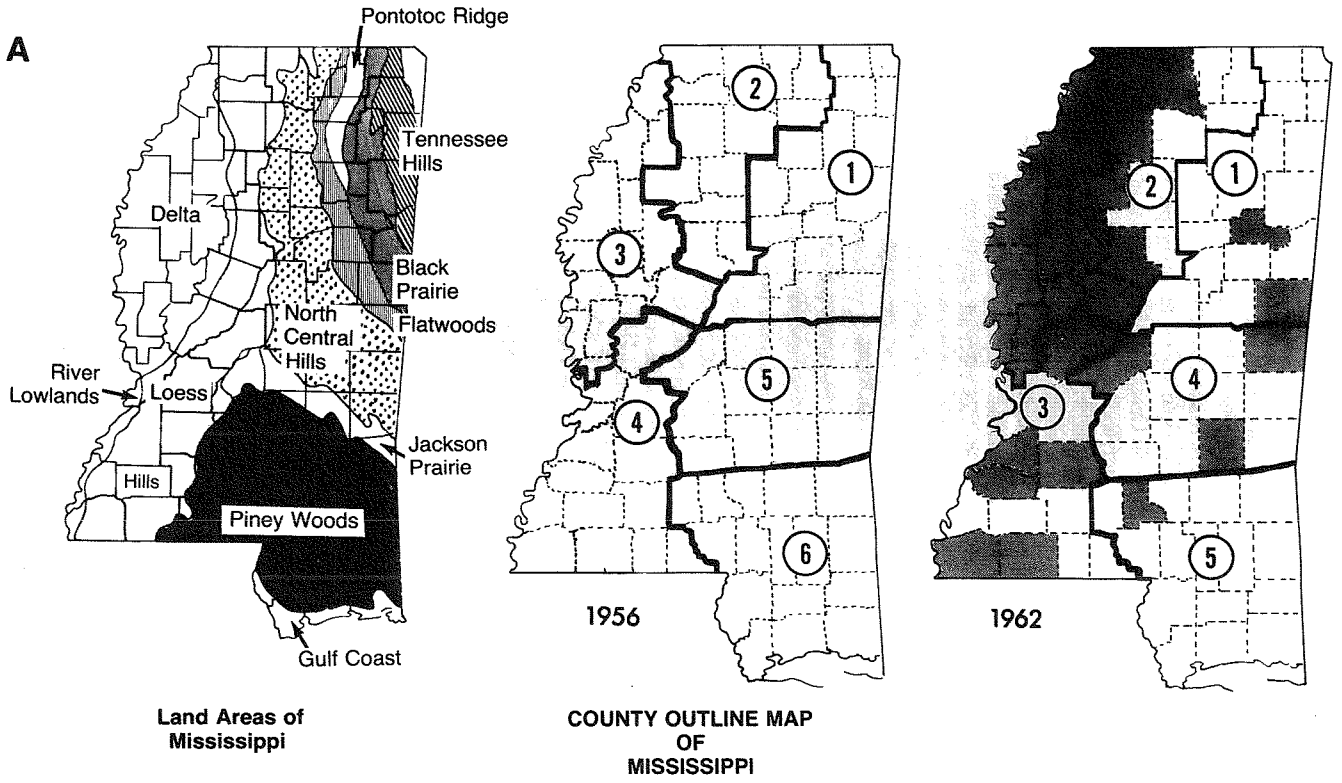
Cracking

Minority voting strength is diluted and cancelled out when a minority population concentration, large enough for separate representation, is broken up (cracked) by district lines, fragmented and dispersed throughout two or more districts with white voting majorities.

Cracking is illustrated by the history of Mississippi congressional redistricting. (See Figure 5-1.) The black population in Mississippi has been concentrated historically in the northwest area of the state commonly known as the Delta, and today, thirteen of the state's twenty-one majority-black counties are located there. A unique geopolitical entity, the economy of which is based primarily on agriculture, particularly cotton and soybeans, the Delta is noted for its large plantations and oppressive social structure. From 1882 to 1966—when black citizens were denied the right to register and vote—the Mississippi legislature drew congressional district lines so that the Delta was always contained within one congressional district. In 1960 the population of this district (District 3) was 66 percent black. Mississippi lost one congressional seat under the 1960 Census, and, in 1962, the legislature combined the Second and Third Districts. But the Delta was kept intact within the new Second District, which was 59 percent black.

In 1965, Congress enacted the Voting Rights Act, and just as blacks were beginning to register and vote, the Mississippi legislature in 1966 redrew the congressional district lines horizontally along an east-west configuration, dismembered the heavy black population concentration in the Delta, and split it up among four of the five congressional districts. All five districts were majority-white in voting age population, and this scheme was preserved in the Mississippi redistricting plans of 1972 and 1981.[25]

Cracking also occurs when majority-black counties, previously put together in a legislative district, are split up and placed in separate majority-white districts. Prior to 1981, four of the five majority-black counties in Southside Virginia—Charles City (70 percent black), Surry (63 percent black), Sussex (61 percent black),



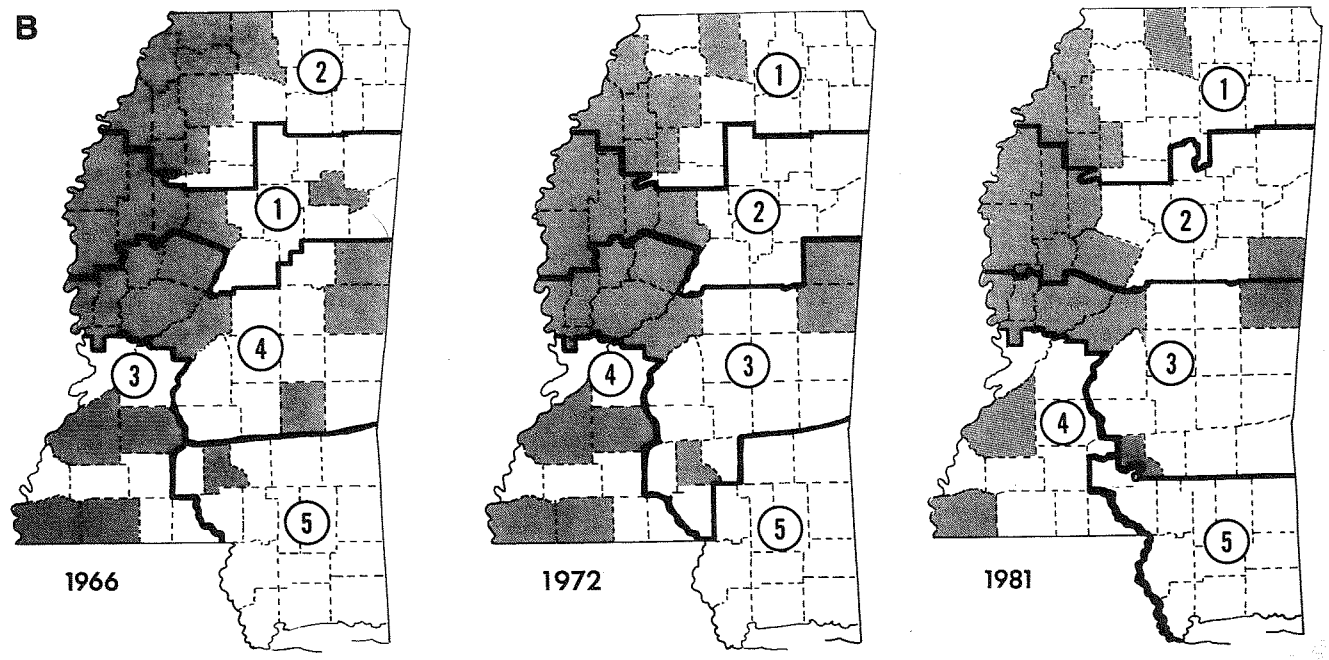


Figure 5-1. Cracking in Mississippi congressional redistricting. A. Prior to the passage of the Voting Rights Act, the heavily black Delta, in the northwest part of the state, was preserved intact from 1882 to 1962. B. After the Voting Rights Act became law, the Delta area was split up among Mississippi's congressional districts, diluting black voting strength. Majority-black counties are shaded.

and Greensville (57 percent black)—were contained within a single House of Delegates' district, which was majority-black in population. (See Figure 5-2.) In the Virginia General Assembly's 1981 legislative reapportionment plan, these four majority-black counties were split up and distributed among five separate legislative districts, all majority-white.[26]

Cracking can also take place in large urban areas. In Norfolk, Virginia's largest city, the black population—which constitutes 32 percent of the city's total—is concentrated in a number of contiguous, majority-black precincts in the southern part of the city. (See Figure 5-3.) In its 1981 legislative reapportionment plan for Norfolk's two senate districts, the Virginia General Assembly bisected the black area, creating two districts which were 62 percent and 60 percent white. The assembly rejected an alternative plan proposed by Douglas Wilder, the only black member of the Virginia senate, which would have kept this black population intact and created a majority-black senatorial district.[27]

Cracking can occur in county and municipal redistricting as well. In Warren County, Mississippi, the black population is concentrated in the county seat of Vicksburg. (See Figure 5-4.) Prior to redistricting, three of the county's five supervisors' districts were entirely within the Vicksburg city limits, and all three were majority-black in population. In three successive county redistricting plans, in 1970, 1975, and 1978, the Warren County Board of Supervisors redrew the boundaries of the five supervisors' districts so that each district, like spokes of a wheel, converged on Vicksburg, and split the black population concentration up among the districts.[28]

Racial gerrymandering such as this can occur on a large scale. Between 1968 and 1980, more than half of Mississippi's eighty-two counties redrew the boundaries of their supervisors' districts to incorporate urban and rural areas in each of the five districts and split up the municipal population center—which frequently contained more than half of the county's black population—among the districts. In each of the litigated cases, the county proffered a nonracial justification contending that it was necessary to equalize each county supervisor's road and bridge maintenance responsibilities among the districts.[29] In at least twenty-two cases this type of gerrymandering was challenged in Section 5 objections or in federal district court litigation.[30] However, in some counties, such district alignments were put into effect in court-ordered plans, which are immune from Voting Rights Act scrutiny,[31] or were never challenged in court.

Stacking

Stacking is the racial gerrymandering technique in which a large minority population concentration is put together with a larger white population with the purpose or effect of depriving minority voters of a voting majority. Stacking can occur in multimember districts or single-member districts.

A classic instance of stacking was the Alabama House of Representatives redistricting plan enacted by the Alabama legislature just six weeks after the Voting Rights Act became law. In *Sims v. Baggett*,[32] an early decision in the Alabama reapportionment case, the district court declared the House plan unconstitutional

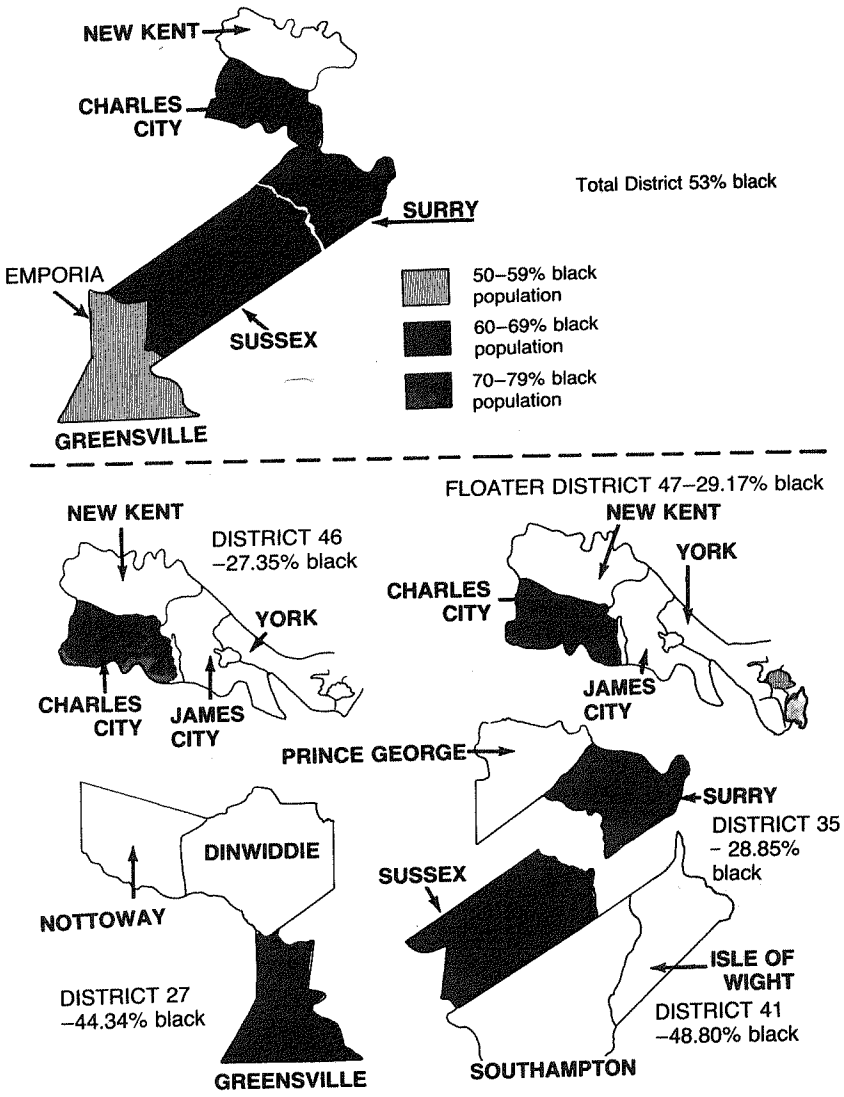


Figure 5-2. Cracking in Virginia House of Delegates redistricting. Before redistricting (top map), Virginia House District 45 combined four majority-black counties, and was majority-black in population. After redistricting (bottom map), District 45 was broken up, and the majority-black counties all were placed in separate majority-white districts.

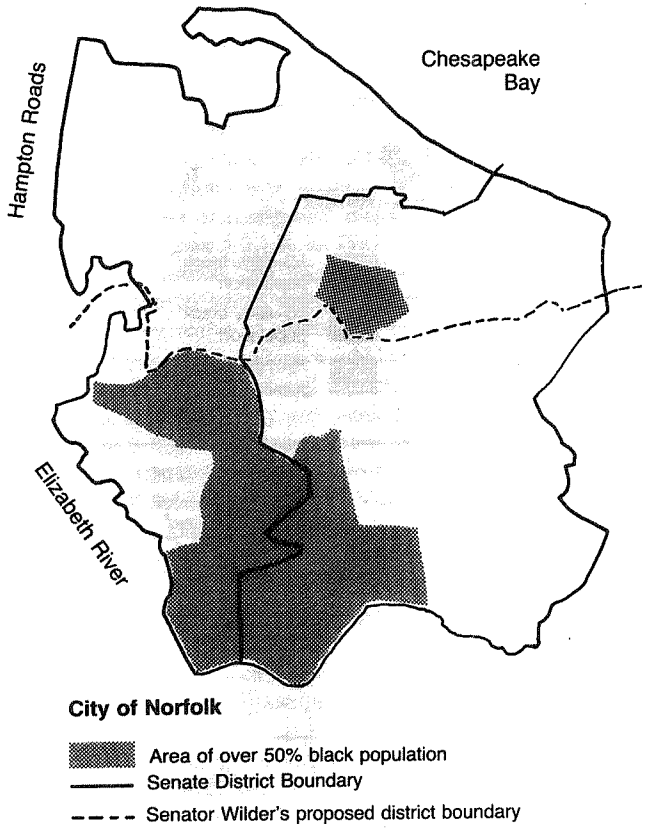


Figure 5-3. Cracking in Virginia state redistricting. Norfolk, Virginia, senate redistricting. The black population concentration in south Norfolk was divided between two districts in the Virginia senate's plan (solid line). Sen. Douglas Wilder's plan, which kept this black population concentration intact (broken line), was voted down.

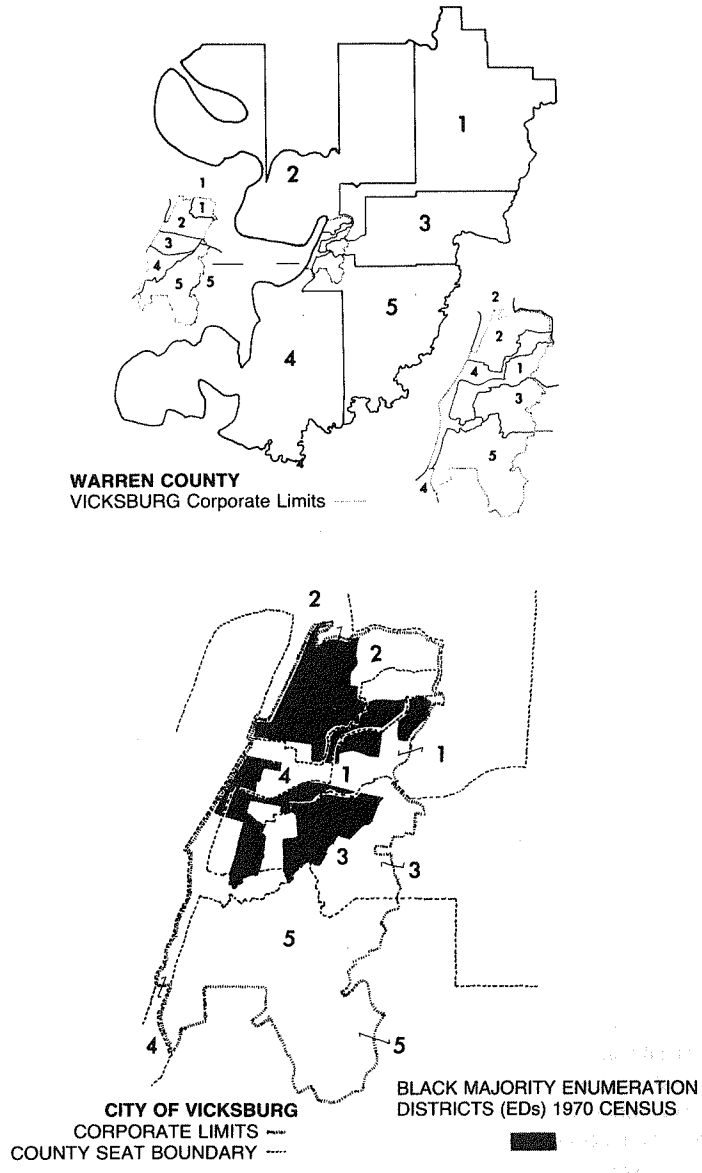


Figure 5-4. Cracking in Mississippi county redistricting. Warren County, Mississippi redistricting. Before redistricting, there were three majority-black districts in Vicksburg (top left). After redistricting, all five districts converged on Vicksburg (top middle and right) and fragmented the black population concentration (bottom map).

for one person, one vote violations, but found racial gerrymandering as well. The district court noted that Macon County (Tuskegee), a predominantly black county east of Montgomery, had almost enough population to meet the norm for an equipopulous House district. Instead of giving Macon County separate representation, the legislature combined Macon with two predominantly white counties to create a majority-white, three-member House district. Similarly, the legislature linked Bullock County, which was 71.9 percent nonwhite, with three predominantly white counties to create another multimember House district.[33] "Systematic and intentional dilution of Negro voting power by racial gerrymandering," the district court held," is just as discriminatory as complete disfranchisement or total segregation."[34] It continued:

> In the present case, we have a situation where nonwhites have long been denied the right to vote and historically have not been represented by nonwhites in the councils of state. Historically, counties have been the voting unit, but suddenly we find without any apparent reason a number of counties that are entitled to their own representatives on a population basis aggregated, turning Negro majorities into minorities. It would be unfortunate if Alabama's Negroes were to find, just as they were about to achieve the right to vote, that that right had been abridged by racial gerrymandering.[35]

Similarly, in Mississippi, until 1979, majority-black counties were combined with predominantly white counties throughout the state in successive legislative reapportionment plans, both court ordered and legislatively enacted, to create majority-white multimember districts which denied black voters the opportunity to elect senators and representatives of their choice. (See Figure 5-5.)[36]

A more recent example involves Petersburg, Virginia, which is 61 percent black—the highest black percentage of any city in the state. (See Figure 5-6.) Before legislative reapportionment in 1981, the city constituted a single House of Delegates' district. Under the 1980 Census, however, Petersburg lacked sufficient population to remain a correctly apportioned House district. Instead of combining Petersburg with adjoining majority-black areas, the Virginia legislature combined the black population concentration in Petersburg with the almost totally white adjacent city of Colonial Heights, turning a black majority into a black minority and creating a 56 percent white single-member House district.[37]

Packing

Packing occurs when minority populations are overconcentrated in a single district, generally at the 80 percent level and above, in excess of the percentage needed for minority voters to elect candidates of their choice. The purpose of packing is to deprive minority voters of the opportunity to obtain a voting majority (or to influence the outcome of elections) in adjoining districts. Politically, each minority vote packed into the discriminatory district above the number needed to elect a minority candidate is a wasted vote.

The classic case of packing is the 1961 New York congressional redistricting plan challenged (unsuccessfully) in *Wright v. Rockefeller*.[38] The New York legislature packed black and Puerto Rican voters into one of four Manhattan congressional districts, where, combined, they comprised 86 percent of the population,

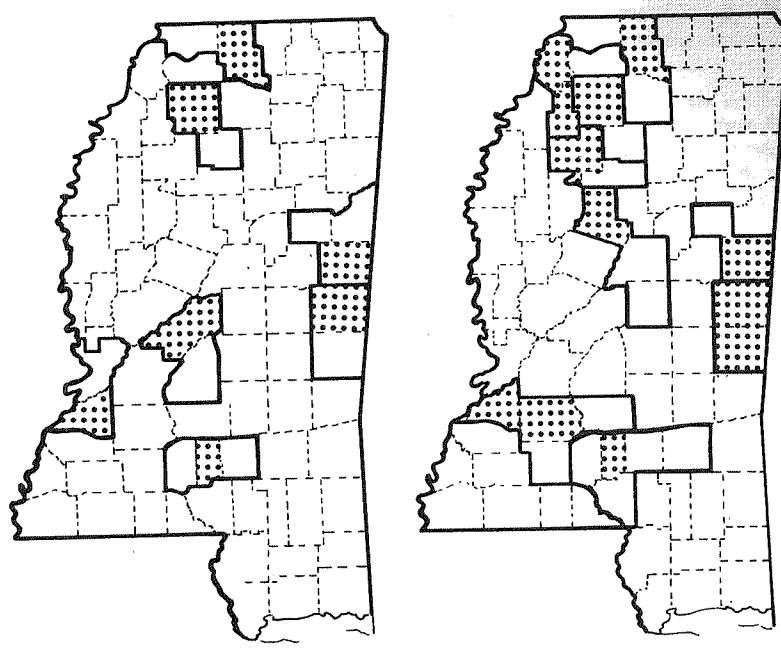


Figure 5-5. Stacking 1975 Mississippi legislative reapportionment plan. Many majority-black counties throughout the state were combined with majority-white counties in multimember districts in both the House (left map) and Senate (right map) plans. The U.S. attorney general objected to this plan in 1975. Dotted areas represent majority-black counties that have been stacked with majority-white counties to form majority-white district.

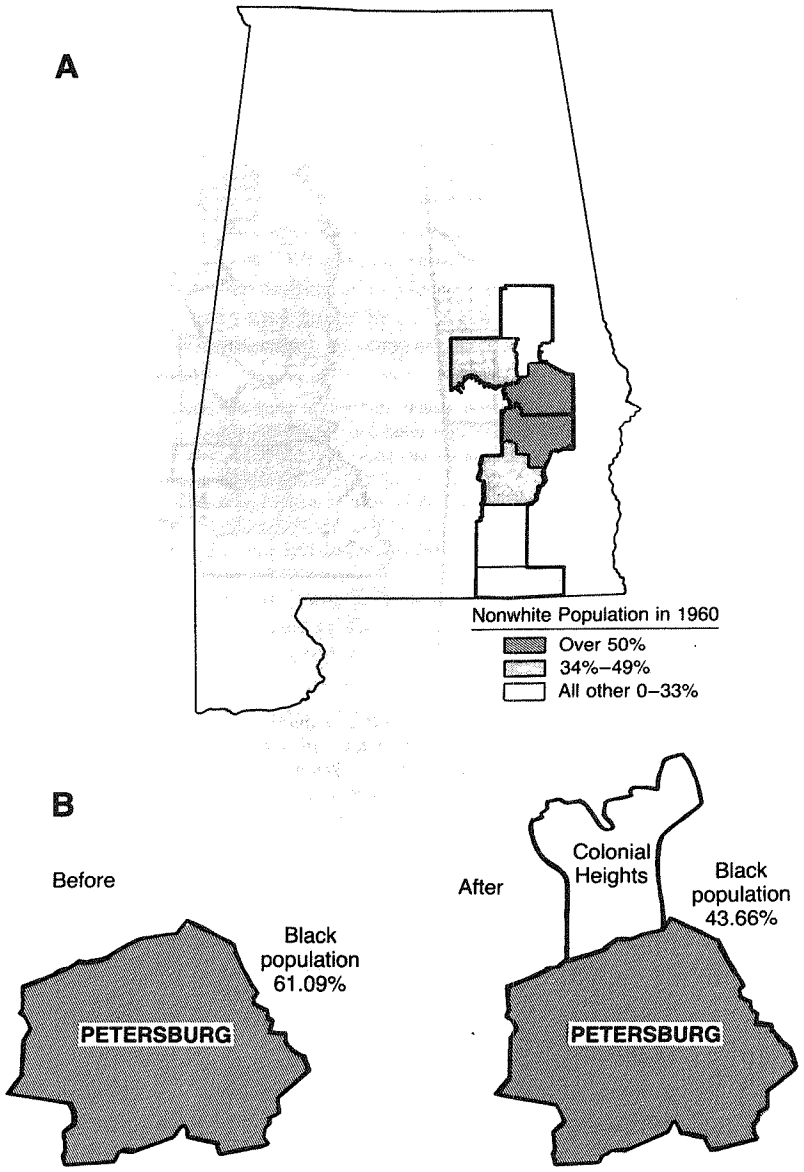


Figure 5-6. Stacking in Alabama and Virginia legislative reapportionment. A. 1965 Alabama legislative reapportionment. Heavily black counties were combined in large multimember districts with predominantly white counties to create majority-white House districts. B. 1981 Virginia legislative reapportionment. The city of Petersburg, which prior to redistricting made a complete House district which was 61 percent black, was combined with the almost all-white city of Colonial Heights, to create a new 56 percent white, single-member House district.

leaving minority voters only 29 percent, 28 percent, and 5 percent of the population in the adjoining districts. Justice Douglas, in a dissenting opinion, described the districts as follows:

> [Z]ig zag tortuous lines are drawn to concentrate Negroes and Puerto Ricans in Manhattan's Eighteenth Congressional District and practically to exclude them from the Seventeenth Congressional District. . . . The record strongly suggests that these twists and turns producing an 11-sided, step-shaped boundary between the Seventeenth and Eighteenth Districts were made to bring into the Eighteenth District and keep out of the Seventeenth as many Negroes and Puerto Ricans as possible.[39]

Packing continues to be used as a racial gerrymandering device, as the 1981 Texas congressional redistricting plan illustrates. South Texas, which includes the counties along the Rio Grande Valley and the Gulf of Mexico, experienced a substantial population growth between 1970 and 1980, and, according to the 1980 Census, the area is now 67 percent Mexican American. Because of this substantial population growth, the area, which had six congressional districts, was entitled to an additional one. Under the preexisting scheme, Mexican Americans comprised more than 65 percent of the population in two districts, and elected two Mexican American members of Congress from them.

Because of the extensive population growth, the Texas legislature could have created a third district with a substantial Mexican American majority. Instead, however, in its 1981 plan it packed Mexican Americans into new District 15, which was 80 percent Mexican American, in order to prevent them from having a substantial majority in the new District 27, which was only 53 percent Mexican American and which actually had an Anglo majority in the voting age population. The legislature rejected alternative plans which would have avoided this dilution of Mexican American voting strength. After the attorney general objected, a three-judge district court ordered into effect a plan creating three districts in South Texas with substantial Mexican American majorities of 72 percent (District 15), 71 percent (District 20), and 64 percent (District 27).[40]

Packing can also occur below 80 percent. In Virginia, there is a contiguous black population concentration in two Tidewater cities in southeast Virginia, Hampton and Newport News. The ACLU of Virginia proposed to the Virginia House of Delegates a legislative reapportionment plan which would have created two majority-black districts in these two cities. But instead, the House in January 1982 adopted a plan which packed the black concentration into one single-member district which combined portions of Hampton and Newport News and which was 75 percent black. In lodging a Section 5 objection to the plan, the attorney general found:

> Chapter 16 "packs" most of the concentrated black population of Hampton and Newport News into one 75% black district, a level which appears to be well in excess of that necessary to give black voters a fair opportunity to elect a candidate of their choice, while the remainder of the black concentration is divided among three other districts, all of which have substantial white majorities.[41]

JUDICIAL ENFORCEMENT OF RACIAL GERRYMANDERING PROTECTIONS

At-Large Voting

Racial gerrymandering of district lines violates the Fourteenth and Fifteenth Amendments to the United States Constitution and Sections 2 and 5 of the Voting Rights Act of 1965. In court challenges to at-large elections, the Supreme Court has flip-flopped on whether proof of discriminatory intent is required to demonstrate a constitutional violation and what kind of evidence shows discriminatory intent.[42] When the issue first arose in the context of the first legislative reapportionment cases in the mid-1960s, the Supreme Court indicated that an "invidious result"[43] would be sufficient, and that multimember legislative districts could be struck down if it could be shown that

> designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.[44]

Then in two cases challenging multimember legislative districting,[45] the Court held that the mere fact that minorities were not proportionately represented does not prove a constitutional violation.

> The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.[46]

Utilizing this standard, the Court in *White v. Regester* held unconstitutional at-large voting for state legislators in two multimember districts in Dallas and Bexar (San Antonio) counties in Texas for dilution of black and Mexican American voting strength, respectively. The Court held that plaintiffs satisfied their burden of proving a denial of equal access to the political process on the "totality of circumstances" which showed a prior history of racial discrimination in voting, electoral mechanisms such as majority vote requirement and a "place" or post requirement which enhanced discrimination at the polls, underrepresentation of minorities, racial bloc voting, discrimination in slating, unresponsiveness of white elected officials, and the continued effects of past discrimination in education, employment, economics, health, politics, and other areas.[47]

In 1980 in *City of Mobile v. Bolden,*[48] a challenge to at-large, citywide city council elections in Mobile, Alabama, a sharply divided court held that proof of discriminatory purpose was required to prove a violation under the Constitution and Section 2 of the Voting Rights Act. In reversing two lower courts which had upheld the black voters' challenge, the Court rejected as "far from proof that the at-large electoral scheme represents purposeful discrimination,"[49] the same evidentiary factors which proved unconstitutional discrimination in *White v. Regester.*[50]

The *Bolden* decision evoked a firestorm of criticism and protest in the legal

community.[51] Under *Bolden,* the burden of proving that a voting law which dilutes minority voting strength was adopted or retained for a specific discriminatory purpose is an extremely difficult, frequently impossible task. Evidence of why a particular at-large voting scheme was adopted may be lacking or inconclusive. If, as in the *Bolden* case, the system was adopted many years ago, there may be little documentary evidence showing motivation, and, as the *Birmingham* (Ala.) *Post-Herald* succinctly put it,

> many discriminatory voting and registration rules were adopted years ago by persons who are now dead. It would be a neat trick to subpoena them from their graves for testimony about their racial motivations.[52]

In most cases, legislators are unlikely to admit any racial motivations, and thus the true intent is likely to be concealed. In the absence of a "smoking gun," courts must resort to circumstantial or indirect evidence of intent. But in *Bolden,* a majority of the Court was unable to agree on the proper legal standard for determining discriminatory intent. And if a majority of the justices of the Supreme Court cannot agree on a proper legal standard for proving discriminatory intent, how is anyone to know what is required? The obligation to prove a specific discriminatory intent also maximizes judicial intrusion into the legislative process, puts state legislatures and local governing bodies on trial, and requires federal judges to label public officials "racist" in order to find a constitutional violation.

After extensive hearings, in October 1981 and June 1982, both houses of Congress, by overwhelming majorities, amended Section 2 of the Voting Rights Act of 1965 to eliminate the discriminatory intent requirement engrafted onto the statute by the *Bolden* decision. The new Section 2 of the Voting Rights Act prohibits any voting practice "imposed or applied . . . in a manner which results in a denial or abridgement of the right . . . to vote" on account of race, color, or language-minority status.[53] The Section 2 amendment did not alter the constitutional standard, however.

Two days after President Reagan signed into law the new Voting Rights Act extension bill, in July 1982, the Supreme Court in *Rogers v. Lodge,*[54] in effect reversed itself once again, ruling that "discriminatory intent need not be proven by direct evidence,"[55] and held unconstitutional at-large, countywide elections for county commissioners in Burke County, Georgia. The evidence in that case, which, according to the Court, showed intent in retaining at-large voting, was very similar to the evidence accepted by the Court in *White v. Regester,* but rejected in the *Mobile* case: blacks were a minority of the county's registered voters; "overwhelming evidence of bloc voting along racial lines"; a past history of discrimination in voting, education, political party participation, and other areas which "restricted the present opportunity of blacks effectively to participate in the political process"; evidence that "elected officials of Burke County have been unresponsive and insensitive to the needs of the black community"; "the depressed socio-economic status of Burke County blacks"; the large geographic size of the county; and a majority vote requirement, a post requirement, and lack of any district residency requirement, which enhanced "the tendency of multi-member districts to minimize the voting strength of racial minorities."[56]

The *Rogers v. Lodge* decision considerably eased the burden of proving discriminatory purpose by accepting as probative circumstantial evidence showing that minority voters are denied equal access to the political process. This eliminates the need for direct evidence showing the subjective motivation of legislators which the *City of Mobile v. Bolden* decision appeared to require. However, the *Rogers* ruling did not do away with the requirement of proving discriminatory intent to make out a constitutional violation.

The new Section 2 "results" test, on the other hand, is much more expansive in that it focuses on the results and impact of the discriminatory practice, rather than on the intent of the lawmakers. Not only is proof of discriminatory intent no longer necessary for a statutory violation, but evidence of such objective factors as a past history of official discrimination, racially polarized voting, the existence of voting practices such as majority vote and anti-single-shot requirements which discriminate against minorities, and depressed socioeconomic conditions in the minority community, in and of themselves, are sufficient to prove a Section 2 violation.[57] Whether the white elected officials are responsive to minority needs is not critical.[58]

Section 5 of the Voting Rights Act also provides a remedy for switches to at-large elections in states and localities covered by that section. In the earliest Supreme Court case interpreting the scope of the Section 5 preclearance requirement, *Allen v. State Board of Elections,*[59] the Court held that a Mississippi statute permitting county boards of supervisors to switch from district to at-large elections was a voting law change for which federal preclearance must be obtained because of its potential for diluting black voting strength:

> The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot. See *Reynolds* v. *Sims,* 377 U.S. 533, 555. Voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole. This type of change could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting.

In no case subsequently has the District Court for the District of Columbia or the Supreme Court approved a change from district to at-large voting in a jurisdiction covered by Section 5. The federal courts and the Justice Department also have forced cities with at-large municipal elections to implement ward plans by refusing to preclear, under Section 5, discriminatory municipal annexations until single-member-district ward plans have been adopted.[60]

Discriminatory Line-Drawing

To date, since *Wright v. Rockefeller* in 1964, the Supreme Court has not given plenary consideration to a case alleging unconstitutional racial line-drawing in a legislatively enacted single-member redistricting plan. However, in *Connor v. Finch*[61] the Court did apply constitutional cases prohibiting dilution of minority voting strength to condemn cracking and stacking in a reapportionment plan ordered by a Mississippi district court. In addressing plaintiffs' charges that the plan

impermissibly diluted black voting strength, the court censured unexplained departures from the district court's own neutral guidelines which had "the apparent effect of scattering Negro voting concentrations among a number of white majority districts."[62]

The Court first held that the district court's plan impermissibly diluted black voting strength in Hinds County, Mississippi, by unnecessarily fragmenting a black population concentration in the city of Jackson. In Hinds County, 69 percent of the county's black population (1970 Census) was concentrated in forty-eight contiguous, majority-black Census enumeration districts in the central-city portion of Jackson. In 1969, and again in 1975, the county board of supervisors drew five supervisors' districts for the election of county officials which split up this heavy black population concentration, and the Mississippi district court decided to use these five county supervisors' districts (sometimes called "beats") as senatorial districts in its state senate plan.

The Supreme Court criticized this cracking of black votes through

> five oddly shaped beats that extend from the far corners of the county in long corridors that fragment the City of Jackson, where much of the Negro population is concentrated.

The Court indicated that although the supervisors' districts were assertedly drawn to equalize the responsibilities of the county supervisors in road and bridge construction and maintenance, those justifications were "irrelevant to the problem of apportioning State Senate seats." Given that there was no state policy of beat representation in the state legislature, there was no justification for the district court's decision to use the discriminatory Hinds County supervisors' districts for state senatorial districting.

The Supreme Court also criticized stacking, which unnecessarily combined black population concentrations with more populous white concentrations to create legislative districts with white voting majorities. Claiborne County, majority-black, was combined with Lincoln County, majority-white, and Beat 3 of Copiah County, also majority-white, "to make a white majority senatorial district." Similarly, majority-black Jefferson County, which is contiguous with Claiborne, was combined with four supervisors' districts in an adjoining majority-white county, Adams, "to make an irregularly shaped senatorial district with a slight Negro voting-age majority." The plaintiffs' alternative plan, which would have placed Claiborne and Jefferson together in a single district with Copiah County to create a compact senate district with 55 percent black voting age population, was rejected without explanation.

The Court held that all these elements—unexplained departures from the district court's own neutral guidelines, the fragmentation and dilution of black voting strength, the distorted shapes of the districts, and the rejection of alternative plans which would have avoided this dilution—were probative of intentional racial discrimination and led "to a charge that the departures are explicable only in terms of a purpose to minimize the voting strength of a minority group."

Connor v. Finch is the leading Supreme Court case invalidating a legislative

reapportionment plan for racial gerrymandering of single-member legislative districts. In a number of cases, lower federal courts have held redistricting plans unconstitutional for cracking[63] and stacking.[64]

Cases brought pursuant to Section 5 of the Voting Rights Act differ from cases alleging unconstitutional discrimination in several important respects. In constitutional cases, states or local jurisdictions have enacted and already implemented the redistricting plan challenged by aggrieved minority voters. Under Section 5, however, redistricting plans enacted by states or localities cannot be implemented until federal preclearance already has been obtained. Hence, Section 5 cases are filed by states or other political subdivisions as plaintiffs against the United States or the attorney general, and aggrieved minority voters may intervene in these actions to protect their right to a nondiscriminatory plan. In cases alleging a constitutional deprivation, the minority voter plaintiffs have the burden of proving that the challenged plan was enacted or maintained for a racially discriminatory purpose; discriminatory effect alone is not sufficient. But in Section 5 lawsuits, the state or political subdivision has the burden of proving that its proposed reapportionment plan does not have a racially discriminatory purpose or effect.[65] Federal court jurisdiction for Section 5 preclearance cases is limited by the Voting Rights Act to the District Court for the District of Columbia, with a direct appeal to the Supreme Court.

In Section 5 cases, the District Court for the District of Columbia has refused to approve reapportionment plans which unnecessarily combine black population concentrations with more populous white concentrations or which split up black population concentrations with the purpose or effect of diluting black voting strength. In the most recent decision, *Busbee v. Smith*,[66] involving the 1981 Georgia congressional redistricting plan, the district court found that the black population in the Atlanta area was concentrated in one contiguous band stretching across the southern portion of Atlanta and Fulton County to south central DeKalb County, south of an east-west racial boundary line formed by the Southern Railroad line in Fulton and North Avenue in Atlanta. The Georgia General Assembly rejected proposed districts which corresponded to this racial boundary, and instead, enacted a plan with districts running north and south, combining portions of the black concentration with predominantly white areas of north Fulton and DeKalb counties. The District Court ruled:

> In this case, the state fragmented the large and contiguous black population that exists in the metropolitan area of Atlanta between two Congressional districts, thus minimizing the possibility of electing a black to the Congress in the Fifth Congressional District.

On the basis of this effect, together with statements of the chairman of the House Reapportionment Committee that "I'm not for drawing a nigger district," the district court concluded that the plan was drawn for a racially discriminatory purpose.

In the Warren County, Mississippi, county redistricting case, *Donnell v. United States*,[67] the Supreme Court summarily affirmed a district court decision denying Section 5 preclearance to a plan which split up and dispersed the black population concentration at Vicksburg, which formerly was contained intact within majority-black districts.

In only one Section 5 case, *Beer v. United States*,[68] has the Supreme Court allowed preclearance of a plan which split up black population concentration. In the *Beer* case, the attorney general objected to a New Orleans city redistricting plan that split up black neighborhoods—which form a curving east-west band through central New Orleans—among five districts. The district court also disapproved the plan, but the Supreme Court reversed by a vote of five to three, the majority interpreting the Section 5 "effect" standard as merely protecting minority voters from voting changes which would diminish their voting strength:

> In other words, the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.[69]

Under the prior 1961 plan, none of the five districts had a clear black registered majority, while the proposed plan, despite this slicing up of black neighborhoods, gave blacks a registered majority in one district and a population majority—but not a registered majority—in another. Thus, the Supreme Court reasoned, the plan offered the opportunity for the election of one and possibly two blacks to the city council, and could not be considered to have a discriminatory effect under this retrogression standard.

The Supreme Court's *Beer* decision dealt minority voting rights a severe setback. Under the *Beer* retrogression standard, if the prior plan is 90 percent discriminatory, and the new plan is only 80 percent discriminatory, the new plan must be precleared (in the absence of evidence of discriminatory purpose) because it constitutes a 10 percent enhancement of black voting strength and is not retrogressive. The apparent basis of this retrogression holding may have been the Court's fear that Section 5 could be interpreted to require racial quotas or proportional representation. The district court, having established a numerical test for judging redistricting plans, calculated that blacks, on the basis of their percentage of the registered voters, should be able to elect 2.42 of the city's seven council members, and on the basis of their percentage of the city's population, 3.15 council members.[70]

In subsequent cases, however, the Supreme Court has summarily affirmed district court decisions which have ameliorated a strict application of this *Beer* retrogression standard. In *Wilkes County v. United States*, the district court with the approval of the Supreme Court held that if the prior plan is severely malapportioned, it should not be used as a benchmark for measuring retrogression and

> it is appropriate, in measuring the effect of the voting changes, to compare the voting changes with options for properly apportioned single-member districts.[71]

In *Mississippi v. United States*,[72] the district court, again with Supreme Court endorsement, held that the discriminatory effect of a new single-member-district plan cannot be measured by comparing it with a prior, racially discriminatory multimember district plan which diluted black voting strength. Instead, the district court used as the benchmark for measuring retrogression a nondiscriminatory court-ordered single-member-district legislative reapportionment plan.

Recently, the district court in the Mississippi Section 5 congressional redistricting case held that any prior plan not subjected to Section 5 preclearance on

the merits would probably not be an adequate benchmark for measuring whether a new, proposed plan diminished existing levels of minority voting strength:

> It is very doubtful that an apportionment plan never reviewed on the merits under Section 5 and which in fact is retrogressive compared to the districting scheme in effect on the effective date of the Voting Rights Act can ever serve as a firm benchmark for the purpose of measuring the possible discriminatory effect of subsequent plans.[73]

Supreme Court and lower court decisions generally have recognized the discriminatory impact of the racial gerrymandering techniques of at-large elections, cracking, and stacking, and have struck down voting schemes and reapportionment plans which diluted minority voting strength, both in constitutional and Section 5 cases. In each of these cases submergence of minority voting strength in at-large districts, and cracking and stacking characteristics, were an essential element of the court's holding, although these factors were not entirely sufficient, in and of themselves, to invalidate the plan. In voting rights litigation, more has to be proven than simply the discriminatory effect of the challenged plan. However, in constitutional cases, as the Supreme Court's recent decision in *Rogers v. Lodge* demonstrates, the discriminatory impact of a challenged plan "bear[s] heavily on the issue of purposeful discrimination."[74] While the Supreme Court has not recently addressed the "packing" issue, several reapportionment plans have been objected to by the attorney general under Section 5 which have employed packing to dilute minority voting strength, and those Section 5 objections provide important precedents for the courts to use in future litigation.

CURRENT ISSUES IN RACIAL GERRYMANDERING LITIGATION

The increased use of computers has brought about a technological revolution in the legislative reapportionment process. With computers, it is now possible in any state or locality to draw numerous, even hundreds, of legislative reapportionment plans which meet the one person, one vote standard with total deviations of less than 5 percent or even 1 percent. Given the large number of plans to choose from, the challenge in the 1980s for the courts and persons involved in legislative reapportionment is to develop objective and nondiscriminatory standards for selection of the "best" plan among the wide range of choices. The courts will now be compelled, more than ever before, to develop strict antidiscrimination guidelines governing legislative reapportionment.

The reapportionment litigation of the 1980s is likely to raise several fundamental issues for definitive resolution: What is dilution of minority voting strength? Are minorities better off spread around and having a significant influence in the election of a number of white officials, or concentrated in a few districts where they can elect candidates of their choice? Is it sufficient to create districts in which minority voters are 50 percent or more in a district, or does the minority population percentage have to be higher to give minorities a chance to elect their own officials? What remedial action is required in vote dilution cases, and what restrictions limit the remedies available?

The Vote Dilution Principle

Increasingly, states and political subdivisions have attempted to justify their racial gerrymandering efforts—whether at-large voting or discriminatory line drawing—with the rationalization that minorities are better off having influence in several white majority districts in the election of white officials than having one or a few black- or Hispanic-majority districts in which minorities can elect candidates of their choice. For example, in the Mississippi congressional redistricting case, described before, state legislators justified fragmentation of black voting strength in the majority-black Delta area with the argument that a congressional redistricting plan with two districts which were at least 40 percent or more black was preferable to a plan which created one district with a significant black majority, because the former plan would give black voters significant influence in at least two districts, while the latter plan would give them influence in only one.[75] Similarly, state officials in Virginia in the 1981 legislative reapportionment litigation attempted to defend discriminatory multimember districts for the Virginia House of Delegates by arguing that in two-member or four-member districts, black voters would have influence over the entire legislative delegation, while in single-member, majority-black districts, black voter influence would be less.[76]

The history of legislative gerrymandering, and the racial gerrymandering examples previously discussed in which legislative redistricting plans have been struck down by the courts or objected to under the Voting Rights Act, show that such explanations generally are after-the-fact rationalizations for dilution of minority voting strength. Submerging minority voting strength by spreading minority voters around among several majority-white districts or by at-large voting schemes is, in fact, the hallmark of racial gerrymandering.

However, there have been instances in which minority voters have requested legislative officials, for strategic reasons, to create two or more high-influence districts, rather than a district in which minorities would be a substantial majority. This apparently happened in the recent Texas congressional redistricting in order to preserve the reelection chances of two white liberal members of Congress from the Dallas area.[77] The question then arises, how can one distinguish when such redistricting is discriminatory, and when it is benign? The preferences of the minority community may not always be controlling, since in some instances opinions in the minority community may be mixed, and the desires of minorities may not always be determinative of a constitutional violation.

An important test is whether or not racial bloc voting exists. This test is wholly objective and can be determined by the voting statistics. Racial bloc voting shows the degree to which the minority community is politically isolated and unable to elect candidates of its choice to public office. If there is racial bloc voting, at-large election schemes and redistricting plans which dilute and fragment minority voting strength in majority-white districts render minority voters politically powerless.

Minorities are both unable to elect their choices to office and unable to form coalitions with whites for the election of candidates favored by the minority community. Further, white officials are free to ignore the needs and interests of the minority community, since white voters control the elections. Minority voters, as one court put it, are "frozen into permanent political minorities destined for constant defeat at the hands of the controlling political majorities."[78]

The importance of racial bloc voting proof in determining whether a given districting scheme is unconstitutionally discriminatory has been recognized by the Supreme Court. In *Rogers v. Lodge*,[79] in which the Supreme Court struck down at-large, countywide voting in Burke County, Georgia, Justice White, writing for the majority, held:

> Voting along racial lines allows those elected to ignore black interests without fear of political consequences, and without bloc voting the minority candidates would not lose elections solely because of their race.[80]

The 65 Percent Rule

Another technique legislators have attempted to utilize to discriminate against minority voters is the disguised majority-white district. Legislators will enact a plan with a district which is 53 percent or 54 percent minority, and then contend that they have not discriminated because they have devised a majority-black or majority-Hispanic district.

The statistical reality in most parts of the country is that such a district is simply not sufficient to give minority voters an opportunity to elect candidates of their choice to office. The facts of the Hinds County (Jackson), Mississippi, redistricting case are illustrative.[81] Prior to county redistricting, blacks—who constituted almost 40 percent of the county's population—had substantial majorities of 76 percent and 68 percent in two of the five supervisors' districts. The county board of supervisors redistricted itself in 1969, sliced up the black concentration in the Jackson central city, and created five districts, all of which were majority-white. This plan was held unconstitutional for excessive malapportionment based on 1970 Census data, and the board of supervisors drew a new plan in 1973 in which blacks had slight population majorities of 54 percent and 53 percent in two of the five districts. (See Table 5-2.) The board argued that this plan could not be considered discriminatory because it provided two majority-black supervisors' districts.

Although total population statistics are the proper measure of numerical malapportionment in the one person, one vote cases, other vote dilution cases must measure actual minority voting strength to determine whether minority voters have been discriminated against.[82] The board's argument failed to account for white-black disparities between total population, on the one hand, and voting-age population, registered voters, and turnout, on the other.

Census statistics showed that 68 percent of the total white population—two out of every three white persons—were of voting age, compared with only 55 percent of the total black population, or slightly more than one out of every two. Consequently, the black voting-age population for each of the five districts was

Table 5-2. Racial population percentages by district, 1973 redistricting plan Hinds County, Mississippi

	Whites			Blacks		
District	Total population (%)	Voting-age population (%)	Registered population (%)	Total population (%)	Voting-age population (%)	Registered population (%)
1	70.5	74.7	79.3	29.5	25.3	20.7
2	46.6	52.0	58.3	53.4	48.0	41.7
3	72.3	76.4	80.7	27.7	23.6	19.3
4	68.0	72.5	77.3	32.0	27.5	22.7
5	46.0	51.4	57.8	54.0	48.6	42.2

Source: 1970 census statistics and court findings and record in *Kirksey v. Board of Supervisors of Hinds County*.

approximately five percentage points less than the total black percentage, and the white voting-age population was approximately five percentage points more than the total white percentage. The two districts which were 54 percent and 53 percent black in total population were actually majority-white in voting-age population.

Further, registration statistics showed that 63 percent of the white voting-age population was registered to vote, compared with only 49 percent for blacks. Also, historically, turnout among black voters had been disproportionately lower than white turnout. Some have argued that voter registration and turnout disparities should not be considered, because as a result of the Voting Rights Act, there are no current barriers to black registration, and therefore these disparities can only be due to apathy. However, as the testimony in this case and others has indicated, these disparities are directly attributable to the extensive history of past discrimination, including purposeful denial to blacks of the opportunity to register and vote, and depressed socioeconomic conditions in the black community which limit electoral participation and are also the direct result of past discrimination.[83] In addition, low turnout may result from alienation of eligible black voters caused by past exclusion and racial gerrymandering, giving rise to the perception that these official, continuing barriers and continued racial bloc voting have made black political participation futile. As a result of registration disparities, the percentage of black registered voters in these two majority-black supervisors' districts was approximately five to six points lower than the black voting-age population percentages, and the reverse was true for the white voter registration percentages.

Altogether, the differences between the black population percentage and the black registered-voter percentage of these five districts ranged from 8 points to 12 points. Generally, the blacker the district, the greater the difference. The result was that District 2, whose total population was 53 percent black, was actually 58 percent white in registered voters, and District 5, whose total population was 54 percent black, was 58 percent white in registered voters.

The turnout differences were difficult to quantify in the same way because there were no reliable turnout statistics by race. The expert witnesses who testified in this case estimated that black turnout was at least 3 to 4 percent lower than white turnout.

Accordingly, as a result of these factors, the expert witnesses for the black voter plaintiffs estimated that in order for black voters to have an equal opportunity, or a fifty-fifty chance to elect candidates of their choice, the districts would have to be at least 65 percent black in total population or 60 percent black in voting age population. These estimates were actually confirmed in this case. The 1973 plan was struck down by the Court of Appeals for the Fifth Circuit for unconstitutional discrimination, and the board of supervisors was ordered to devise a new plan. This new plan provided two districts in which black persons were more than 65 percent of the population, and in the 1979 county elections two black county supervisors, two black justices of the peace, and two black constables were elected to county office, the first elected black officials in Hinds County since Reconstruction.

The principles embodied in this case have come to be known as the "65 percent rule." In areas with a past history of racial discrimination affecting the right

to vote, and with strict patterns of racial bloc voting, minorities frequently must constitute at least 65 percent of the population or 60 percent of the voting age population of districts in order to have an equal opportunity to elect candidates of their choice. This 65 percent rule has been endorsed by the courts,[84] and accepted by the Justice Department as a rule of thumb in reviewing Section 5 submissions.[85] Contrary to what some have charged, it is not overreaching and does not embody any form of racial preference for minority voters. Rather, it is empirically based and confirmed by the statistical data in case after case.

The Remedy Issue

Having found a constitutional or statutory violation in a particular at-large voting scheme or redistricting plan, or faced with a Section 5 objection and imminent elections, what is a court supposed to do by way of providing a remedy? Some have argued that courts should limit themselves to ordering redistricting authorities to devise a new racially neutral, color-blind redistricting plan. This argument derives from the view that all the Constitution and laws require is racially neutral, color-blind election systems and that any race-conscious remedy violates basic societal values.

The fundamental defect in this argument is that a racially neutral remedy may be no remedy at all. Any redistricting plan drawn without regard to the location of minority population concentrations—whether by legislative bodies or by the courts themselves—may be just as discriminatory as a conscious gerrymander. For example, the 1973 Hinds County, Mississippi, county redistricting plan, described previously, was ordered into effect by the district court as a judicial remedy for a prior, unconstitutionally malapportioned plan and had all the characteristics of an intentional racial gerrymander. Yet both the district court and the court of appeals concluded that the plan was "racially neutral" in intent,[86] drawn to equalize the county supervisors' road and bridge construction and maintenance responsibilities among the districts, and not to discriminate. Nevertheless, the Fifth Circuit held it unconstitutional because, by fragmenting black voting strength, it perpetuated a past intentional denial to blacks of equal access to the political process.[87]

Furthermore, court orders directing state or local political bodies to produce a race-neutral plan may simply be unrealistic. Any politician who has campaigned for political office knows exactly where the minority population in his or her district lives. He or she doesn't have to have racial census data to know this. To expect these politicians to close their eyes to the important fact of minority population locations is like asking someone not to think of a pink elephant.

In *Connor v. Finch*,[88] the leading Supreme Court decision establishing judicial guidelines governing court-ordered legislative redistricting plans, the Court specifically directed district courts to devise remedial plans which avoid vote dilution through cracking and stacking of black population concentrations. This cannot be accomplished without first identifying the areas of minority vote concentrations, and by drawing district lines in such a manner to avoid fragmenting these concentrations or unnecessarily combining them with white concentrations.

In most instances, to remedy vote dilution, courts must create election dis-

tricts in which minorities constitute 65 percent or more of the population, or 60 percent or more of the voting age population, to give minority voters the opportunity to elect representatives of their choice. Many federal judges, particularly conservative district judges in the South, are reluctant to do this, and call it reverse gerrymandering.

However, in *United Jewish Organizations v. Carey*,[89] the Supreme Court, by a vote of seven to one, with only Chief Justice Burger dissenting, held that devising 65 percent nonwhite majority districts to remedy a Section 5 objection to a legislative reapportionment plan does not violate Fourteenth or Fifteenth Amendment guarantees. Although that case directly involved remedial action of the New York State legislature to satisfy the Justice Department's Section 5 objection, the Court's reasoning also is applicable to court-ordered remedial redistricting plans as well.

Compliance with the Voting Rights Act itself often necessitates the use of racial criteria in drawing district lines. Once a state or local jurisdiction has been found guilty of diminishing existing levels of minority voting strength, regardless of motivation, the covered jurisdiction must carve out large enough nonwhite-majority districts and increase the percentage of black voters in those districts to satisfy the act's requirements.

Further, in devising such districts, the court or legislative body must determine how large the minority percentage must be in order to satisfy the Voting Rights Act, or in the constitutional case, the constitutional requirements. If the district court determines that a challenged plan is unconstitutional because it denies minority voters the opportunity to elect candidates of their choice, then in order to provide an effective remedy, it must devise a plan which does allow minorities to elect their choices to office. In most instances, this requires the creation of 65 percent nonwhite districts. Otherwise, the court will supplant a plan which denies minorities the opportunity to elect candidates with another one which does the same thing. If the creation of 65 percent nonwhite districts were barred, on grounds of reverse gerrymandering or for some other reason, the minority voters would be left without any effective remedy for unlawful dilution of their voting strength.

Using race conscious remedies in redistricting does not stigmatize the minority community in the same way as does the use of racial criteria in other contexts, as when minorities are fenced out of particular districts because of race. In this instance the use of racial criteria is benign and beneficial to the minority community because it enhances their voting strength. Furthermore, the creation of 65 percent minority districts does not discriminate against whites or unfairly dilute their voting strength as a group so long as the percentage of white-majority districts approximates the percentage of whites in the population.

The critics of the *United Jewish Organizations* decision frequently overlook that the creation of three Brooklyn senate districts and six assembly districts which were over 65 percent nonwhite still left whites, who constituted 65 percent of the Kings County population, in the majority in 70 percent of the county's legislative districts.[90] Thus, the Supreme Court concluded that even if there was racial bloc voting, "whites would not be underrepresented relative to their share of the population."[91]

> In individual districts where non-white majorities were increased to approximately 65%, it became more likely, given racial bloc voting, that black candidates would be elected instead of their white opponents, and it became less likely that white voters would be represented by a member of their own race; but as long as whites in Kings County, as a group, were provided with fair representation, we cannot conclude that there was a cognizable discrimination against whites or an abridgement of their right to vote on grounds of race.[92]

White voters in 65 percent nonwhite districts are in no worse position than minority voters in majority-white districts.

CONCLUSION

Mere access to the ballot does not ensure that minorities will be accorded the opportunity to participate effectively in the electoral processes. At-large election schemes and discriminatory redistricting remain prime weapons for minimizing and cancelling out the voting strength of minority voters. By extending the Voting Rights Act, and by enacting the new Section 2 "results" test, Congress has preserved and expanded the statutory protections against dilution of minority voting strength.

Enforcement of these protections, however, remains a problem. In some instances, the courts have been insensitive to vote dilution claims. The Reagan Administration's retreats from active enforcement of voting rights guarantees[93] mean that most lawsuits to enforce these protections will have to be brought by disadvantaged minority voters, who frequently are not able to bear the financial costs of expensive voting rights litigation. Racial gerrymandering strikes at the heart of our electoral processes and must be eliminated on all fronts if the democratic goal of full and effective participation by all citizens in government is to be achieved.

NOTES

1. Robert Luce, *Legislative Principles* (DaCapo Press: New York, 1971), 396.
2. Ibid., 397–398.
3. Ibid., 399; see also *Encyclopedia of Social Sciences* (MacMillan Co.: New York, 1931), 6: 638.
4. *Encyclopedia of Social Sciences*, 638.
5. Luce, *Legislative Principles*, 398.
6. 377 U.S. 533 (1964).
7. 377 U.S. at 565.
8. Robert G. Dixon, Jr., *Democratic Representation: Reapportionment in Law and Politics* (Oxford University Press: New York, 1968), 22.
9. 364 U.S. 339 (1960).
10. Quoted in *Perkins v. Matthews*, 400 U.S. 379, 389 (1971).
11. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).
12. See, e.g., *Bolden v. City of Mobile*, 423 F. Supp. 384, 389–92 (S.D. Ala. 1976); Lawyers' Committee for Civil Rights Under Law, *Voting in Mississippi* (Washington, D.C.: 1981), 28–31, 102–111.
13. Dixon, *Democratic Representation*, 460.
14. See, e.g., *Encyclopedia of Social Sciences*, 638; *Reynolds v. Sims*, 377 U.S. at 578–79.

15. Dixon, *Democratic Representation,* 460–461.
16. Frank R. Parker, "County Redistricting in Mississippi: Case Studies in Racial Gerrymandering," *Mississippi Law Journal* 44 (1973): 391 ff. The terms "cracking," "stacking," and "packing" were first coined in a nonracial context of population malapportionment and urban gerrymandering by Gus Tyler in "Court versus Legislature: The Socio-Politics of Malapportionment," *Law and Contemporary Problems* 27 (1962): 390, 400.
17. *Voting in Mississippi,* 27.
18. Council of State Governments, "Apportionment of the Legislatures," *The Book of the States, 1968–69,* vol. 17 (Chicago, Ill.: 1969), 66–67.
19. See *White v. Regester,* 412 U.S. 755, 765–70 (1973) (Texas); *Sims v. Amos,* 336 F. Supp. 924, 936 (M.D. Ala.) (1972) (three-judge court), *aff'd mem.*, 409 U.S. 942 (1972) (Alabama); *Bussie v. Governor of Louisiana,* 333 F. Supp. 452, 454 (E.D. La.) (1971), *modif'd and aff'd,* 457 F.2d 796 (5th Cir. 1972), *vac'd and remanded on other grounds sub nom. McKeithen* 407 F. Supp. 191 (1972) (Louisiana); *Mississippi v. United States,* 490 F. Supp. 569 (D.D.C. 1979) (three-judge court), *aff'd,* 444 U.S. 1050 (1980). Multimember district schemes were objected to by the Attorney General under Section 5 of the Voting Rights Act for racial discrimination in Georgia (see *Georgia v. United States,* 411 U.S. 526 (1973)), Louisiana, Mississippi, and South Carolina (*but see Morris v. Gressette,* 432 U.S. 491 (1977). U.S. Department of Justice, *Complete Listing of Objections Pursuant to Section 5 of the Voting Rights Act of 1965,* February, 1981.
20. Chandler Davidson and George Korbel, "At Large Elections and Minority Group Representation: A Reexamination of Historical and Contemporary Evidence," *Journal of Politics* 43 (1981): 982-1,005; Richard L. Engstrom and Michael D. McDonald, "The Election of Blacks to City Councils: Clarifying the Impact of Electoral Arrangements on the Seats/Population Relationship," *American Political Science Review* 75 (1981): 344–54; Delbert Taebel, "Minority Representation on City Councils," *Social Science Quarterly* 59 (1978): 143–52; Theodore P. Robinson and Thomas R. Dye, "Reformism and Black Representation on City Councils," *Social Science Quarterly* 59 (1978): 133–41; Albert K. Karnig, "Black Representation on City Councils," *Urban Affairs Quarterly* 12 (1976): 223–43; Clinton B. Jones, "The Impact of Local Election Systems on Black Political Representation," *Urban Affairs Quarterly* 11 (1976): 345–56.
21. Laughlin McDonald, *Voting Rights in the South* (American Civil Liberties Union: Atlanta, 1982), 40–43.
22. Southwest Voter Registration Education Project, *Survey of Chicano Representation in 361 Texas Public School Boards, 1979–80* (San Antonio, 1981), 7.
23. Heywood T. Sanders, "Government Structure in American Cities," *The Municipal Year Book 1979* (Washington, D.C.: International City Management Association, 1979), 99.
24. Michael S. Deeb, *Election and Composition of City and Town Councils in Virginia* (Virginia Municipal League: Richmond, 1977), 36.
25. Section 5 objection letter from William Bradford Reynolds, Assistant Attorney General in charge of the Civil Rights Division, U.S. Department of Justice to Jerris Leonard, attorney for the State of Mississippi, 20 March 1982; briefs filed on behalf of Henry J. Kirksey, et al., defendants-intervenors, in opposition to state's motion for partial summary judgment, *Mississippi v. Smith,* 541 F. Supp. 1329 (D.D.C. 1982) (three-judge court), *appeal dism'd,* 103 S. Ct. 1888 (1983).
26. Section 5 objection letter from Reynolds to Perkins Wilson, Virginia Assistant Attorney General 31 July 1981; Plaintiffs' Trial Memorandum of Law, *Elam v. Dalton* consolidated with *Cosner v. Dalton,* 522 F. Supp. 350 (E.D. Va. 1981) (three-judge court).
27. Section 5 objection letter from James P. Turner, Acting Assistant Attorney General, U.S. Department of Justice, to Perkins Wilson, 17 July 1981; Plaintiffs' Trial Memorandum of Law, *Elam v. Dalton.*

28. *Donnell v. United States,* Civil No. 78-0392 (D.D.C. 31 July 1979) (three-judge court) *aff'd,* 444 U.S. 1059 (1980).
29. E.g., *Donnell v. United States.*
30. Lawyers' Committee, *Voting in Mississippi,* 49–50.
31. *Connor v. Johnson,* 402 U.S. 690 (1971).
32. 247 F. Supp. 96 (M.D. Ala. 1965) (three-judge court).
33. 247 F. Supp. at 107, 109.
34. 247 F. Supp. at 109.
35. *Ibid.*
36. Lawyers' Committee, *Voting in Mississippi,* 19–27.
37. Section 5 objection letter from Reynolds to Perkins Wilson, 31 July 1981; Plaintiffs' Trial Memorandum of Law, *Elam v. Dalton.*
38. 376 U.S. 52 (1964).
39. 376 U.S. at 60–61 (dissenting opinion).
40. Section 5 objection letter from Reynolds to David Dean, Texas Secretary of State, 29 January 1982; *Seamon* v. *Upham,* 536 F. Supp. 931 (E.D. Tex. 1982) (three-judge court), *rev'd on other grounds sub nom. Upham* v. *Seamon,* 456 U.S. 37, 71 L.Ed.2d 725 (1982), *on remand,* 536 F. Supp. 1030 (E.D. Tex. 1982).
41. Section 5 objection letter from Reynolds to Gerald L. Baliles, Virginia Attorney General, 12 March 1982.
42. See, e.g., S. Rep. No. 97-417, 97th Cong., 2d Sess., 19–27 (1982) (Senate Judiciary Committee Report on the extension of the Voting Rights Act); Frank R. Parker, "The Impact of *City of Mobile v. Bolden* and Strategies and Legal Arguments for Voting Rights Cases in Its Wake," in Rockefeller Foundation, *The Right to Vote* (Rockefeller Foundation: New York, 1981), 98–125.
43. *Burns v. Richardson,* 384 U.S. 73, 88 (1966).
44. 384 U.S. at 88; *Fortson v. Dorsey,* 379 U.S. 433, 439 (1965).
45. *Whitcomb v. Chavis,* 403 U.S. 124 (1971); *White v. Regester,* 412 U.S. 755 (1973).
46. 412 U.S. at 766–67.
47. 412 U.S. at 767–69.
48. 466 U.S. 55 (1980).
49. 466 U.S. at 74.
50. 466 U.S. at 73–74.
51. See, e.g., "The Supreme Court, 1980 Term," *Harvard Law Review* 95 (1980): 91, 138; Comment, "*City of Mobile v. Bolden:* A Setback in the Fight Against Discrimination," *Brooklyn Law Review* 47 (1980): 169; Note, "*City of Mobile v. Bolden:* Voter Dilution and New Intent Requirements under the Fifteenth and Fourteenth Amendments, *Houston Law Review* 18 (1981): 611; Hearings on the Extension of the Voting Rights Act of 1965 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. (1982).
52. Editorial, 13 November 1981, *Birmingham Post-Herald.*
53. Public Law No. 97-205, §3, 96 Stat. 134 (29 June 1982) (to be codified at 42 U.S.C. § 1973).
54. 458 U.S. 613 (1982).
55. 458 U.S. at 618.
56. 458 U.S. at 623–27.
57. S. Rep. No. 97-417, 97th Cong., 2d Sess., pp. 29–29 (1982).
58. *Ibid.*, 29 n. 116.
59. 393 U.S. 544, 569 (1969).
60. *City of Petersburg, Virginia v. United States,* 354 F. Supp. 1021 (D.D.C. 1972), *aff'd mem.*, 410 U.S. 962 (1973); *City of Richmond, Virginia v. United States,* 422 U.S. 358 (1975).
61. 431 U.S. 407 (1977).
62. 431 U.S. at 421–26.
63. See, e.g., *Kirksey v. Board of Supervisors of Hinds County, Mississippi,* 554 F.2d 139, 151 (5th Cir. 1977) *(en banc), cert. denied,* 434 U.S. 968 (1977) ("By frag-

menting a geographically concentrated but substantial black minority in a community where bloc voting has been a way of political life, the plan will cancel or minimize the voting strength of the black minority and will tend to submerge the interests of the black community."); *Robinson v. Commissioners Court, Anderson County,* 505 F.2d 674, 676 (5th Cir. 1974) "Here we are confronted with a county Commissioners Court which has cut the county's black community into three illogical parts in order to dilute the black vote in precinct elections, acting as a modern Caesar dissecting its private Gaul. Such apportionment poisons our representatives democracy at its roots. Our constitution cannot abide it."); *Moore v. Leflore County Bd. of Election Comm'rs,* 361 F. Supp. 603, 604 (N.D. Miss. 1972), *aff'd* 502 F.2d 621 (5th Cir. 1974) (invalidated plan "utilized narrow corridors to bring into southwest Greenwood the lines of four districts (Beats 1, 2, 3 and 5), whereby the concentrations of black residents heretofore in Beat 3 were borken up and placed in those several districts").

64. E.g., *Sims v. Baggett.*
65. *City of Rome v. United States* 446 U.S. 156, 172 (1980).
66. 549 F. Supp. 494 (D.D.C. 1982) (three-judge court). *Aff'd mem.*, 103 S. Ct. 809 (1983).
67. Civil No. 78-0392 (D.D.C. 31 July 1979) (three-judge court), *aff'd mem.*, 444 U.S. 1059 (1980).
68. 425 U.S. 130 (1976).
69. 425 U.S. at 141.
70. 374 F. Supp. 363 (D.D.C. 1974), *rev'd,* 425 U.S. 130 (1976).
71. 450 F. Supp. 1171, 1178 (D.D.C. 1978) (three-judge court), *aff'd mem.*, 439 U.S. 99 (1978).
72. 490 F. Supp. 569, 582 (D.D.C. 1979) (three-judge court), *aff'd mem.*, 444 U.S. 1050 (1980).
73. *Mississippi v. Smith,* 541 F. Supp. 1329, 1332 (D.D.C. 1982) (three-judge court), *appeal dism'd,* 103 S. Ct. 1888 (1983).
74. 458 U.S. at 623.
75. See *Jordan v. Winter,* 541 F. Supp. 1135, 1143 (N.D. Miss. 1982) (three-judge court), *vacated and remanded,* 103 S. Ct. 2077 (1983).
76. Frank R. Parker, "The Virginia Legislative Reapportionment Case: Reapportionment Issues of the 1980s," *George Mason University Law Review* 5 (1982): 43.
77. *Upham v. Seamon,* 456 U.S. at 39–40.
78. *Graves v. Barnes,* 373 F. Supp. 704, 732 (W.D. Tex. 1972) *aff'd sub nom. White v. Regester,* 412 U.S. 755 (1973).
79. 458 U.S. 613 (1982).
80. 458 U.S. at 623.
81. *Kirksey v. Board of Supervisors of Hinds County, Mississippi,* 402 F. Supp. 658 (S.D. Miss. 1975), *rev'd,* 554 F.2d 139 (5th Cir. 1977) *(en banc), cert. denied,* 434 U.S. 968 (1977).
82. *City of Rome v. United States,* 446 U.S. 156, 186–87 and n. 22 (1980); *Kirksey v. Board of Supervisors,* 554 F.2d at 149–50; *Moore v. Leflore County Board of Election Commissioners,* 502 F.2d 621, 624 (5th Cir. 1974); *Zimmer v. McKeithen,* 485 F.2d 1297, 1303 (5th Cir. 1973) *(en banc), aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall,* 424 U.S. 636 (1975).
83. The principle that low socioeconomic status and deprivations in education, income, employment and other areas have a negative impact on opportunities for political participation is firmly established in the social science literature, e.g., Raymond E. Wolfinger and Steven J. Rosenstone, *Who Votes?* (New Haven and London: Yale University Press, 1980), 91–93; Lester Milbraith, *Political Participation* (Chicago: Rand McNally, 1965), chap. V; William Erbe, "Social Involvement and Political Activity: Replication and Elaboration," *American Sociological Review* 29 (1964): 198–215; Angus Campbell, et al., *The American Voter* (New York: John Wiley & Sons, 1960), chap. 17; Angus Campbell, Gerald Gurin, and Warren E. Miller, *The Voter Decides* (Evanston, Ill.: Row, Peterson & Co., 1954), 187–99. (Footnote continued.)

84. See, e.g., *Mississippi v. United States,* 490 F. Supp. 569, 575 (D.D.C. 1969) (three-judge court), *aff'd mem.*, 444 U.S. 1050 (1980); *Donnell v. United States,* Civil No. 78-0392 (D.D.C. 31 July 1979) (three-judge court), *aff'd mem.*, 444 U.S. 1059 (1980).
85. See, e.g., *United Jewish Organizations v. Carey,* 430 U.S. 144 (1977).
86. 554 F.2d at 141, 146.
87. 554 F.2d at 148–51.
88. 431 U.S. 407, 421–26 (1977).
89. 430 U.S. 144 (1977).
90. 430 U.S. at 166.
91. Ibid.
92. Ibid (footnote omitted).
93. Washington Council of Lawyers, *Reagan Civil Rights: The First Twenty Months* (Washington, D.C.: 1982), 57–59.