

# THE VOTING RIGHTS ACT AND MISSISSIPPI: 1965–2006

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## INTRODUCTION

Mississippi is the poorest state in the union. Its population is 36% black, the highest of any of the fifty states.<sup>1</sup> Resistance to the civil rights movement was as bitter and violent there as anywhere. State and local officials frequently erected obstacles to prevent black people from voting, and those obstacles were a centerpiece of the evidence presented to Congress to support passage of the Voting Rights Act of 1965.<sup>2</sup> After the Act was passed, Mississippi's government worked hard to undermine it. In its 1966 session, the state legislature changed a number of the voting laws to limit the influence of the newly enfranchised black voters, and Mississippi officials refused to submit those changes for preclearance as required by Section 5 of the Act.<sup>3</sup> Black citizens filed a court challenge to several of those provisions, leading to the U.S. Supreme Court's watershed 1969 decision in *Allen v. State Board of Elections*, which held that the state could not implement the provisions, unless they were approved under Section 5.<sup>4</sup>

Dramatic changes have occurred since then. Mississippi has the highest number of black elected officials in the country. One of its four members in the U.S. House of Representatives is black. Twenty-seven percent of the members of the state legislature are black. Many of the local governmental bodies are integrated, and 31% of the members of the county governing boards, known as boards of supervisors, are black.<sup>5</sup>

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<sup>1</sup> See U.S. Census Bureau, 2000 Census Summary File 1, at tbl.P3, available at <http://factfinder.census.gov> (last visited Jan. 3, 2008).

<sup>2</sup> See *infra* Part I.

<sup>3</sup> See *infra* Part II.

<sup>4</sup> See *Allen v. State Bd. of Elections*, 393 U.S. 544, 571 (1969).

<sup>5</sup> See *infra* Part IV.

These changes would not have come to pass without the Voting Rights Act. Even after the Act was signed, many changes were a long time in the making, and most came about through Section 5 objections imposed by the U.S. Department of Justice (DOJ) and court orders obtained after extensive litigation. Since its first objection in 1969, the DOJ has objected to Mississippi voting changes 169 times, 112 of which were made since Section 5 was reauthorized in 1982. These changes involved election districts for Congress, the state legislature, most of the county governing boards in the state and many of the cities and school boards. In addition, federal observers have been sent to particular locations in Mississippi to observe elections pursuant to provisions of the Act on 548 separate occasions since 1966, far more than any other state. Two hundred and fifty of those have been since the 1982 reauthorization.<sup>6</sup>

While the progress since 1965 has made an important difference in the state, there is still a long way to go. Enormous gaps exist between whites and blacks in terms of both economic and political power. On average, a black citizen of Mississippi is likely to have half the income of a white person.<sup>7</sup> Black citizens are underrepresented at all levels of government. Despite the highest black population percentage of any of the fifty states, none of Mississippi's statewide elected officials are black.<sup>8</sup> Elections are still driven by racially polarized voting, and most white voters do not vote for black candidates in black-white elections no matter their qualifications.<sup>9</sup> In the most recent statewide elections, held in 2003, the state's forty-six-year-old Director of the Department of Finance and Administration, a black man named Gary Anderson, was defeated in the State Treasurer's race by a twenty-nine-year-old white bank employee who had no experience in governmental finance.<sup>10</sup> Racial campaign appeals still surface in elections in the state. In the race for a Mississippi Supreme Court seat in 2004, the white candidate in a black-white election adopted the campaign slogan, "one of us," which had been characterized as a racist appeal by a federal court when it was used by a white candidate in a black-white congressional race over twenty years earlier.<sup>11</sup> In recent times, discriminatory measures such as dual registration have been resurrected years after they were abolished, and officials have failed to submit voting changes for preclearance,

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<sup>6</sup> See *infra* Part VII.

<sup>7</sup> See Fair Data 2000, Selected Socioeconomic Data: Mississippi Chart 8 (2003), [http://www.fairdata2000.com/SF3/contrast\\_charts/Statewide/Black/Mississippi\\_SF3\\_Black.pdf](http://www.fairdata2000.com/SF3/contrast_charts/Statewide/Black/Mississippi_SF3_Black.pdf).

<sup>8</sup> See *infra* Part VI.

<sup>9</sup> See *infra* Part V.

<sup>10</sup> See *infra* Part V.

<sup>11</sup> See *infra* Part VI.

requiring courts to step in and force compliance with Section 5 decades after it was passed.<sup>12</sup>

All of this means that in Mississippi, as in several states, the full protections of the 1965 Voting Rights Act must remain in place. As long as people are willing to ignore the law, and as long as race plays an excessive role in political life, there is potential for backsliding that must be avoided at all costs. The problem of race stemming from slavery and its legacy has been Mississippi's greatest burden. Important changes have occurred since the passage of the Act. But if those changes are to live on, and if Mississippi is to move forward in the coming years, the bulwark of legal protections from which they grew must not be dismantled or diminished.

### I. THE VOTING RIGHTS ACT OF 1965

Although Congress, through the Civil Rights Act of 1964,<sup>13</sup> outlawed racial discrimination in employment, public accommodations and a number of other areas, that Act did not address the persistent problems of discrimination in voting that existed in a number of parts of the country, particularly the South.<sup>14</sup> In 1965, President Lyndon Johnson asked Congress to pass a voting rights bill against a backdrop of dramatic protests throughout the South, particularly those in Selma, Alabama, in March of 1965.<sup>15</sup> In August of that year, Congress passed the Voting Rights Act of 1965 with bipartisan majorities of both houses.<sup>16</sup>

The Act was designed not only to ensure the right of minority citizens to register and cast a vote, but to prohibit discriminatory measures passed by state and local governments that minimize the power of that vote.<sup>17</sup> Both permanent and nonpermanent provisions are in the Act. One of the more important permanent provisions is Section 2, which applies throughout the nation and outlaws any voting practice that results in the denial or abridgement of voting rights on the basis of a person's race, color or membership in a language-minority group.<sup>18</sup>

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<sup>12</sup> See *infra* Part VIII.

<sup>13</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

<sup>14</sup> See generally QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990 (Chandler Davidson & Bernard Grofman eds., 1994) [hereinafter QUIET REVOLUTION].

<sup>15</sup> Peyton McCrary et al., *Alabama*, in QUIET REVOLUTION, *supra* note 14, at 38.

<sup>16</sup> See Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)).

<sup>17</sup> See generally S. REP. NO. 89-162 (1965), 1965 U.S.C.C.A.N. 2508.

<sup>18</sup> See 42 U.S.C. § 1973(a) (2006).

The nonpermanent provisions that are relevant to Mississippi at the present time are Section 5, which is the preclearance section,<sup>19</sup> and Section 8, which permits the DOJ to send federal observers to polling places in certain jurisdictions.<sup>20</sup> These nonpermanent provisions apply only to certain jurisdictions in the country.<sup>21</sup> The formula that resulted in the coverage of these particular areas is set out in Section 4 of the Act.<sup>22</sup> Mississippi is a covered state for purposes of these provisions.<sup>23</sup>

Section 5 is the most important of the nonpermanent sections. It requires covered jurisdictions to submit all proposed changes relating to voting to the Attorney General or the U.S. District Court for the District of Columbia.<sup>24</sup> Unless a change is approved by the Attorney General, acting through the DOJ, or the District Court for the District of Columbia, it may not be implemented.<sup>25</sup> This approval is known as preclearance. Under the Act, the covered jurisdiction must demonstrate that the voting change does not have the purpose or effect of discriminating on the basis of race or language minority.<sup>26</sup> If the DOJ or the federal court determines the jurisdiction did not carry that burden, then an objection should be issued to the change.<sup>27</sup> If an objection is issued, the change cannot be put into operation.<sup>28</sup>

This provision has been of vital importance because it has ensured review of new voting measures to determine in advance whether they discriminate on the basis of race and has not required minority citizens to undertake the enormous expense and time-consuming burden of pursuing litigation every time a state or local government institutes a new measure to dilute their voting strength.

## II. IMPLEMENTATION OF SECTION 5 IN MISSISSIPPI

Although the Act was passed in 1965, delays by Mississippi officials in complying with their obligations under Section 5 postponed for several years any meaningful review of voting changes. After the Supreme Court's

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<sup>19</sup> *Id.* § 1973c(a).

<sup>20</sup> *Id.* § 1973f.

<sup>21</sup> *See* 28 C.F.R. 51 app. (2007); 28 C.F.R. 55 app. (2007).

<sup>22</sup> 42 U.S.C. § 1973b.

<sup>23</sup> *See* 28 C.F.R. 51 app.; 28 C.F.R. 55 app.

<sup>24</sup> 42 U.S.C. § 1973c.

<sup>25</sup> *See id.*

<sup>26</sup> *See id.*

<sup>27</sup> *See id.*

<sup>28</sup> *See id.*; *see also* Department of Justice, About Section 5: Administrative Review of Voting Changes, [http://www.usdoj.gov/crt/voting/sec\\_5/about.htm](http://www.usdoj.gov/crt/voting/sec_5/about.htm) (last visited Dec. 30, 2007).

1969 decision in *Allen*, the state finally submitted the three 1966 laws that were the subject of that case, leading to the first Section 5 objection in Mississippi.<sup>29</sup> It came on May 21, 1969, when the DOJ objected to all three of those laws—one changing the method of selecting county superintendents of education in eleven counties from election to appointment, one giving counties the right to elect their boards of supervisors at-large rather than by districts and one adding burdensome new qualification requirements for independent candidates in general elections.<sup>30</sup> This was the first of 169 objections to voting changes in Mississippi.<sup>31</sup> Nearly two-thirds of those (112) came after Section 5 was reauthorized in 1982.<sup>32</sup>

This lengthy list of objections covers a wide range of voting practices, most involving redistricting plans.<sup>33</sup> Of the 169 objections since enforcement of the Act began, 104 relate to redistricting.<sup>34</sup> Of the 112 objections since the Act was reauthorized in 1982, 86 relate to redistricting.<sup>35</sup> Other objections were imposed because of changes involving at-large elections, annexations of territory, numbered post requirements, majority vote requirements, candidate qualification requirements, changes from election to appointment of certain public officials, drawing of precinct lines, polling place relocations, open primary laws, repeal of assistance to illiterate and disabled voters and a variety of other measures.<sup>36</sup>

Most of these are classic weapons in the arsenal of racial discrimination. The ones most frequently used are those that affect the racial composition of the electorate for particular offices: redistricting, at-large elections and annexations of territory. In the context of racial bloc voting, which is the pernicious legacy of segregation in many parts of this country, these tools can be used to dilute the natural voting strength of minority citizens by creating a disproportionately high number of offices chosen from majority white electorates. If white and black voters generally vote for different candidates, this means white voters will have more power to choose candidates, and black voters less than their numbers normally would allow. And, given the unfortunate fact that white voters in these areas generally vote only for white candidates and not black candidates, the result is that

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<sup>29</sup> See Letter from Jerris Leonard, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to A.F. Summer, Attorney Gen. of Miss. (May 21, 1969).

<sup>30</sup> *Id.* at 1.

<sup>31</sup> See Department of Justice, Section 5 Objection Determinations: Mississippi, [http://www.usdoj.gov/crt/voting/sec\\_5/ms\\_obj2.htm](http://www.usdoj.gov/crt/voting/sec_5/ms_obj2.htm) (last visited Jan. 3, 2008).

<sup>32</sup> See *id.*

<sup>33</sup> See *id.*

<sup>34</sup> See *id.*

<sup>35</sup> See *id.*

<sup>36</sup> See *id.*

whites occupy a disproportionately high number of elected positions.<sup>37</sup> This means, of course, that black citizens are limited to a lesser role in government than would be the case in the absence of these discriminatory electoral mechanisms.

Changes other than those affecting the makeup for the electorate also carry the potential for discrimination. For example, polling places can be moved and precinct lines redrawn to require minority voters, who are disproportionately poorer and less likely to have automobiles than whites,<sup>38</sup> to travel greater distances to vote. This can discourage people from voting and make a difference in the outcome, particularly in close elections. Similarly, elected positions can be changed to appointed ones<sup>39</sup> at the very time the voting population in an area becomes majority-black as a means of keeping black citizens from electing a candidate to the particular office. Indeed, each of the changes that led to an objection involved some type of tool that could be used to discriminate against minority citizens who were secured the right to cast a ballot through the Voting Rights Act but were subject to a variety of tricks designed to minimize the effectiveness of that ballot.

Some of the 169 objections in Mississippi involved voting changes—such as the open primary law, qualifications for independent candidates and restrictions on the ability of illiterate and disabled voters to seek assistance—that governed all elections in the state.<sup>40</sup> Others were targeted at specific types of elections, including those for Congress, the state legislature, state court judges, county boards of supervisors, county superintendents of education, city council members, city clerks and county and city school board members.<sup>41</sup>

Acts passed by the state legislature that had a statewide impact drew twenty-one objections—ten of them since the Act was reauthorized in 1982.<sup>42</sup> Other objection letters targeted laws passed by the legislature prior to reauthorization that affected a specific group of localities.<sup>43</sup>

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<sup>37</sup> See *infra* Parts IV and V.

<sup>38</sup> See Fair Data 2000, *supra* note 7, at Chart 14.

<sup>39</sup> See, e.g., *Allen v. State Bd. of Elections*, 393 U.S. 544, 550 (1969) (discussing 1966 Mississippi Code amendment that allowed for appointment of county superintendent of education).

<sup>40</sup> See Department of Justice, *supra* note 31.

<sup>41</sup> See *id.*

<sup>42</sup> See *id.*

<sup>43</sup> See, e.g., Letter from Jerris Leonard, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to A.F. Summer, Attorney Gen. of Miss. (May 21, 1969); Letter from J. Stanley Pottinger, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to A.F. Summer, Attorney Gen. of Miss. (Dec. 1, 1975); Letter from Drew S. Days, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to A.F. Summer, Attorney Gen. of Miss. (July 8, 1977).

Ninety-nine objections were interposed to voting changes involving Mississippi's counties—seventy-nine of them since the Act was reauthorized in 1982.<sup>44</sup> These objections covered forty-eight of Mississippi's eighty-two counties.<sup>45</sup> Twenty-five of the forty-eight counties were repeat offenders, drawing two or more objections.<sup>46</sup> Sunflower and Tate Counties had six each, Bolivar County had five and Grenada, Leflore, Monroe and Yazoo Counties had four each.<sup>47</sup> Objections were imposed thirty-six times to actions affecting Mississippi municipalities—eighteen of those since reauthorization of the Act.<sup>48</sup> The thirty-six objections involved twenty-eight different municipalities.<sup>49</sup> Most of the remaining objections involved local school districts throughout the state.<sup>50</sup>

As the above figures show, Section 5 is important both at the state and local levels. Some of the discriminatory measures instituted in the context of statewide redistricting plans are discussed later in this report, but it is important to note that efforts to perpetuate the discrimination of the past are also manifest in local elections. The Mississippi legislature's 1966 backlash against the Voting Rights Act included a law giving counties the option of electing their governing boards, known as boards of supervisors, at-large rather than by single-member districts as required under pre-existing state law.<sup>51</sup> This would have allowed white majority counties to ensure that all five members of the county board of supervisors would be chosen by the majority-white electorate, thus preventing integration in county government.<sup>52</sup> That was one of the laws that the Supreme Court in *Allen* said could not be enforced absent preclearance<sup>53</sup> and one in the first group to draw an objection from the DOJ under Section 5.<sup>54</sup> But the efforts did not stop there. The 1971 legislature passed an act authorizing counties to con-

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<sup>44</sup> See Department of Justice, *supra* note 31.

<sup>45</sup> See *id.*; see also NAT'L COMM'N ON THE VOTING RIGHTS ACT, PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK, 1982–2005 Map 5G (2006), available at <http://www.votingrightsact.org/report/finalreport.pdf> [hereinafter Protecting Minority Voters].

<sup>46</sup> See PROTECTING MINORITY VOTERS, *supra* note 45, at Map 5G.

<sup>47</sup> Department of Justice, *supra* note 31. These figures only deal with objections involving the counties themselves. They do not include objections to changes involving elections for officials of county school boards, which are separate entities from the counties themselves, or municipalities located within counties.

<sup>48</sup> See *id.*

<sup>49</sup> See *id.*

<sup>50</sup> See *id.*

<sup>51</sup> See Letter from Jerris Leonard, *supra* note 29, at 1.

<sup>52</sup> See *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969).

<sup>53</sup> *Id.* at 570.

<sup>54</sup> See Letter from Jerris Leonard, *supra* note 29, at 1–2.

vert to at-large elections with residency districts, a slight variation on the nullified 1966 law.<sup>55</sup> Once again, the DOJ objected.<sup>56</sup>

Two counties, Grenada and Attala, adopted at-large elections anyway, each drawing an objection in 1971.<sup>57</sup> After those efforts failed, both Grenada and Attala Counties designed redistricting plans that caused the DOJ to again object in 1973<sup>58</sup> and 1974,<sup>59</sup> respectively. Grenada County then concocted another plan that led to still another objection in 1976.<sup>60</sup> Eleven years later, the DOJ was once more compelled to object to yet another Grenada County redistricting plan.<sup>61</sup>

Many other counties also designed discriminatory redistricting plans.<sup>62</sup> Since enforcement of the Act began, Section 5 objections were interposed against eighty-seven different county redistricting plans in Mississippi—seventy-five of those occurring after the 1982 reauthorization.<sup>63</sup> Many counties incurred multiple objections.<sup>64</sup> Those objections, along with litigation brought under Section 2 of the Act and the Fourteenth Amendment, forced counties to return to the drawing board and create more equitable redistricting plans.

One example where this occurred is Chickasaw County. According to the 1980 Census, blacks made up 36% of the total population of Chickasaw County; however, the County drew its supervisory districts so that each was majority-white.<sup>65</sup> A federal district court in 1989 held that this configuration violated Section 2 and ordered the county to adopt a new plan.<sup>66</sup> The County then passed three different plans over the next six years, all of

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<sup>55</sup> See Letter from David L. Norman, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to A.F. Sumner, Attorney Gen. of Miss. (Sept. 10, 1971).

<sup>56</sup> See *id.* at 1.

<sup>57</sup> See Letter from David L. Norman, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to John C. Love, Love and Love (June 30, 1971); Letter from David L. Norman, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to William O. Semmes, Attorney, Grenada County Bd. of Supervisors (June 30, 1971).

<sup>58</sup> See Letter from J. Stanley Pottinger, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to William O. Semmes, Attorney, Grenada County Bd. of Supervisors (Aug. 9, 1973).

<sup>59</sup> See Letter from J. Stanley Pottinger, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to John C. Love, Attorney, Bd. of Supervisors of Attala County (Sept. 3, 1974).

<sup>60</sup> See Letter from J. Stanley Pottinger, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to William O. Semmes, Attorney, Grenada County Bd. of Supervisors (Mar. 30, 1976).

<sup>61</sup> See Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to George C. Cochran, Counsel, Grenada County (June 2, 1987).

<sup>62</sup> See Department of Justice, *supra* note 31.

<sup>63</sup> See *id.*

<sup>64</sup> See *id.*

<sup>65</sup> *Gunn v. Chickasaw County*, 705 F. Supp. 315, 316–17 (N.D. Miss. 1989).

<sup>66</sup> *Id.* at 324.

which led to Section 5 objections.<sup>67</sup> In the wake of this abject failure to comply with the Act, the federal court drew its own plan for the 1995 elections containing two of five majority black districts to reflect Chickasaw County's 38.6% black population, which had increased under the 1990 Census.<sup>68</sup> Only after that, did the county adopt a lawful plan that was pre-cleared by the DOJ.<sup>69</sup>

These are just some of the many examples of the widespread violations of the Act that led the DOJ to object to so many voting changes since the initial passage of the Act in 1965 and again since its reauthorization in 1982.

### III. THE RELUCTANT COMPLIANCE WITH SECTION 5

As mentioned earlier, Mississippi officials refused to comply with their obligations under Section 5 in the wake of the passage of the Voting Rights Act, leading to the Supreme Court's 1969 decision in *Allen*. Two years later, in its next major Section 5 enforcement decision, *Perkins v. Matthews*, the Supreme Court held that the city of Canton, Mississippi, violated Section 5 when it attempted to enforce a change from ward to at-large elections for the city council, a change in polling place locations and an alteration of the city's voting population through annexation.<sup>70</sup>

Unfortunately, these decisions did not end the problem of noncompliance. At various times, black voters had to return to the courts to force state and local officials to fulfill the basic requirement of submitting voting changes for Section 5 review. For example, the state failed to submit a number of laws passed over a period of several years adding new state trial court judgeships elected under a numbered post system.<sup>71</sup> In 1986, the fed-

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<sup>67</sup> See Letter from Isabelle Katz Pinzler, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to James S. Gore, *Gore & Gregory* (Apr. 11, 1995); Letter from James P. Turner, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to John A. Gregory, *Gore & Gregory* (Mar. 26, 1993); Letter from James P. Turner, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to John P. Fox (Feb. 27, 1990).

<sup>68</sup> *Gunn v. Chickasaw County*, No. 1:87cv165-D-D, 1995 U.S. Dist. LEXIS 21583 (N.D. Miss. Apr. 21, 1995).

<sup>69</sup> See Letter from Elizabeth Johnson, Chief, Voting Section, Civil Rights Div., Dep't of Justice, to John Andrew Gregory (Jan. 21, 1999).

<sup>70</sup> See *Perkins v. Matthews*, 400 U.S. 379, 382–83 (1971). *Allen*, *Perkins* and the other cases discussed in this particular section of this report are known as Section 5 enforcement actions. These are cases that can be brought by any voter in a Section 5 jurisdiction to prevent implementation of any unprecleared voting change in that jurisdiction. See 42 U.S.C. § 1973c (2006). If the new procedure affects voting, and is therefore subject to Section 5, and has not been precleared, the court hearing the case must issue an order preventing the use of the procedure.

<sup>71</sup> See *Kirksey v. Allain*, 635 F. Supp. 347, 347–38 (S.D. Miss. 1986) (three-judge court).

eral district court in *Kirksey v. Allain* was required to step in and enjoin further elections for those seats until preclearance was obtained.<sup>72</sup> State officials then submitted the changes to the DOJ, which later that year entered an objection to the numbered post requirement for many of the judge-ships.<sup>73</sup>

The U.S. Supreme Court revisited the issue of Section 5 non-compliance in 1997 when state officials refused to submit for Section 5 review a number of changes in state law made to conform to the National Voter Registration Act.<sup>74</sup> In *Young v. Fordice*, the Court unanimously held that the officials had violated Section 5 and could not go forward with the changes until preclearance was obtained.<sup>75</sup>

As recently as November 2005, forty years after the Act was passed, a three-judge federal court enjoined the city of McComb from enforcing a state court order it had obtained that removed a black member of the city's Board of Selectmen from his seat by changing the requirements for holding that office.<sup>76</sup> As the three-judge court pointed out, the order clearly altered the pre-existing practice, yet the city had done nothing to preclear it.<sup>77</sup> The court ordered the black selectman restored to his office and enjoined the city from enforcing the change unless preclearance was obtained.<sup>78</sup>

#### IV. BLACK ELECTED OFFICIALS AND THE IMPACT OF THE VOTING RIGHTS ACT

Thirty-six percent of Mississippi's population is black, the highest percentage of the fifty states.<sup>79</sup> Thirty-three percent of the voting age population (VAP) is black.<sup>80</sup> Despite these high percentages, no black person has been elected to a statewide office in Mississippi since Reconstruction. In 2001, the Joint Center for Political and Economic Studies reported

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<sup>72</sup> *See id.*

<sup>73</sup> *See* Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Stephen J. Kirchmayr, Deputy Attorney Gen., Jackson, Miss. (July 1, 1986).

<sup>74</sup> *See* *Young v. Fordice*, 520 U.S. 273, 275, 280 (1997).

<sup>75</sup> *Id.* at 291.

<sup>76</sup> *Myers v. City of McComb*, No. 3:05-cv-00481 (S.D. Miss. Nov. 23, 2005) (three-judge court) (unpublished order).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *See* U.S. Census Bureau, 2000 Census Summary File 1, at tbl.P3, available at <http://factfinder.census.gov> (last visited Jan. 3, 2008).

<sup>80</sup> *See* U.S. Census Bureau, 2000 Census Summary File 1, at tbl.P5, available at <http://factfinder.census.gov> (last visited Jan. 3, 2008).

that Mississippi had 892 black elected officials.<sup>81</sup> The vast majority of the black officials were elected from black-majority districts, and most of those districts were created as a result of the Voting Rights Act.

#### A. CONGRESS

Mississippi has never elected a black U.S. Senator.<sup>82</sup> Two served during Reconstruction as the result of appointment by the legislature prior to passage of the Seventeenth Amendment, which provides for the direct election of senators.<sup>83</sup>

No black person served in the U.S. House of Representatives from Mississippi between 1883 and 1986.<sup>84</sup> During much of this time, the majority-black area of the Mississippi Delta was contained within a single congressional district in the northwest part of the state.<sup>85</sup> That district was almost 60% black as of 1962.<sup>86</sup> But in 1966, less than a year after passage of the Voting Rights Act, the Mississippi legislature carved the Delta up among three of the state's five congressional districts, resulting in no districts with a black majority.<sup>87</sup> This basic configuration was adopted again in 1971 and 1981.<sup>88</sup>

When the 1981 plan was submitted under Section 5, the DOJ imposed an objection.<sup>89</sup> Black citizens filed a lawsuit seeking to hold the 1982 elections from a court-ordered plan, and the federal district court responded by drawing a district centered in the Delta that was 53% black in total population and 48% black in VAP.<sup>90</sup> This was insufficient to elect a black candidate in that polarized and poverty-stricken region of the state, and the Mis-

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<sup>81</sup> DAVID A. BOSITIS, JOINT CTR. FOR POLITICAL AND ECON. STUDIES, BLACK ELECTED OFFICIALS: A STATISTICAL SUMMARY 14 tbl.2 (2001), available at <http://www.jointcenter.org/publications1/publication-PDFs/BEO-pdfs/2001-BEO.pdf>.

<sup>82</sup> See CONG. RESEARCH SERV., BLACK MEMBERS OF THE UNITED STATES CONGRESS: 1870–2004 37 tbl.1 (2004), available at <http://fpc.state.gov/documents/organization/31339.pdf>.

<sup>83</sup> See *id.* at 1, 37 tbl.1; U.S. CONST. amend. XVII.

<sup>84</sup> See CONGRESSIONAL RESEARCH SERVICE, *supra* note 82, at 38–41.

<sup>85</sup> See FRANK R. PARKER, BLACK VOTES COUNT: POLITICAL EMPOWERMENT IN MISSISSIPPI AFTER 1965 41–51 (1990).

<sup>86</sup> See *id.*

<sup>87</sup> See *id.* at 48.

<sup>88</sup> See *id.* at 41–51; see also *Jordan v. Winter*, 541 F. Supp. 1135, 1137–39 (N.D. Miss. 1982) (three-judge court), *vacated sub nom. Brooks v. Winter*, 461 U.S. 921 (1983).

<sup>89</sup> See Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Jerris Leonard, Jerris Leonard & Assocs. (Mar. 30, 1982).

<sup>90</sup> *Jordan*, 541 F. Supp. at 1144–45; *Jordan v. Winter*, 604 F. Supp. 807, 810 (N.D. Miss. 1984) (three-judge court), *aff'd sub nom. Miss. Republican Executive Comm. v. Brooks*, 469 U.S. 1002 (1984).

Mississippi delegation remained all white following the 1982 election.<sup>91</sup> However, the black plaintiffs appealed to the U.S. Supreme Court, which remanded the case for reconsideration in light of the 1982 amendment to Section 2 of the Act.<sup>92</sup> In 1984, the federal court held that its prior plan did not comply with Section 2 and drew a new plan, this one with a black VAP majority of 52.83%.<sup>93</sup> Although a white candidate won again in 1984, things changed two years later when Mike Espy was elected, becoming the first black member of Congress from Mississippi in more than one hundred years.<sup>94</sup> Since that time, Mississippi's House delegation, which fell from five representatives to four after the state lost a seat in the 2000 Census, has included one black member.<sup>95</sup>

## B. THE STATE LEGISLATURE

Significant integration came to Mississippi's legislature even later than in other states. No black citizen was elected to the state's legislature in the twentieth century until 1967. In that year, Robert Clark of Holmes County won election to the State House of Representatives.<sup>96</sup> He remained the only black member of the 122-seat House until 1975, when the DOJ objected to the legislature's redistricting plan of that year, and a court-ordered plan creating single-member districts in some of the urban areas in the state led to the election of three more black House members.<sup>97</sup> In 1979, after the State adopted plans dividing the entire legislature into single-member districts, fifteen black members were elected to the House and two to the previously all-white Senate.<sup>98</sup> After a new plan was adopted and precleared in 1982, three additional black members were elected to the House in the 1983 elections and two more in 1987.<sup>99</sup> As the 1990s approached, black citizens remained woefully underrepresented, with black candidates elected to only twenty of 152 House seats (13%) and only two of fifty-two Senate seats (4%) in a state that was 32 % black VAP at the time.<sup>100</sup>

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<sup>91</sup> See *Jordan*, 604 F. Supp. at 811-13.

<sup>92</sup> See *Brooks v. Winter*, 461 U.S. 921, 921 (1983).

<sup>93</sup> *Jordan*, 604 F. Supp. at 814-19.

<sup>94</sup> H.R. DOC. NO. 101-117, at 49 (1990).

<sup>95</sup> See CONGRESSIONAL RESEARCH SERVICE, *supra* note 82, at 38-41.

<sup>96</sup> See PARKER, *supra* note 85, at 72.

<sup>97</sup> See *id.* at 115, 119-27.

<sup>98</sup> See *id.* at 127, 133.

<sup>99</sup> See *id.* at 133 & fig.5.1.

<sup>100</sup> See *id.*

New House and Senate plans were adopted by the legislature in 1991, but the DOJ denied preclearance.<sup>101</sup> According to the objection letter, even though the plans did not decrease the number of black-majority districts from the 1982 plan and, therefore, had no retrogressive effect, there were significant indications that a racially discriminatory purpose was at play.<sup>102</sup> These indications included the fact that the legislature had turned away alternatives under which, according to the DOJ, “reasonably compact and contiguous districts could be drawn in a number of additional areas of the State in which black voters usually would be able to elect representatives of their choice,” as well as the fact that “support for the [legislature’s plan] and opposition to alternative suggestions were sometimes characterized by overt racial appeals.”<sup>103</sup> For example, the alternative plan was often called the “Black Caucus Plan” and even the “black plan” on the House floor even though it was supported by thirty-eight white and twenty black members, and privately, some white legislators referred to it as “the nigger plan.”<sup>104</sup>

In 1992, the legislature drew new plans in order to cure the Section 5 defects.<sup>105</sup> The House plan was precleared, but the DOJ objected once again to the Senate plan, specifically to the districts drawn for southwest Mississippi.<sup>106</sup> The legislature then amended the Senate plan for that area, and the new version was precleared.<sup>107</sup>

Special elections were held in 1992 under the new plans, resulting in the election of thirty-three black citizens in the 122-member House (27%) and ten in the fifty-two-member Senate (19%).<sup>108</sup> A slight increase has occurred since that time and presently there are thirty-six black members in the 122-member House (29.5%) and eleven black senators in the fifty-two-member Senate (21%).<sup>109</sup>

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<sup>101</sup> *Watkins v. Mabus*, 771 F. Supp. 789, 791–92 (S.D. Miss. 1991) (three-judge court), *aff’d in part, vacated in part*, 502 U.S. 954 (1991).

<sup>102</sup> *Id.* at 792.

<sup>103</sup> *Id.* at 792 (quoting letter from the Attorney General dated July 2, 1991).

<sup>104</sup> Jay Eubank, *Racial Slurs Mar Work on Voting Lines*, CLARION LEDGER, July 14, 1991, at 1A.

<sup>105</sup> See Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice, to Roger Wicker, Chairman, Miss. Elections Comm., William C. Denny, Chairman, Miss. House of Representatives Apportionment & Elections Comm. (Mar. 30, 1992).

<sup>106</sup> *Id.* at 1, 3.

<sup>107</sup> See *Watkins v. Fordice*, 791 F. Supp. 646, 647 (S.D. Miss. 1992) (three-judge court).

<sup>108</sup> See generally DICK MOLPUS, SEC’Y OF STATE OF MISS., MISSISSIPPI OFFICIAL AND STATISTICAL REGISTER: 1992–1996 (1993).

<sup>109</sup> See Mississippi House of Representatives, House Members, [http://www.ls.state.ms.us/hr\\_membs.htm](http://www.ls.state.ms.us/hr_membs.htm) (last visited Jan. 3, 2008); Mississippi State Senate, Senate Members, [http://www.ls.state.ms.us/ss\\_membs.htm](http://www.ls.state.ms.us/ss_membs.htm) (last visited Jan. 3, 2008).

## C. LOCAL OFFICIALS

As of 1965, the only black local elected officials in the state were the mayor and city council of the all-black town of Mound Bayou in the Mississippi Delta.<sup>110</sup> That has changed. The fruits of enforcement of the Voting Rights Act are reflected in the fact that Mississippi now has 127 black county supervisors, which is 31% of the total number of 410 supervisors.<sup>111</sup> Those 127 supervisors come from sixty-seven different counties.<sup>112</sup> Of those sixty-seven counties, Section 5 objections were lodged one or more times against redistricting plans for supervisors in forty-three of them.<sup>113</sup> Since 1982, two others have been the subject of successful Section 2 lawsuits.<sup>114</sup> During the same period, some of the counties with Section 5 objections were also the subject of successful Section 2 litigation.<sup>115</sup> Thus, most of the current plans under which black supervisors were elected in Mississippi are the legacy of direct enforcement of the Act, particularly the preclearance provision of Section 5. Even for those counties that never encountered a Section 5 objection or a Section 2 lawsuit, it is safe to say that most designed their plans lawfully because of a recognition that discrimination likely would be met by a Section 5 objection.

Section 5 objections also were interposed over the years to the imposition of at-large elections and discriminatory redistricting plans for city councils. Efforts of municipalities to convert to at-large elections led to three objections, all of them before the 1982 reauthorization.<sup>116</sup> New municipal redistricting plans led to thirteen more objections, ten of them since the reauthorization.<sup>117</sup> And municipal annexations of property that changed the voting populations were met with another thirteen objections, seven since reauthorization.<sup>118</sup> There are no current statistics kept of the number of black city council members in Mississippi.

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<sup>110</sup> U.S. COMM'N ON CIVIL RIGHTS, POLITICAL PARTICIPATION 218 (1968).

<sup>111</sup> These figures were obtained from the Mississippi Association of Supervisors Minority Caucus, which maintains a current list of the black supervisors in the state. Each of Mississippi's eighty-two counties has five supervisors.

<sup>112</sup> *See id.*

<sup>113</sup> *Id.* (figures obtained by comparing Mississippi Association of Supervisors Minority Caucus listing with Department of Justice, *supra* note 31).

<sup>114</sup> *See Clark v. Calhoun County*, 88 F.3d 1393 (5th Cir. 1996); *Houston v. Lafayette County*, 20 F. Supp. 2d 996 (N.D. Miss. 1998).

<sup>115</sup> *See Smith v. Walthall County*, 157 F.R.D. 388 (S.D. Miss. 1994); *Bryant v. Lawrence County*, 814 F. Supp. 1346 (S.D. Miss. 1993); *Ewing v. Monroe County*, 740 F. Supp. 417 (N.D. Miss. 1990); *Gunn v. Chickasaw County*, 705 F. Supp. 315 (N.D. Miss. 1989); *Cobbs v. Grenada County*, No. WC84-136-S-O, 1989 WL 251321 (N.D. Miss., Sept. 13, 1989).

<sup>116</sup> *See Department of Justice, supra* note 31.

<sup>117</sup> *See id.*

<sup>118</sup> *See id.*

## D. STATE COURT JUDGES

In 1965, there were only a handful of black lawyers in Mississippi and no black judges.<sup>119</sup> Over twenty years later, in 1986, the number of black lawyers had increased, but only one of nine Mississippi Supreme Court justices was black, only one of seventy-nine circuit and chancery court judges was black, and only one of twenty-three county court judgeships had ever been held by a black person.<sup>120</sup> The nearly all-white trial bench was the result of the use of at-large elections to choose judges in every multi-judge district in the state.<sup>121</sup> Further integration of the trial courts came about only after litigation under Section 2 and Section 5 led to the creation of a number of majority-black judicial election subdistricts and the abolition of numbered posts in some of the state's remaining at-large election districts.<sup>122</sup> Special elections held in 1989 resulted in a significant increase in the number of black trial court judges. At the present time, eight of forty-five chancery court judges, eight of forty-nine circuit court judges, and five of twenty-six county court judges are black.<sup>123</sup>

The Mississippi Supreme Court has nine justices.<sup>124</sup> The state is divided into three districts generally running east-west, each of which elects three justices.<sup>125</sup> None of the districts are majority-black.<sup>126</sup> Prior to 1985, no black person served as a justice of the Mississippi Supreme Court in the twentieth century. Since 1985, one of the nine justices has been black. The other eight have been white. The first black justice was appointed to a mid-term vacancy.<sup>127</sup> When he retired mid-term, another black justice was appointed in his place, and when that justice retired mid-term, still another black justice was appointed to the seat.<sup>128</sup> Each of these justices won when the seat came up for election, but they all had the advantage of incum-

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<sup>119</sup> See *Martin v. Allain*, 658 F. Supp. 1183, 1192–93 (S.D. Miss. 1987).

<sup>120</sup> See *id.* at 1193–94.

<sup>121</sup> See *id.* at 1194.

<sup>122</sup> See *Martin v. Mabus*, 734 F. Supp. 1216 (S.D. Miss. 1990); *Martin v. Mabus*, 700 F. Supp. 327 (S.D. Miss. 1988); *Martin*, 658 F. Supp. at 1183; *Kirksey v. Allain*, 635 F. Supp. 347, 347 (S.D. Miss. 1986) (three-judge court).

<sup>123</sup> Miss. State Conference of the NAACP, NAACP Conscience of a Nation—Voting Rights Act 1965–2005; Looking Back. Never Going Back (Nov. 12, 2005) (unpublished conference program booklet listing black judges). Not every county in Mississippi has a county court. Of those that do, most have only one county judge, although some more populous counties have more than one.

<sup>124</sup> See Mississippi Supreme Court, Mississippi Supreme Court – Directory, <http://www.mssc.state.ms.us/StateJudiciary/Directory/default.htm> (last visited Jan. 3, 2008).

<sup>125</sup> See MISS. CONST. art. VI, § 145.

<sup>126</sup> *Magnolia Bar Ass'n, Inc. v. Lee*, 793 F. Supp. 1386, 1391 (S.D. Miss. 1992), *aff'd*, 994 F.2d 1143 (5th Cir. 1993).

<sup>127</sup> *Id.* at 1393.

<sup>128</sup> *Id.*

bency. The district from which they were elected is 46% black VAP, according to the 2000 Census.<sup>129</sup>

The Mississippi Court of Appeals is an intermediate appellate court that was created in the early part of the 1990s and began operation in 1995.<sup>130</sup> Ten judges serve on it, two each elected from one of five districts in the state.<sup>131</sup> One of the five districts is majority-black<sup>132</sup> and two of the ten judges are black, both elected from that district.<sup>133</sup>

#### E. PUBLIC SERVICE AND HIGHWAY COMMISSIONS

The three-member Public Service Commission and the three-member highway commission are elected from nearly identical districts as those used for the Supreme Court—three districts generally running east-west,<sup>134</sup> all majority-white.<sup>135</sup> No black candidate has ever been elected to these commissions.

### V. RACIALLY POLARIZED VOTING

The unfortunate existence of racially polarized voting is, of course, the reason the Voting Rights Act is necessary, and its continuing presence confirms the need to keep in place all of the protections of the Act. In areas where racial bloc voting exists, with whites generally voting only for whites and blacks for blacks in black-white elections, minority voting strength will be reduced if election districts are drawn so that white voters are a majority in a disproportionately high number of election districts. That would mean the white majorities in those districts would control the outcome of an unfair number of elections, and since they would generally not vote for black candidates, black voters would have less power than their

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<sup>129</sup> See MISS. CODE ANN. § 9-3-1 (West, Westlaw through 2007 Regular Sess. and 1st Ex. Sess.); U.S. Census Bureau, 2000 Census Redistricting Data (Public Law 94-171) Summary File, at tbl.PL3, available at <http://factfinder.census.gov> (last visited Feb. 7, 2008).

<sup>130</sup> Leslie H. Southwick, *The Mississippi Court of Appeals: History, Procedures, & First Year's Jurisprudence*, 65 MISS. L.J. 593, 616–21, 623 (1996).

<sup>131</sup> See *id.* at 621; see also MISS. CODE ANN. § 9-4-1 (West, Westlaw through 2007 Regular Sess. and 1st Ex. Sess.).

<sup>132</sup> See U.S. Census Bureau, 2000 Census Summary File 1, at tbl.P3, available at <http://factfinder.census.gov> (last visited Jan. 3, 2008) (showing Congressional District 2 as the only majority-black district).

<sup>133</sup> Statement based on personal knowledge of the author.

<sup>134</sup> See Mississippi Public Service Commission, Commissioners, <http://www.psc.state.ms.us/Commissioners/commissioners.htm> (last visited Jan. 3, 2008).

<sup>135</sup> See U.S. Census Bureau, 2000 Census Summary File 1, at tbl.P3, available at <http://factfinder.census.gov> (last visited Feb. 7, 2008).

numbers would indicate. Thus, black citizens would be elected to fewer positions than they would be in a fair system.

Racial bloc voting has long been a fixture of Mississippi elections, and unfortunately remains so to this day. The sad facts have been documented by a long litany of court decisions. In *Jordan v. Winter*, a congressional redistricting case, the three-judge district court said: "From all the evidence, we conclude that blacks consistently lose elections in Mississippi because the majority of voters choose their preferred candidates on the basis of race."<sup>136</sup> In *Martin v. Allain*, which involved a statewide challenge to the election of state trial court judges from multi-member districts, the federal district court noted that a number of court decisions had confirmed the pervasive existence of bloc voting in Mississippi.<sup>137</sup> After examining statistical evidence from elections throughout the state, the court concluded that "racial polarization . . . exists throughout the State of Mississippi . . . and that blacks overwhelmingly tend to vote for blacks and whites almost unanimously vote for whites in most black versus white elections."<sup>138</sup> This same pattern has been confirmed in a number of decisions throughout the state dealing with local redistricting.<sup>139</sup>

There have been instances of crossover voting sufficient to elect black candidates, but those are few and far between. When Mississippi's first black legislator in modern times, Robert Clark, attempted in 1982 to become Mississippi's first black congressman in the twentieth century, he was defeated in the newly-drawn court-ordered 48% black VAP Second Congressional District when he received only 15% of the white vote.<sup>140</sup> After the district was redrawn by the court in 1984 with a 53% black VAP district, Clark lost again, receiving 95% of the black vote but only 7% of the white vote.<sup>141</sup> Finally, in 1986, Mike Espy narrowly won with 97% of the black vote and 12% of the white vote.<sup>142</sup>

No black candidate has won election to Congress or the state legislature from a majority-white district in Mississippi, and no black candidate

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<sup>136</sup> *Jordan v. Winter*, 604 F. Supp. 807, 812–13 (N.D. Miss. 1984).

<sup>137</sup> *Martin v. Allain*, 658 F. Supp. 1183, 1193–94 (S.D. Miss. 1987).

<sup>138</sup> *Id.* at 1194.

<sup>139</sup> See, e.g., *Teague v. Attala County*, 92 F.3d 283 (5th Cir. 1996); *Clark v. Calhoun County*, 88 F.3d 1393 (5th Cir. 1996); *Houston v. Lafayette County*, 20 F. Supp. 2d 996 (N.D. Miss. 1998); *Ewing v. Monroe County*, 740 F. Supp. 417 (N.D. Miss. 1990); *Gunn v. Chickasaw County*, 705 F. Supp. 315 (N.D. Miss. 1989); *Jordan v. City of Greenwood*, 599 F. Supp. 397 (N.D. Miss. 1984).

<sup>140</sup> *Jordan*, 604 F. Supp. at 812.

<sup>141</sup> *Martin*, 658 F. Supp. at 1194.

<sup>142</sup> *Id.*

has won a statewide office in the twentieth century.<sup>143</sup> The only state-level body where a majority-white district has elected a black candidate is the Mississippi Supreme Court, where, since 1985, there has been one black justice out of nine.<sup>144</sup> This success occurred in the Central Supreme Court District, which elects three of the nine justices.<sup>145</sup> All three of the Supreme Court districts are majority-white. The Central District has the highest black VAP of the three districts at 46%, according to the 2000 Census.<sup>146</sup> Reuben Anderson, a black Hinds Country Circuit Judge, was appointed to a mid-term vacancy in 1985 and then won election over a far-right racist candidate, Richard Barrett.<sup>147</sup> Running as an incumbent, Anderson received the overwhelming majority of the black vote and an estimated 58% of the white vote.<sup>148</sup> While it was comforting that a black incumbent could gain a majority of the white vote against an overt extremist, Justice Anderson's success with white voters was unique. The federal district judge in *Martin* made that point in his discussion of the Anderson election, noting that in every other black-white judicial election in the state as of that time, black candidates had received, on average, 2% of the white vote.<sup>149</sup>

Indeed, each subsequent black candidate for that Mississippi Supreme Court seat was opposed by most white voters. When Justice Anderson's retirement from the court led to a midterm vacancy in 1991, Hinds County Circuit Judge Fred Banks, who is black, was appointed to the position. He ran twice as an incumbent, defeating white candidates each time, winning first with 51% of the total vote<sup>150</sup> and then 54%,<sup>151</sup> but never receiving a majority of the white vote. When Justice Banks retired from the court midterm in 2002, Hinds County Circuit Judge James Graves, who is black, was

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<sup>143</sup> After this report was written and submitted to Congress, a black candidate from Corinth, Eric Powell, was elected to the Mississippi State Senate from a majority-white district. Bill Minor, *Senate Leadership Game is Played for High Stakes*, SUN HERALD (Biloxi, Miss.), Dec. 13, 2007, at B4. Also in 2007, a black candidate named Adrienne Wooten was elected to the Mississippi State House of Representatives from a district that was majority-white according to the 2000 Census. However, it is believed that demographic changes in Wooten's district since the 2000 Census had turned it into a majority black district.

<sup>144</sup> See *Magnolia Bar Ass'n, Inc. v. Lee*, 793 F. Supp. 1386, 1393 (S.D. Miss. 1992), *aff'd*, 994 F.2d 1143 (5th Cir. 1993).

<sup>145</sup> See *supra* notes 124–125 and accompanying text.

<sup>146</sup> See MISS. CODE ANN. § 9-3-1 (West, Westlaw through 2007 Regular Sess. and 1st Ex. Sess.); U.S. Census Bureau, 2000 Census Redistricting Data (Public Law 94-171) Summary File, at tbl.PL3, available at <http://factfinder.census.gov> (last visited Feb. 7, 2008).

<sup>147</sup> See *Martin*, 658 F. Supp. at 1193.

<sup>148</sup> *Id.* at 1194.

<sup>149</sup> *Id.*

<sup>150</sup> Reed Branson, *Dye Loses; Briggs Win Gives GOP Top 2 Spots*, MEMPHIS COMMERCIAL APPEAL, Nov. 6, 1991, at A1.

<sup>151</sup> *Results in Contested Races*, MEMPHIS COMMERCIAL APPEAL, Nov. 7, 1996, at A5.

named to the seat. Justice Graves ran as an incumbent in 2004, defeating a white candidate in a runoff with 57% of the vote.<sup>152</sup> But, most whites voted against him.<sup>153</sup> Justice Graves won all fourteen of the majority-black counties in his district but only two of the eight majority-white counties.<sup>154</sup>

While the successive victories of black candidates for one of the nine state supreme court seats, coming in a 46% black VAP district, is a positive thing, Mississippi still has a long way to go to reach the day when voters routinely make their decisions in black-white elections based on qualifications and other non-racial factors. This point was emphasized dramatically in the most recent elections for statewide offices in Mississippi, held in 2003. The Director of the Mississippi Department of Finance and Administration, forty-six-year-old Gary Anderson, who is black, ran for the office of State Treasurer against a twenty-nine-year-old white candidate with no experience beyond the fact that he worked in a bank. Despite his superior qualifications, Gary Anderson received only 40% of the vote and lost the election.<sup>155</sup> Of Mississippi's twenty-five majority-black counties, Anderson won twenty-four.<sup>156</sup> Of the fifty-seven majority-white counties, Anderson won only eighteen and lost thirty-nine.<sup>157</sup> While he received some of the white vote, most whites voted against him.

Anderson is a Democrat and his opponent a Republican, but that does not explain his defeat. Another Democratic candidate for a down-ticket statewide office, Jim Hood, won 62% of the vote in his race for Attorney General against an opponent who not only, like Hood, had experience as a state prosecutor, but also had experience as an FBI agent.<sup>158</sup> Yet Hood won overwhelmingly. Obviously, a number of factors come into play in any election contest, but a major reason for the different electoral fates of Jim Hood, a Democrat running for Attorney General, and Gary Anderson, a

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<sup>152</sup> *Supreme Victory*, JET, Dec. 6, 2004, at 8.

<sup>153</sup> *See id.*

<sup>154</sup> *See* ERIC CLARK, SEC'Y OF STATE OF MISS., MISSISSIPPI OFFICIAL AND STATISTICAL REGISTER, 2004–2008 668–69 (2005), available at [http://www.sos.state.ms.us/ed\\_pubs/BlueBook/pdfs/2004-2008\\_bluebook.pdf](http://www.sos.state.ms.us/ed_pubs/BlueBook/pdfs/2004-2008_bluebook.pdf); U.S. Census Bureau, 2000 Census Summary File 1, at tbl.P3, available at <http://factfinder.census.gov> (last visited Feb. 6, 2008).

<sup>155</sup> CLARK, *supra* note 154, at 582–83.

<sup>156</sup> *See id.*; U.S. Census Bureau, 2000 Census Summary File 1, at tbl.P3, available at <http://factfinder.census.gov> (last visited Feb. 6, 2008).

<sup>157</sup> *See* CLARK, *supra* note 154, at 582–83; U.S. Census Bureau, 2000 Census Summary File 1, at tbl.P3, available at <http://factfinder.census.gov> (last visited Feb. 6, 2008).

<sup>158</sup> *Lt. Gov. Tuck Wins Second Term; Hood Elected Attorney General*, MEMPHIS COMMERCIAL APPEAL, Nov. 5, 2003, at A2; Sheila Hardwell Byrd & Matt Volz, *Lt. Gov. Amy Tuck Easily Wins—Becomes First Woman to Serve Two Consecutive Statewide Terms*, MEMPHIS COMMERCIAL APPEAL, Nov. 5, 2003, at 4.

Democrat running for Treasurer, is that Hood is white and Anderson is black.

The racial gulf in Mississippi was also driven home by the results of the racially charged 2001 referendum on the state flag, the upper left hand corner of which prominently displays the Confederate battle flag. A study of the election results showed that 93% of black voters supported a new flag. However, only 11% of the white voters supported a new flag, despite the widespread recognition that the old one, containing the symbol of the Confederate Civil War struggle to retain slavery in the South, is offensive to most black Mississippians. The overwhelming majority of white voters were unwilling to reach across racial lines and abandon this relic of the slaveholding South.<sup>159</sup>

During Robert Clark's unsuccessful 1982 campaign for Congress, one black Mississippi Delta preacher summarized the unfortunate situation this way: "Most whites won't vote for a black, even if he was Jesus come down from the heavens. Even then, they'd be the first to say, 'That can't be Jesus. Everybody knows Jesus is white.'" <sup>160</sup> There has been some progress since 1982, but racial polarization and division remain to this day, and there is still a long way to go.

## VI. RACIAL CAMPAIGN APPEALS

In the 1982 congressional election held from the court-drawn 48% black VAP Second Congressional District, the victorious white candidate, Republican Webb Franklin, ran on the slogan, "He's one of us."<sup>161</sup> The three-judge federal district court, in its subsequent 1984 decision, pointed out that this was an obvious racial appeal to the white majority:

Evidence of racial campaign tactics used during the 1982 election in the Second District supports the conclusion that Mississippi voters are urged to cast their ballots according to race. This inducement to racially polarized voting operated to further diminish the already unrealistic chance for blacks to be elected in majority white voting population districts.<sup>162</sup>

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<sup>159</sup> The information in this paragraph comes from Allan Lichtman, Report on the 2001 Flag Special Election in the State of Mississippi (May 29, 2001) (unpublished study). Professor Lichtman was the Chair of the History Department at American University. The numbers are based on a regression analysis that compares election outcomes in every precinct in the state with the racial demographics of the precincts.

<sup>160</sup> MELANY NELSON, *EVEN MISSISSIPPI* 86 (1989).

<sup>161</sup> *Jordan v. Winter*, 604 F. Supp. 807, 813 n.8 (N.D. Miss. 1984).

<sup>162</sup> *Id.* at 813.

The phrase “one of us” implies there is a “them.” If a candidate like Webb Franklin in 1982 says he is “one of us,” he clearly means that his opponent is not, but instead is one of “them.” The use of this in black-white campaigns—suggesting that “us” is one race and “them” is the other—is particularly unfortunate since it exploits racial divisions.

Regrettably, this is not a thing of the past. The black incumbent Mississippi Supreme Court Justice who reached office by appointment to a midterm vacancy, Justice James Graves, was opposed in his 2004 election by a white Rankin County Circuit Judge named Samac Richardson. Judge Richardson’s campaign slogan, which adorned the front of his flyers, was “One of Us,” the same words that the federal district court in *Jordan* said were a racial appeal when used in 1982.<sup>163</sup>

Other politicians have used similar tactics. Despite the fact that the Governor and Lieutenant Governor of Mississippi do not run as a ticket, the successful gubernatorial candidate in the 2003 election, current Governor Haley Barbour, used campaign literature to tie his opponent, Democratic incumbent Ronnie Musgrove, with the Democratic candidate for Lieutenant Governor, Barbara Blackmon.<sup>164</sup> Blackmon is black. One of the direct mail pieces featured the headline, “If you think four years of Ronnie Musgrove have been bad, imagine what four years with Ronnie Musgrove and Barbara Blackmon would be like.” This was accompanied by photographs of Musgrove and Blackmon, with the Blackmon photo in the more prominent position.

This trick of demonizing a black political figure and attacking an opponent by linking him or her to that figure was repeated in a special election held a few months later, in early 2004, for a State Senate seat. Incumbent Richard White pointed out in a flyer that his opponent “had a major fundraiser that was hosted by Barbara Blackmon.” Others had hosted a number of fundraisers for his opponent but the only one chosen by White for the campaign literature was that of Blackmon, the black politician.

## VII. THE DEPLOYMENT OF FEDERAL OBSERVERS

Section 8 of the Voting Rights Act authorizes the use of federal observers to monitor polling places on Election Day in jurisdictions certified by the federal courts or the Attorney General.<sup>165</sup> The repeated placement

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<sup>163</sup> *Id.*; see also *Jordan*, 604 F. Supp. at 813.

<sup>164</sup> Copies of the advertisements discussed in this and the following paragraph are on file with the author.

<sup>165</sup> See 42 U.S.C. § 1973f (2006).

of federal observers in a particular area is some indication of the potential for discrimination in that area and the need for oversight and monitoring to ensure fairness at the polling place. In Mississippi, federal observers have been sent to various locations in the state to monitor elections on 540 separate occasions since 1966—250 times since the 1982 reauthorization.<sup>166</sup> Both figures are more than in any other state.<sup>167</sup> In fact, Mississippi accounts for 40% of the overall elections to which federal observers have been sent since the 1982 reauthorization.<sup>168</sup>

Since 1982, observers were sent to forty-eight of the state's eighty-two counties.<sup>169</sup> Many of these counties were the subject of repeat visits during that time period.<sup>170</sup> For example, observers monitored nineteen elections in Sunflower County, seventeen in Noxubee County, and sixteen in Bolivar County since 1982.<sup>171</sup>

### VIII. THE BATTLES OVER DUAL REGISTRATION

Section 5 and Section 2 complement each other in a number of ways. For example, Section 5 is an important mechanism for protecting and maintaining progress achieved through Section 2. This is illustrated by the experience in Mississippi with dual registration.

The 1890 Mississippi Constitution was designed to minimize and ultimately eliminate the black vote.<sup>172</sup> One of the statutory provisions passed two years later was a dual registration provision requiring voters to register separately for state and municipal elections.<sup>173</sup> Over the better part of the next century, the Mississippi State Legislature maintained this dual provision, passing a revised version of it in 1984.<sup>174</sup> Black voters filed a lawsuit and, in 1987, a federal district court struck down the requirement.<sup>175</sup> The

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<sup>166</sup> PROTECTING MINORITY VOTERS, *supra* note 45, at 60. Each instance of monitoring in a particular location is counted separately. For example, if observers were sent to monitor eight different counties during a statewide election, this would be counted as eight separate observances. If observers were sent to two different municipalities to observe separate municipal elections in a single county on the same election day, it would be counted as two observances. Each particular election day is counted separately. If observers go to a particular county for both a primary election and again for the general election, these are two separate observances. *See id.*

<sup>167</sup> *See id.* at Map 10B.

<sup>168</sup> *Id.* at 61.

<sup>169</sup> *See id.* at Map 10F.

<sup>170</sup> *See id.*

<sup>171</sup> *See id.*

<sup>172</sup> *See* Miss. State Chapter, Operation PUSH v. Allain, 674 F. Supp. 1245, 1251 (N.D. Miss. 1987), *aff'd*, 932 F.2d 400 (5th Cir. 1991).

<sup>173</sup> *Id.* at 1248–49.

<sup>174</sup> *Id.* at 1249–52.

<sup>175</sup> *Id.* at 1247.

court held that the 1892 law was adopted for a racially discriminatory purpose and the 1984 revision had a discriminatory result, thus violating Section 2 of the Act.<sup>176</sup>

As a result of the federal court ruling, Mississippi moved to a unitary system where registration would allow a new voter to vote in all elections.<sup>177</sup> However, that changed in 1995 when the state began implementing new procedures that it adopted to conform to the National Voter Registration Act (NVRA).<sup>178</sup> Under those procedures, voters who registered under the terms of the NVRA would be eligible to vote only in federal elections and would have to register a second time under pre-existing state procedures in order to vote in other elections.<sup>179</sup> Statistics indicated that blacks made up a majority of those registering pursuant to the NVRA.<sup>180</sup> In addition, the state's Department of Human Services provided its mostly-black public assistance clientele with only the NVRA registration forms, which registered a person only for federal elections, while the state's Department of Public Safety allowed driver's license applicants, most of whom are white, to use the state voter registration form, which enabled them to vote in all elections.<sup>181</sup>

Mississippi refused to submit its procedures for preclearance. It finally did so only under order from the U.S. Supreme Court in *Young* in 1997.<sup>182</sup> Once the procedures were finally submitted, the DOJ objected, noting that the state had resurrected a form of the dual registration policy struck down by the federal court in *Mississippi State Chapter, Operation PUSH v. Allain*.<sup>183</sup> According to the DOJ objection letter, the new procedures had a retrogressive effect on black voting strength and were implemented and maintained under circumstances indicating improper racial considerations.<sup>184</sup> Only after the DOJ objected did Mississippi return to the unitary registration system it had adopted after the *Operation PUSH* decision.<sup>185</sup>

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<sup>176</sup> *Id.* at 1252.

<sup>177</sup> Letter from Isabelle Katz Pinzler, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Sandra M. Shelton, Special Assistant Attorney Gen., State of Miss. (Sept. 22, 1997).

<sup>178</sup> *See id.* at 3.

<sup>179</sup> *See id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 3–4.

<sup>182</sup> *Young v. Fordice*, 520 U.S. 273, 275 (1997).

<sup>183</sup> *See* Letter from Isabelle Katz Pinzler, *supra* note 177, at 3.

<sup>184</sup> *See id.* at 5.

<sup>185</sup> *See Young*, 520 U.S. at 290–91 (ordering the district court to enjoin further use of the dual registration system).

## IX. THE EFFICACY OF LITIGATION

As is clear from the cases cited here, litigation under Section 2 of the Act has played a role in the changes that occurred in Mississippi. But it has only been a small part of the story. Objections issued under Section 5 have made a far more significant difference.

The experience with county boards of supervisors is a prime example. As mentioned earlier, the 127 black supervisors holding office today come from sixty-seven different counties, forty-three of which incurred one or more Section 5 objections of redistricting plans for supervisors.<sup>186</sup> There were only two counties whose redistricting plans were changed solely as a result of reported Section 2 lawsuits without any Section 5 objections.<sup>187</sup> There were some counties with a combination of Section 5 objections and Section 2 litigation,<sup>188</sup> but the objections were the dominant feature in changing the landscape of Mississippi politics in the counties. And, as mentioned earlier, the counties that voluntarily adopted non-discriminatory plans without any objection or litigation did so with an awareness that failure to do so would not only be illegal, but likely futile in light of the Section 5 preclearance procedure.

If Section 5 is abolished, litigation under Section 2 will not be sufficient to prevent the discriminatory voting changes that will occur in the absence of a preclearance requirement. The legal resources did not exist in Mississippi in the past forty years to bring a lawsuit in lieu of every one of the 169 objections that have been issued, and they will not exist in the future. Voting rights litigation is expensive and time-consuming and there are not enough lawyers who practice in the area to carry the load. Certainly, a few lawsuits would be filed here and there, but without the mechanism of Section 5 in place, the field will be open for a resurgence of discriminatory voting changes that the legal process will be unable to control.

## X. CONCLUSION

The phrase is often invoked: "Those who cannot remember the past are condemned to repeat it."<sup>189</sup> No place more than Mississippi has been

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<sup>186</sup> See *supra* Part IV.C.

<sup>187</sup> See *Clark v. Calhoun County*, 88 F.3d 1393 (5th Cir. 1996); *Houston v. Lafayette County*, 20 F. Supp. 2d 996 (N.D. Miss. 1998).

<sup>188</sup> See *Smith v. Walthall County*, 157 F.R.D. 388 (S.D. Miss. 1994); *Bryant v. Lawrence County*, 814 F. Supp. 1346 (S.D. Miss. 1993); *Ewing v. Monroe County*, 740 F. Supp. 417 (N.D. Miss. 1990); *Gunn v. Chickasaw County*, 705 F. Supp. 315 (N.D. Miss. 1989); *Cobbs v. Grenada County*, No. WC84-136-S-O, 1989 WL 251321 (N.D. Miss, Sept. 13, 1989).

<sup>189</sup> GEORGE SANTAYANA, *LIFE OF REASON* 82 (Charles Scribners Sons 1954) (1905).

torn by slavery, by the lost promise of emancipation after the Reconstruction period, by the resurgence of racist power in the latter part of the nineteenth century and most of the twentieth century and by the legacy of poverty and racial separation that still exists. While people's behavior and people's hearts can change over time, vigilance is required to ensure that laws and structures remain in place to prevent us as a society from turning back to the worst impulses of the past. Occasional flashes of those impulses illustrate the need for that vigilance. Important changes have come to pass in Mississippi in the last forty years—changes due in large part to the mechanisms of the Voting Rights Act, particularly the preclearance provision of Section 5. But like the gains that were washed away after the nation abandoned the goals of Reconstruction in 1876, the progress of the last forty years is not assured for the future.

The State of Mississippi has come a long way, but it still has a long way to go. This is not the time to abandon the law that has been more important than any other in the march of progress since 1965.<sup>190</sup>

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<sup>190</sup> After this report was written and submitted, Congress did, in fact, renew expiring provisions of the VRA. See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 7, 120 Stat. 577 (2006).