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The Undermining of the First Reconstruction
Lessons for the Second

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It is not only historians who name eras, make analogies, draw lessons from the past. As the Selma March was approaching Montgomery, Alabama, in 1965, and as Congress was pushing House Resolution 6400 toward passage, the *Montgomery Advertiser*, sensing the strong national current, remarked, "It is almost certain that President Johnson's reconstruction bill will be enacted."[1] The President Johnson referred to was not Andrew, but Lyndon; the "reconstruction" alluded to was not the first, but the second; and the bill was not the "Force" or "Ku Klux" laws, but the Voting Rights Act. Renewed in 1970, 1975, and 1982, the Voting Rights Act has been repeatedly attacked as anti-southern, an infringement on matters better left to state and local governments, and, most important, as unnecessary. It is therefore both desirable and safe, according to VRA opponents, to dismantle at least this vestige of the second Reconstruction.

That blacks, despite the guarantee of racially impartial suffrage in the Fifteenth Amendment, gradually lost the right to vote after the end of the first Reconstruction should caution students of policy as well as policymakers against a second abandonment of national regulation of elections. But beyond this obvious parallel, what lessons for the present can be drawn from the earlier period? What were the terms of the national suffrage guarantees passed by Congress in the 1860s and 1870s? What promises did southern white leaders of a century ago make in an attempt to convince northerners that black rights would be safe under "home rule" for Dixie? By what legal and extralegal means was black political power diluted and blacks eventually almost totally disfranchised? How safe is it, if we go by the historical record, to rely on judicial protection of minority political rights? How exact are the parallels, and, therefore, how relevant are the lessons? Have the conditions of blacks and the current and likely actions of whites changed so much that we have little to learn from history?

An earlier version of this paper was presented before The Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, 24 June 1981, and appears in its *Hearings* (Washington, D.C.: U.S. Government Printing Office, 1982), 2009–2022.

THE FIRST FEDERAL VOTING RIGHTS MACHINERY

During the first Reconstruction, the national government made two attempts by constitutional amendment and four attempts by law to protect black voting rights. Section 2 of the Fourteenth Amendment held out to the states the carrot of increased representation in Congress if they would repeal laws or state constitutional provisions excluding blacks from the right of suffrage. Less than a year after that amendment's ratification, however, Congress passed the more explicit provisions of the Fifteenth Amendment, which absolutely precluded state or national authorities from denying—or *abridging*—the right of citizens to vote on account of race, color, or previous condition of servitude. The Fortieth Congress considered, but, after discussion, rejected broader versions of the Fifteenth Amendment which would have banned literacy and property tests and other similar devices.[2]

Yet Congress recognized that the amendments, as well as the Military Reconstruction Acts which, even before the adoption of the Fifteenth Amendment, had enfranchised blacks in the seceding states, were not self-executing. To preclude official or unofficial violence, intimidation, or election irregularities from robbing citizens of any color of the right to vote and to have their ballots counted as cast, Congress in 1870 and 1871 passed the so-called enforcement, force, and Ku Klux acts, and in 1890 considered the Lodge Fair Elections Bill, but shelved it by one vote in the Senate.[3] Both the enforcement and Ku Klux acts made interfering with the right of citizens to vote a federal crime, and the Force Act went farther, requiring federal courts, upon a petition from two resident citizens, to appoint federal officers to oversee the registration and election process in cities or towns containing 20,000 or more inhabitants. The Lodge Bill in 1890 sought to extend the provisions of the Force Bill to all voters, rural as well as urban.

NINETEENTH-CENTURY SOUTHERN WHITE PROMISES TO RESPECT BLACK VOTING RIGHTS

The first southern white response to threats of Reconstruction was defiance.[4] Believing that the Civil War had settled only the questions of secession and slavery and that those who retained power in the states would be allowed to set the status of the freedmen approximately equal to that of the antebellum free people of color, white southerners virulently and often violently opposed all efforts to guarantee blacks equal rights, notably in the 1866 Civil Rights Bill, the Reconstruction Acts, the Fourteenth and Fifteenth Amendments, the various enforcement acts, and the 1875 Civil Rights Act. That the Republican majority, with substantial support from northern public opinion, continued for a time to insist on equal rights, however, convinced white southern Democrats to alter their tactics. While a "white line" faction continued and even, in the mid-1870s, intensified the forcible intimidation of black voters, a more moderate "New Departure" faction of southern Democrats emerged at the same time, assuring northerners that black rights would be safe if federal protection were withdrawn. The left or moderate hand, the Wade Hampton, L.Q.C. Lamar, and Francis T. Nicholls faction of the party, at least claimed not to know what the right or extreme racist hand, the Martin W. Gary and Ben Tillman faction, was doing. But the combined one-two punch was devastating to black political power in the Deep South.

The moderates' paper pledges were strong, and they persuaded those northerners who, like President Rutherford B. Hayes, were anxious to believe them. The Mississippi state Democratic platform of 1875 affirmed a belief in "the civil and political equality of all men as established by the Constitution of the United States and the amendments thereto." In the words of the authoritative work on Mississippi Reconstruction, however, "the majority of the delegates did not take the document very seriously."[5] Similarly, in Louisiana in 1876, in the words of the leading historical work on Reconstruction in that state, "The Democratic Platform also explicitly recognized the binding effect of the 13th, 14th, and 15th amendments to the United States Constitution, and the party pledged itself to protect every citizen, regardless of race, in the exercise of his rights. Every one of these pledges, except possibly the acknowledgement of the 13th Amendment, would be broken within a few years."[6]

In Virginia in 1873, the state Democratic party platform, again according to the standard scholarly monograph on the subject, "promised to administer equal justice to both races." Nevertheless, the Democrats, including even moderate gubernatorial candidate James L. Kemper, "made much of the color line" during that campaign, and, as we shall see below, the Virginians took action in the 1874 and 1876 legislative sessions to reduce the black vote.[7]

In South Carolina, which had the largest black percentage of any state in the union at the time, the 1876 Democratic state platform announced: "We declare our acceptance, in perfect good faith, of the thirteenth, fourteenth, and fifteenth amendments to the Federal Constitution." The South's best known moderate Redeemer, South Carolina gubernatorial candidate Wade Hampton, promised repeatedly that "not one single right enjoyed by the colored people today shall be taken from them. They shall be the equals, under the law, of any man in South Carolina." Blacks would soon convert to the Democratic party, Hampton prophesied, "because they will find that their rights will be better protected by that party."[8]

Many observers at the time recognized the cynicism which was involved in such pledges and prognostications. As Amos Akerman, who had returned to the South after serving briefly as Attorney General under Grant, remarked at the time, "when speaking for effect at the North" the southern Democrats "say much about accepting the results of the war in good faith, and respecting the rights of everybody," but contradicted those statements by their "drastic policy and unguarded utterances" in the South.[9] Even the oft mentioned moderate policy of appointing blacks to some offices was mostly window dressing. As Gov. Francis T. Nicholls of Louisiana, one of the most prominent New Departure Democrats, noted: "[I] appointed a number of [blacks] to small offices sandwiching them on Boards between white men where . . . they were powerless to do harm."[10]

The southern Democrats' promises had been, in fact, violated even as they were uttered. As U.S. Senate investigations in 1877 and 1878 documented, widespread Ku Klux and Red Shirt violence kept many blacks from the polls, racially discriminatory voting restrictions and facially neutral laws administered in a dis-

criminatory fashion discouraged others, and blatant ballot box stuffing and fraudulent counting negated the votes of many who managed to overcome other obstacles to voting.[11] By 1880, even President Rutherford B. Hayes, whose southern policy was built on the assumption that white moderates would live up to their promises, hold the more openly racist whites in check, and join a Whiggish alliance with Republicans, recognized the southern violations and asked Congress to pass more legislation to protect black rights effectively.[12]

FOUR STAGES IN THE ATTACK ON BLACK VOTING RIGHTS AFTER THE FIRST RECONSTRUCTION

There were four overlapping stages, four sets of distinct tactics in the late nineteenth and early twentieth century attacks on black voting rights: the *Klan stage*, the *dilution stage*, the *disfranchisement stage*, and the *lily-white stage*. In the first era, which is the best known, the basic tactics were violence, intimidation, and fraud. These methods continued to be used in later periods, as they were needed, to reinforce other, subtler devices, and that they were always available often deterred blacks from organizing challenges to white political domination. Coordinated and deftly targeted white violence and fraud in the South from 1870 to 1876 gradually overthrew every southern Republican government.

Much less well known or understood, the second or "dilution" phase was much more subtle. It aimed at reducing the threat of black political power efficaciously but quietly, so as to decrease the possibility that the national government would again intervene to protect blacks from white southerners.

The third or "disfranchisement" phase is familiar to every student of the South. Beginning as early as the 1870s and culminating in the constitutional conventions from 1890 on, white Democrats passed literacy and property tests and poll taxes with the expressed intent and demonstrated effect of disfranchising the vast majority of blacks. Though they provided loopholes for poor or illiterate whites—the grandfather and "fighting grandfather" clauses and the "understanding" clause—they also meant to and did disfranchise large numbers of lower status white people. Nonetheless, the prime object of all these attacks on universal or impartial suffrage was the black man.[13]

The final or "lily-white" stage generally succeeded the disfranchisement of most blacks. Its aim was to crush any elevation of blacks above the distinctly secondary political status into which the disfranchisement measures had forced them, and to reduce, from very slim to none, any chances of blacks being elected or appointed to office or exercising any political muscle whatsoever. Some blacks remained on the voter rolls even after the turn of the century constitutions and amendments went into effect, and had the registration procedures been at all fair, many more could have registered. According to the U.S. Census of 1900, for instance, close to half of the adult black males in the South were literate, and others were direct descendants either of whites or of the more than 200,000 blacks who had served in the Civil War or earlier wars. Republican and even Democratic administrations in the late nineteenth century had appointed blacks to federal offices—postmasterships, tariff and other tax collection posts, as well as many positions in the justice system. Yet during the so-called "Progressive Era," white southern politicians considered the prospect of any black at or near an office of responsibility as an impudent and intolerable attack on the newly established racial status quo, and they tried to ensure, through further "reforms" of local government, that never again could a black be elected to even a minor office within the South.[14]

NINETEENTH CENTURY DILUTION OF BLACK POLITICAL POWER—LESSONS FOR THE 1980s

Black economic status is sufficiently secure and national public opinion committed enough to racially impartial suffrage in the 1980s that it is improbable to expect a return to the days when widespread violence, intimidation, or fraud, literacy tests, or poll taxes could be reimposed in order to *deny* black voting rights altogether. Nevertheless, more sophisticated means of *abridging* black political power are presently in use in numerous areas, and, if the federal check provided by the Voting Rights Act were repealed or its administration relaxed, such means might well be employed much more in the future than they are today. But the abridgement as well as the denial of impartial suffrage is against the Fifteenth Amendment, and subtle as well as blatant discrimination can undermine the effective exercise of citizens' rights. It is therefore appropriate to take a closer look at the historical record in the two less well-known of the four stages, particularly at the second stage. By what means was black political power diluted in the post-Reconstruction South?

Reconstruction and post-Reconstruction southern Democrats used at least sixteen different techniques to hamper black political power without actually denying the franchise to sufficient numbers of voters to invite a strengthening of federal intervention. Many of these devices were facially neutral and might possibly be upheld by courts even today. Indeed, some of them, adopted as long as a century ago, are still in effect and *have* recently been ruled not to violate the Constitution or laws of the United States.[15] Thus, by looking at the past, we see also a possible future, a future which may well come about if continuous federal supervision of election practices is withdrawn from areas where racial bloc voting is still prevalent, a future of relatively subtle, but nonetheless effective racially discriminatory electoral procedures.

Although they all had the same purpose—the minimization of officeholding by black or black-influenced white officeholders—the specific schemes varied because of differences in the black percentage of the population and its geographic distribution. If the blacks were geographically concentrated within the politically relevant area, judicious *gerrymandering* could minimize the number of seats they could hope to win, but single-member districts, always preferred by most whites, could be maintained. If Afro-Americans were in the minority, *at-large elections* could deny them any representation at all, especially when combined with *white primaries*, which minimized defections by disgruntled white factions in the gen-

eral elections. If they had clear, but not substantial majorities, *registration* acts, *poll taxes, secret ballot* or *multiple-box* laws or *petty crimes* provisions could cut those majorities down, so that the previously mentioned tactics could be used. For temporarily white-controlled cities in such binds, *annexation*, or, in suitable circumstances, the strikingly inventive device of *deannexation or retrocession* of territory was available. If the majorities were too large to be overcome, *bonds* for officeholders could be set so high as to deter from running any but the extremely affluent or those with rich and brave friends, or the authorities might arbitrarily *refuse to accept the bonds* as valid, or election officials might *consolidate polling places* to such an extent as to make the trip to the polls or the line at the polls intolerably long, or they might just *fail to open the polls* altogether. In extremes, the legislatures could *impeach or otherwise displace* elected officials or *do away with local elections* altogether and vest the power to choose local officials in the legislature or governor or their appointees. Since many areas still lack detailed political histories, this list and historians' current knowledge of the incidence of all these practices are necessarily incomplete. Nonetheless, some illustrations are useful to lend concreteness to the catalogue.

Racially motivated gerrymandering was widely employed in cities as well as states, for legislatures as well as Congress. Although more than 60 percent of South Carolina's people were black in the 1880s, only one of her seven congressional districts had a secure black majority. Known at the time as the "black district," the South Carolina Seventh sliced through county lines and ducked around Charleston back alleys picking up every possible black, while avoiding as many whites as it could; was contiguous at one point only by considering the Atlantic Ocean a land mass; contained nearly a third more people than another of the state's districts; and was shaped, the *New York Times* said, like a boa constrictor, the color of its intended victim clear.[16] Similarly, partisan and racial considerations—the two correlated almost perfectly in the Deep South at the time—gave North Carolina its "Black Second" Congressional District, Alabama its "Black Fourth," and Mississippi its notorious "Shoestring District," which tracked the Mississippi River down the whole length of the state in order to concentrate as much of the Negro vote as possible in one seat.[17] In the Texas legislature, the boundaries of all the black belt multicounty "floater" districts, in the words of the standard work on race relations in that state, "were gerrymandered in order to create a white majority."[18] Similar racially tainted gerrymanders "whitened" state legislatures all across the South, as well as in the cities of Richmond, Nashville, Montgomery, Raleigh, Chattanooga, Jackson (Mississippi), and doubtless others which have not yet received intensive study.[19]

At-large city elections, clearly motivated by racial purposes, appeared in the South as early as the first elections in which blacks were allowed to vote. "To guard against the possibility of the election of black city officials," white Atlanta Democrats in 1868 "secured from the legislature the general ticket system."[20] Two years later, after a temporarily Republican Georgia legislature restored the ward system, two of the ten candidates elected were black. But when the G.O.P. lost control of the legislature in 1871, the Democrats went back to the at-large system, and no more blacks were elected to the Atlanta city government until 1953.[21] In Mobile, Alabama, the rabidly racist 1874 and 1876 Redeemer legislatures mandated explicit at-large systems for the election of school board and city government officials. In the case of the school board, this replaced a system which had been designed to guarantee "minority representation," and in the instance of the city government, it was a substitute for a vague 1870 law which a local racist faction of white Republicans had interpreted, under Democratic pressure, to require at-large elections. No black has ever been elected to either governmental body under these at-large systems, which persist in Alabama law to this day.[22] Chattanooga, Memphis, and Nashville "reformers," too, introduced and at times succeeded in getting the Tennessee legislature to pass at-large election statutes for their cities. "Their efforts stemmed from partisan and racial motives," says the leading authority on the subject, who titles his chapter on the topic: "Urban Reform: The Nemesis of Black Power."[23]

The Democratic primary was not at first principally a disfranchising device, for the vast majority of blacks wished only to cast Republican or independent votes and have them counted as cast; and, in fact, a few blacks were often allowed to vote in such primaries, in return for pledges of allegiance to the Democrats, in order to cut down the Republican totals in the general elections. But the local primary soon became the real election in many areas, and it was restricted to whites only in certain Texas counties from 1874 on, in Edgefield and Charleston counties in South Carolina from 1878 on, in Birmingham from 1888 on, and in Atlanta for various periods before 1895 and from that date until at least the *Smith v. Allwright* decision in 1944.[24]

By lengthening residency requirements, by requiring periodic voter registration at centrally located places during working hours and presentation of registration receipts at the polls (which burdened lower-class voters who were not accustomed, in those prebureaucratic days, to keeping records), by demanding copiously detailed information, which sometimes had to be vouched for by witnesses, before a voter could register, by allowing registration boards sufficient discretion to enable them to pad or unfairly to purge the rolls, by not guaranteeing equal party representation on such boards, and by permitting widespread challenges to voters at the polls, nineteenth century southern Democrats could keep the black vote under control.

Speaking for local Democrats in February 1875, for instance, the *Montgomery Daily Advertiser* pleaded that "if the Legislature does not come to the aid of the negro *[sic]* dominated communities then there is no help for this portion of Alabama." The legislature responded with a strict local registration law.[25] In Mississippi in the same year, according to a leading modern scholar, "the new registration law provided an excellent means for local Democrats to reduce Negro voters to a manageable proportion—an opportunity many seized upon immediately."[26] Texas in 1874 gave city councils the right to delete "ineligibles" from the rolls after the close of registration, a measure "undoubtedly motivated," in the words of Lawrence D. Rice, "by the mobility of certain portions of the population—principally the Negroes."[27] In Tennessee, a municipal registration act was beaten in 1885 only when the Republicans in the state senate walked out, breaking the quorum. When it passed, along with a secret ballot act (which served as a de

facto literacy test, since illiterates were not allowed assistance in voting) in 1889, registration devastated the black vote in the four major Tennessee cities, as it was intended to.[28]

The South Carolina registration and eight-box law was one of the most clever stratagems, and its provisions illustrate better than any other instance how ingenious southern authors could twist seemingly neutral devices for partisan and racist purposes. As first introduced, the bill took the "neutral principle" of voter registration and turned it into a literacy test by requiring potential registrants to sign their names. Its author, the "patrician" Edward McCrady, Jr., estimated that this would disfranchise a majority of the blacks. To those who pointed out that a literacy test would also affect many whites, McCrady proposed as an escape mechanism the first form of the grandfather clause. Massachusetts in 1857 had required literacy of all future voters, but allowed those already on the rolls to stay. McCrady simply adopted the principle of the Massachusetts provision, along with its 1857 date, which, as everyone realized, predated black suffrage. As the bill finally passed, the literacy test was shifted into a new section of the law which provided for separate ballot boxes for each of eight offices, required election officials to shift the boxes around during the voting to make it impossible for a literate friend to put an illiterate's tickets in the correct order before he entered the polling place, and prohibited anyone but the election officers (all but one or two of whom in the entire state seem to have been Democrats) from assisting unlettered voters. In place of the grandfather clause, the registration provision which finally passed allowed the registrar at the close of the registration period to add to the list any voter who had failed to register if the official, to quote the law, "upon such evidence as he may think necessary, in his discretion" judged that the voter should be on the rolls. This open invitation to fraud and discrimination was designed to let registrars enfranchise all whites. Black turnout in South Carolina in the Presidential election of 1884 dropped by an estimated 50 percent from its 1880 level.[29]

Although some scholars have doubted the effect of the poll tax on black voting, contemporaries knew better. It was "the most effective instrumentality of Negro disfranchisement," according to a member of the 1890 Mississippi Constitutional Convention's Franchise Committee, and "practically disfranchised the Negroes" in Georgia, according to a prominent North Carolina disfranchiser. And it was adopted early in some states. Georgia Republicans suspended the tax as a suffrage prerequisite in 1870, but the Democratic Redeemer legislature promptly restored it in 1871, and the 1877 Georgia Constitutional Convention not only fixed it in the fundamental law, but made it cumulative—that is, taxes for all previous years had to be paid before one could vote. Tennessee Democrats in 1870 and Virginia Democrats in 1876 followed Georgia's lead, but anti-Democratic "independent" movements, which were allied with the heavily black Republican parties in each state, made poll tax repeal one of their first orders of business during the 1870s. As is well known, by 1908, all eleven ex-Confederate states had made the poll tax a suffrage prerequisite, and the Afro-American was always its chief intended victim.[30]

Less well known were laws and constitutional provisions disfranchising people for having committed various crimes. While the effect of such provisions is unclear, since many were apparently adopted primarily as insurance if courts struck down more blatantly unconstitutional clauses or mandated fair implementation of those clauses, their intent is obvious. According to the *Richmond State* and the *Petersburg Index and Appeal*, Virginia's petty crimes provision, along with the poll tax, effected "almost . . . a political revolution" in cutting down the black vote.[31] Mississippi's infamous 1875 "pig law" defined the theft of property valued at ten dollars or more, or of any cattle or swine, whatever their value, as grand larceny, thus bringing those convicted of such minor offenses under the previous state constitutional suffrage ban.[32] During debate in the 1895 South Carolina Constitutional Convention, a delegate moved to add to the list of disfranchising crimes housebreaking, receiving stolen goods, breach of trust with a fraudulent intention, fornication, sodomy, assault with intent to ravish, miscegenation, incest, and larceny, and to strike out theft and the middle-class crime of embezzlement. The conventioneers agreed, as they did to another member's proposal to include wife beating. Murderers, however, were allowed to vote.[33] The framer of the crimes provision in the Alabama Constitutional Convention of 1901 thought that its wife-beating provision alone would disqualify 66 percent of the black males.[34] Recent attempts to have the South Carolina and Alabama petty crimes provisions declared unconstitutional have failed in federal courts.[35]

To reduce a black majority in 1877, Montgomery deannexed a predominantly black section, even though the area contained enough valuable industrial property that its retrocession noticeably reduced the city's tax base. Whites in Selma convinced the legislature to reduce that city's size, too, as a Dallas County Democratic state senator later recalled, "in order to cut the [N]egroes out of the city."[36]

To discourage black candidates, the town of Huntsville, Texas, raised the required bond for constables during the 1880s to twenty thousand dollars.[37] In Vance County, North Carolina, in 1887, a sheriff's bond was fixed at fifty-three thousand dollars and a treasurer's, at eighteen thousand dollars. Since few Republicans were wealthy enough to sign such bonds, only those acceptable to rich Democrats could serve. Even if they had affluent friends, successful candidates sometimes had their bonds arbitrarily refused by the county commissioners in North Carolina who were all appointed by the Democrats. In Warren County in 1886, the commissioners turned down a candidate because he "was a colored man." His white opponent, rejected by the voters, was given the office.[38]

Fraud, notorious and ubiquitous in the postbellum South, was supplemented by somewhat less blatant polling place irregularities, which are best illustrated by one scholar's description of the 1876 election in the Alabama "Black Belt": "On election day some polls opened and closed at the whim of election officials while other polls moved several times during the day. Some election officials refused to open the polls at all, and others announced that they were not going to remain at the polls all day to permit blacks to make 'radical majorities.' The failure to open polls in Republican strongholds in Hale, Perry, Marengo, Bullock, Barbour, Greene, Pickens, Wilcox, and Sumter counties undermined Republican strength as effectively as the earlier terror of the Ku Klux Klan, and it involved no bloodshed."[39]

If all else failed, officials could be impeached or forced from office, often on trumped-up charges, and local governments could be made appointive. Thus, North

Carolina Governor William W. Holden was impeached in 1870 for trying to put down the Klan, and Mississippi Governor Adelbert Ames, whom no one credibly charged with any illegal act, was pressured out of office during impeachment proceedings, which also led to resignations by other statewide executive and judicial officials, as well as circuit judges, in that state and in South Carolina.[40] In Tennessee in 1869 and in Virginia in 1870, conservative state legislatures summarily ousted the Nashville and Richmond city governments and replaced Republicans with Democrats. The Alabama legislature abolished the Dallas county criminal court because the elected black Republican judge refused to resign, and did away with the elective office of county commissioner in at least five black belt counties during the 1870s, substituting officers appointed by the Governor. The purpose of Alabama's action was later openly avowed by state legislator James Jefferson Robinson:

> Montgomery county came before us and asked us to give them protection of life, liberty and property by abolishing the offices that the electors in that county had elected. Dallas asked us to strike down the officials they had elected in that county, one of them a Negro that had the right to try a white man for his life, liberty and property. Mr. Chairman, that was a grave question to the Democrats who had always believed in the right of the people to select their own officers, but when we saw the life, liberty and property of the Caucasians were at stake, we struck down in Dallas county the Negro and his cohorts. We put men of the Caucasian race there to try them.[41]

In North Carolina, the state legislature first divested the voters of the right to elect county commissioners and justices of the peace, then arrogated to itself the power to name justices of the peace, then gave the justices of the peace the responsibility of choosing the commissioners. The complexion of county government in Wake and other Republican counties changed immediately and irredeemably.[42]

What policy conclusions can we draw from this review of the nineteenth century dilution phase? First, since politics is often a matter of small margins and any change in the rules potentially can make a large difference in outcomes, it follows that even minor alterations in election structures can be extremely important. Many of the nineteenth century dilutive devices had no impact or only a marginal impact on blacks' ability to vote per se, but they very often made the difference between winning and losing—that is to say, between having some political influence and little or none. Second, many of the schemes were ingenious and their exact form could not have readily been predicted in advance. Any attempt to prohibit discriminatory voting devices must have built into it sufficient administrative flexibility to be able to deal with schemes which cannot all be precisely anticipated. Third, many of the means of abridgement depended largely on discriminatory administration of seemingly fair laws. Since such practices are particularly difficult for courts to evaluate, and since litigation tends to drag on for many years, perhaps allowing the discrimination to continue while lawyers delay and judges make up their minds, it is preferable to vest oversight power in an executive administrative agency, if one really wants to prohibit this type of discrimination. Fourth, many of the existing practices and structures which were in effect grandfathered in, at least by the current legal interpretation of Section 2 of the Voting Rights Act, were adopted as long as a century ago for purposes which historians would probably be willing

to conclude were discriminatory. Although it is difficult and extremely time consuming to uncover evidence of their exact intent which would convince an unsympathetic judge, and nearly impossible to find guns still merrily smoking after so long a time, it is possible to discover quite a lot about motives in many instances.

But variations in judges' opinions on whether a discriminatory motive on the part of the original framers of a particular law has been proved—the crucial constitutional question for the plurality in the Supreme Court's *Bolden* decision—have been extremely wide. Thus in four post-*Bolden* cases, one appeals court panel in *Lodge v. Buxton* doubted that such intent could ever be established; another panel, in *Kirksey v. Jackson,* denied that the voters' intent in a referendum could even be inquired into; Federal District Judge Frank McFadden, in *Underwood v. Hunter,* dismissed all evidence of intent and returned to the effect standard of *Palmer v. Thompson;* and Federal District Judge Virgil Pittman believed the plaintiffs' evidence in two Mobile cases, declaring in *Brown v. Board of School Commissioners* that "Given the relatively limited indicia of legislative intent available in this era, it is difficult to imagine a case of discriminatory intent more precisely or convincingly made out."[43] In directing minorities to enter the political thicket of determining the intent of ancient legislatures and recent voters in order to challenge political structures they allege to be discriminatory, Mr. Justice Stewart in *Bolden* in effect established a lottery. As *Lodge, Underwood,* and the Mobile cases show, the *Bolden* intent standard is so vague that the outcome depends almost entirely on the luck of the judicial draw.

MUNICIPAL "REFORM" AND THE LILY-WHITE STAGE

In his plurality opinion in *Mobile v. Bolden,* Mr. Justice Stewart contended that "It is noteworthy that a system of at-large city elections in place of elections of city officials by the voters of small geographic wards was universally heralded not many years ago as a praiseworthy and progressive reform of corrupt municipal government." In support of this view, Justice Stewart cited only one pertinent source, Banfield and Wilson's *City Politics,* blatantly misread the relevant sentence on the page he cited, and failed to note that Banfield and Wilson elsewhere in the book devoted a full page to the deleterious effect of at-large systems on black representation.[44] Moreover, Justice Stewart's summary is at least a generation out of date, and the view he expressed no longer commands the respect of the community of professional historians, if it ever did. In the nation as a whole, it is clear that commission government and at-large elections had as one of their prime purposes the strengthening of upper-class influence and the corresponding weakening of lower-class influence in politics. In the South, a large part of that lower-class was black. Municipal reform in the region was often part and parcel of the movement to ensure that government would remain lily-white.

The recent historiography of municipal political reform during the early part of the twentieth century has been dominated by the so-called "Weinstein-Hays Thesis." In seminal articles in 1962 and 1964, James Weinstein and Samuel P. Hays examined the social origins and consequences of the city commission and

manager movements. Thier conclusions, now widely accepted by historians, were summarized by Weinstein:

> The heart of the [commission] plan, that of electing only a few men on a citywide vote, made election of minority or labor candidates more difficult and less likely. Before the widespread adoption of commission and manager government it was common for workingmen to enter politics and serve as aldermen, or even mayor . . . But once the commission plan was in effect this became rare. Working-class aldermen were hard hit because the resources needed to conduct a citywide campaign were much greater than those needed for a ward election, and because minorities—political, racial, or national—were usually concentrated in specific wards . . . The nonpartisan ballot, a feature of most commission-manager plans and widely heralded as a great advance in democracy, also tended to operate against minority groups. . . . The end result of the movements was to place city government firmly in the hands of the business-class.[45]

Hays's description of the origins of the municipal reform movement makes clear that these consequences were foreseen and intended: "The movement for reform in municipal government, therefore, constituted an attempt by upper-class, advanced professional, and large-business groups to take formal political power from the previously dominant lower- and middle-class elements so that they might advance their own conceptions of desirable public policy."[46]

Historical works written since the Weinstein and Hays articles have broadened and deepened their research, but have left their conclusions essentially unchanged. In Galveston, fount of the twentieth century commission idea, businessmen led the drive for both at-large elections (which preceded commission government in that city) and the abolition of the mayor-council structure. But the movement was damaging to blacks, as Bradley Rice noted in his recent book: "As some black leaders had anticipated, the at-large feature of the 1895 charter effectively terminated Negro office-holding in Galveston despite the fact the race comprised twenty-two percent of the city's population in 1900. The black incumbent whom the People's Ticket endorsed carried his district but fell victim to city-wide prejudice in the total vote."[47] All across the nation, Rice finds, minority and lower-status groups opposed at-large elections during this era: "The lower classes correctly perceived that the at-large election of a small board would make it difficult for people of limited means to be elected. They expected that governmental schemes devised and promoted by business interests would be run for the benefit of those same interests."[48] Appealing for black votes against the commission in Des Moines, Iowa, in 1908, for instance, an orator told the Trades and Labor Assembly that "This is the Galveston system pure and simple to keep the so-called white trash and colored vote of the south from exerting itself in participation of *[sic]* the affairs of the city."[49]

But why, after the passage of constitutional disfranchisement measures had devastated the black vote in the South, was further "reform" necessary? Whatever the impetus of "reform" electoral structures elsewhere in the nation or before "hard" suffrage restriction laws went into effect in the South, weren't most of the post-1900 changes passed in "race-proof" situations? To understand why the implications of this question are misleading requires a deeper look at both disfranchisement and at the lily-white "progressive" impulse.

Never after the passage of the Fifteenth Amendment were all southern blacks disfranchised. In every state, and particularly in southern cities, where the literate, and, relative to sharecroppers, comparatively wealthy black middle class congregated, thousands of Afro-Americans remained on the voting rolls.[50] In close elections, especially in the often desultory municipal election contests, geographically concentrated minority votes might hold the balance of power. In Mobile in 1908, for instance, nearly 200 blacks were registered, in an era when the normal turnout was about 3,000 in municipal campaigns. When the legislature temporarily shifted to a scheme in which the members of one part of the bicameral city governing body would be selected on a ward basis, there was a real fear that blacks might influence the selection of a member from one or two wards. The answer to this threat was first, to ban blacks altogether from the local Democratic primary—some had previously been allowed to vote, and others then apparently desired to—and second, to return to totally at-large elections, which the legislature ordered in 1911.

In fact, throughout the South, whites in the "Progressive Era" feared that their "solution" to the "Negro problem" might unravel. To counter the possibility that blacks might be able to take advantage of splits within the white community, the Democrats sought to impede the growth of any potential opposition party by legalizing the direct primary and banning defeated primary candidates from running in the general election. All whites, they hoped, would come to consider the primary the real election, and organized party opposition would fade. As we know, the scheme succeeded. Increasingly completely excluded from what became known at that time as the "white primary," blacks could thereafter no longer cherish even the slightest hope that they could ally with a disgruntled white faction or party and thereby regain some political influence.[51]

Two famous incidents underscore the extent to which southerners in the early part of this century insisted upon absolutely lily-white government. They help us understand the pervasiveness and depth of racial motives, the lengths to which white southerners of the time were willing to go to eliminate even the least vestige of black political power, and therefore the improbability that any political change which affected blacks could have been devoid of a racial purpose.

The first incident involved Mrs. Minnie Cox, who had been postmistress at Indianola, Mississippi, during the Harrison and McKinley administrations and had been continued in her job when McKinley's assassination brought Theodore Roosevelt to the presidency. Wealthy and college educated, Mrs. Cox was widely respected in the white community in Sunflower County, and there was never any question of her competence or probity. In 1902, however, a complicated series of maneuvers by opportunistic local, state, and national politicians led to such loud demands for her replacement that the unoffending third-class postmistress in the tiny Mississippi town became the subject of numerous editorials in national newspapers, cabinet meetings, a U.S. Senate debate, and a formal congressional investigation! Mrs. Cox was eventually replaced by a white man.[52]

In the second black cause célèbre of the Theodore Roosevelt administration, the U.S. Senate, responding to southern white protests, held up for two years, solely on racial grounds, the appointment of an affluent, college-educated black doctor, William D. Crum, for the collectorship of the Port of Charleston. The pro-

longed struggle and agitation over the issue of appointing an Afro-American to this comparatively unimportant post was enough to win Roosevelt the virtually unanimous support of Negroes throughout the country at the same time that it helped scotch any hopes the president, previously immensely popular in the South, had for reviving the Republican party in the region.[53]

Along with the Cox affair, the Crum controversy reinforces the findings of other studies which document the pervasiveness of racism and the centrality of racial concerns in the so-called Progressive Era, and establishes a prima facie case of discriminatory intent against laws which affected blacks and which date from that period.[54] Would people who had been about the job of manipulating electoral structures to reduce black influence for over a generation, people who would openly and repeatedly defy a charismatic president in an attempt to keep political offices pure white, be likely to have been unconscious that one of the most widely noted effects of a particular change in the political rules, such as a shift from ward to at-large elections, would be to make it virtually impossible for the foreseeable future to elect a black to office?

THE SUPREME COURT THEN AND NOW

Sanguine nineteenth century supporters of black rights sometimes contented themselves after Reconstruction with the idea that the constitutional protections of those rights would be enforced by the courts, even if Congress and the states reneged. That those hopes proved ill-founded by the turn of the century is well known. And the parallels between past and current judicial language and decisions are close enough to give pause to any who would counsel relaxation of administrative protections of voting rights by offering the hope that the courts will still be around to protect constitutional rights.

The Supreme Court's retreat in such major cases as *Slaughter House*, *The Civil Rights Cases*, and *Plessy v. Ferguson* is common textbook knowledge. Rather less widely known, often mistakenly interpreted, and more closely analogous to more recent decisions is the Court's series of turn of the century opinions on black voting rights and the intent to discriminate.

In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), an attorney for Chinese laundrymen in San Francisco had presented an extensive factual brief detailing both the open avowal of an intent to disadvantage Chinese laundrymen during the San Francisco Board of Supervisors' debate over adoption of the facially neutral ordinance at issue, and the discriminatory effect on the Chinese of the ordinance as administered. In a rather expansive opinion, parts of which it later in effect declared dicta, the Supreme Court found an equal protection violation. Reading *Yick Wo* too broadly, Cornelius J. Jones, a clever but inexperienced black lawyer from Greenville, Mississippi, challenged a client's murder conviction on the grounds that the jury panel had been drawn from the voting rolls, from which blacks had been effectively excluded by the 1890 Mississippi constitution. Quoting extensively from newspaper reports of the debates at the Mississippi disfranchising convention, but offering no direct evidence of the notorious fact that the intent of the delegates had been carried out, Jones asked the Court to declare the Mississippi voting rules unconstitutional and to let his client go free.[55] The Court easily sidestepped Jones, declaring that proof of intent was insufficient, that one had to prove effect as well.[56]

In the next case after the *Williams* debacle, a more savvy black lawyer, Wilford H. Smith of New York, was secretly hired by Booker T. Washington to plug the loopholes in Jones' case. Challenging the 1901 Alabama Constitution's suffrage provisions directly, Smith's brief charged that the state constitution's "fighting grandfather" clause was a blatant attempt to subvert the Fifteenth Amendment, that the debates provided plentiful evidence that the whole scheme was designed to disfranchise blacks both through provisions which the delegates knew would have a disproportionate impact upon them and through preplanned discrimination in the administration of provisions which appeared neutral on their face, and finally, that the plot had been carried out, since Mr. Giles and other literate Negroes had been denied the right to register.[57] Since it could no longer use the impact/intent ploy, the Court turned to another classic dodge in the equal protection game, the question of relief. Smith had contended that the suffrage provisions of the Alabama constitution were so tainted with racist intent that the Court should declare the whole package unconstitutional, but also that it should order the Montgomery registrar to add Mr. Giles to the rolls. But, responded Mr. Justice Holmes, suppose the Court attacked administrative discrimination by ordering Giles and other literate blacks registered, but left the suffrage provisions otherwise intact. Wouldn't the discrimination complained of still persist for most Negroes? Conversely, suppose the Court threw out the provisions altogether. Then if it ordered Giles registered, the Court would become a party to a purportedly unlawful scheme. Any way, Holmes concluded, grasping either horn of the dilemma would involve the courts too deeply in "political questions," which were best left to Congress and the state legislatures. It was a constitutional violation which the judiciary could not relieve.

Interestingly enough, Congress was considering the same question simultaneously. At the same time that he brought the *Williams* case to court, Cornelius J. Jones had challenged the seating of three congressmen from Mississippi before the quasi-judicial House Elections Committee on the grounds that blacks had been unconstitutionally excluded from the electorate and that therefore the elections were illegal per se. While he had not presented a full-fledged case, other lawyers who followed Jones's lead later did, and the committee had put off ruling on the issue until the *Dantzler* challenge from South Carolina in 1903. In that case, decided within six months of *Giles*, the house committee invoked what might be called, in analogy to the "political questions" doctrine, a "judicial questions" doctrine, ruling that such charges of discrimination were best left to the courts. The Alphonse Gaston routine of Congress and the Supreme Court in *Dantzler* and *Giles* left blacks with no rights that the white men of the national government were bound to protect.[58]

In another turn of the century case, the Supreme Court used an extremely stringent intent criterion to slam the door on efforts to mandate as much equality as was possible in a segregated system. (I use "equality" here, of course, only in

the very restricted sense of schools in which the expenditures per child, the physical facilities, and the teacher qualifications are roughly the same for children of every race.) If Mr. Justice Harlan's opinion in *Cumming v. Richmond County School Board*,[59] had been precisely followed, it would have made it practically impossible to prove a constitutional violation against a prudent discriminator. In 1897, the Augusta, Georgia, school board, claiming financial stringency and a desire to use available moneys for black elementary education, had cut off funds for a black high school, while continuing to subsidize two high schools for whites. Pointing out that the school board had just received a very large increase in appropriations from the state government and that, if more money was needed for black elementary schools, it could come from the state supplement or from funds previously devoted to white as well as black schools, black parents charged that the school board's action was unconstitutional. But since school board members had not openly said that they acted because they wished to disadvantage black children, Justice Harlan treated their economic distress excuse as a "rational basis" and disregarded the view, strenuously pressed by one of the great constitutional lawyers of the day, former U.S. Senator George F. Edmunds, that the discriminatory impact of the law should be considered dispositive as to its real intent.[60]

The trend in recent cases on voting rights discrimination poses disturbing parallels to the Supreme Court's post-Reconstruction restriction of constitutional protection of minority rights. Although it denied the requested relief in the first multimember districting case, *Fortson v. Dorsey*,[61] the Court did proclaim a generous and perhaps even workable standard for proving a violation. Those who claimed that a multimember scheme disadvantaged "racial or political elements" of the population could prevail if they could show that the scheme "designedly *or otherwise*" discriminated against them.[62] In *Whitcomb v. Chavis*,[63] the Court denied that the lawyers for the Indianapolis blacks had proved either discriminatory intent or effect, but did not foreclose an attack on either ground. A general history of "bias and franchise dilution in the State's drawing of lines" was sufficient evidence of intent to convince the Supreme Court in *Taylor v. McKeithen*[64] to overturn a southern redistricting scheme. *White v. Regester*[65] held a Texas multimember scheme invalid on the basis of a "totality of the circumstances" approach which blended both "design and impact." And in *Connor v. Johnson*,[66] the Court directed a federal district court to devise a reapportionment scheme which did not include multimember districts, presumably because it recognized the unfairness of such districts to minorities.

In related areas of equal protection law, the Court zigzagged. *Palmer v. Thompson*[67] held that the decision of Jackson, Mississippi, to close its swimming pools could not be reversed on the grounds of discriminatory motive alone, which was established in the record. Impact became the key element.[68] Yet in a series of cases beginning with *Washington v. Davis*,[69] the Court applied an ever stricter "motive test." Although he held that an equal protection violation "must ultimately be traced to a racially discriminatory purpose" in *Washington*, Mr. Justice White did rule that a disproportionate effect on minorities was "not irrelevant" to an inquiry into purpose and that intent was to be assessed by looking at the "totality of the relevant facts."[70] In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[71] the court appears to have dismissed the discriminatory impact of the Chicago suburb's zoning ordinance on racial minorities as irrelevant to a determination of motive, and it readily accepted the Village's explanation that its actions were not motivated by issues of race. And in *Personnel Administrator of Massachusetts v. Feeney*, impact became even less relevant to motive, since the court held that the challenged action had to be shown to have been taken "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[72]

These two streams flow together in *Mobile v. Bolden*, a confusing hodgepodge of opinions headed by Mr. Justice Stewart's for a four-person plurality. Pushing *Feeney* further, Justice Stewart found impact largely irrelevant, dismissed the view that the failure of the state of Alabama to take positive steps to remedy the historical pattern of past discrimination by itself constituted a violation of the Constitution, and, according to one reading of the opinion, limited "the constitutional inquiry to a search for a smoking gun."[73] Like *Cumming* before it, *Bolden* was both a seal of approval on an unjust status quo and an invitation to engage in soft-pedaled discrimination, an announcement that a credulous court is ready to defer to any state and local authorities who can offer plausible reasons besides race for their actions. (It is interesting to note that Mr. Justice Blackmun concurred in Bolden upon the same grounds that Justice Holmes toyed with in *Giles*—relief.) If Congress were to take away the preclearance section of the Voting Rights Act or relax its heretofore fairly stringent controls, *Bolden* would open the door to widespread electoral changes, aimed at reducing minority political power, but adopted either so quietly or accompanied by such heated denials of any discriminatory purpose as to make the true motives difficult if not impossible to prove in court.

NOTES

1. 17 March 1965, quoted in Steven F. Lawson, *Black Ballots: Voting Rights in the South, 1944–1969* (New York: Columbia University Press, 1965), 314.
2. A convenient source on these matters is Bernard Schwartz, ed., *Statutory History of the United States: Civil Rights*, 2 vols. (New York: Chelsea House Publishers, 1970), I, 184, 371–74, 385–87, 392–95, 408–20.
3. Ibid., 445–53, 548–58, 593–96 give provisions of the first three laws. On the Lodge Bill, see J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880–1910* (New Haven, Conn.: Yale University Press, 1974), 29–31, and the sources cited there.
4. See Michael Perman, *Reunion Without Compromise: The South and Reconstruction, 1865–1868* (Cambridge, Eng.: Cambridge University Press, 1973).
5. William C. Harris, *The Day of the Carpetbagger: Republican Reconstruction in Mississippi* (Baton Rouge & London: Louisiana State University Press, 1979), 654–55.
6. Joe Gray Taylor, *Louisiana Reconstructed, 1863–1877* (Baton Rouge: Louisiana State University Press, 1974), 483–84.
7. Jack P. Maddex, Jr., *The Virginia Conservatives, 1867–1879* (Chapel Hill, N.C.: University of North Carolina Press, 1970), 108, 195.
8. All quoted in George B. Tindall, *South Carolina Negroes, 1877–1900* (Columbia, S.C.: University of South Carolina Press, 1952), 12.

9. Quoted in William Gillette, *Retreat From Reconstruction, 1869–1879* (Baton Rouge & London: Louisiana State University Press, 1979), 313.
10. Quoted in William J. Hair, *Bourbonism & Agrarian Protest: Louisiana Politics, 1877–1900* (Baton Rouge: Louisiana State University Press, 1969), 22.
11. *Senate Reports*, No. 855, 45th Cong., 3d Sess.; *Senate Reports*, No. 704, 44th Cong., 2d Sess.
12. Rayford W. Logan, *The Betrayal of the Negro: From Rutherford B. Hayes to Woodrow Wilson* (New York: Collier Books, 1965), 45.
13. See, in general, Kousser, *Shaping of Southern Politics*.
14. It should be noted that the various disfranchisement measures were generally described as "reforms" during this period and that suffrage restriction was a central part of southern "Progressivism." See e.g., ibid., 257–61.
15. *Mobile v. Bolden*, 100 S. Ct. 1490 (1980). But see Federal District Court Judge Virgil Pittman's reversal of this outcome in his decision in *Bolden v. Mobile*, on remand from the Supreme Court, 15 April 1982. See also *Rogers v. Lodge*, 458 U.S. 613 (1982) for the court's clarification of the *Bolden* intent standard.
16. *New York Times*, 13 July 1882, p. 5.
17. Eric Anderson, *Race and Politics in North Carolina, 1872–1901: The Black Second* (Baton Rouge & London: Louisiana State University Press, 1981); Sarah Woolfolk Wiggins, "Alabama: Democratic Bulldozing & Republican Folly," in Otto H. Olsen, ed., *Reconstruction and Redemption in the South* (Baton Rouge & London: Louisiana State University Press, 1980), 68–69; *New York Times*, 27 July 1882, p. 5.
18. Lawrence D. Rice, *The Negro in Texas, 1874–1900* (Baton Rouge: Louisiana State University Press, 1971), 101, 132.
19. Howard N. Rabinowitz, *Race Relations in the Urban South, 1865–1890* (New York: Oxford University Press, 1978), 270–73, 323; Joseph H. Cartwright, *The Triumph of Jim Crow: Tennessee Race Relations in the 1880s* (Knoxville: University of Tennessee Press, 1976), 158.
20. Eugene J. Watts, "Black Political Progress in Atlanta, 1868–1895," *Journal of Negro History*, 59 (1974): 273.
21. Watts, "Black Political Progress," 273; Rabinowitz, *Race Relations in the Urban South*, 269.
22. See the federal court decisions in *Bolden v. City of Mobile* 542 F.Supp. 1050 (S.D. Ala. 1982), and *Brown v. Board of School Commissioners of Mobile County*, 542 F.Supp. 1078 (S.D. Ala. 1982).
23. Cartwright, *Triumph of Jim Crow*, 119–160, quote at 159.
24. Rice, *Negro in Texas*, 113–27; Tindall, *South Carolina Negroes*, 26, 33; Carl V. Harris, *Political Power in Birmingham, 1871–1921* (Knoxville: University of Tennessee Press, 1977), 58; Eugene J. Watts, *The Social Bases of City Politics: Atlanta, 1865–1903* (Westport, Conn.: Greenwood Press, 1978), 24, 30, 31.
25. *Advertiser*, 6 February 1875, quoted in Rabinowitz, *Race Relations in the Urban South*, 274.
26. Harris, *Day of the Carpetbagger*, 701.
27. Rice, *Negro in Texas*, 130.
28. Cartwright, *Triumph of Jim Crow*, 134–35, 223–254; J. Morgan Kousser, "Post-Reconstruction Suffrage Restrictions in Tennessee: A New Look at the V. O. Key Thesis," *Political Science Quarterly*, 88 (1973), 655–83.
29. Kousser, *Shaping of Southern Politics*, 84–92.
30. Ibid., 63–72 and passim.
31. Quoted in Maddex, Jr., *Virginia Conservatives*, 198. Similarly, see Paul Lewinson, *Race, Class, and Party: A History of Negro Suffrage and White Politics in the South* (New York: Russell and Russell, Inc. 1963), 66.
32. C. Vann Woodward, *Origins of the New South, 1877–1913* (Baton Rouge, La.: Louisiana State University Press, 1951), 212–13.
33. South Carolina Constitutional Convention of 1895, *Journal of the Proceedings* (Columbia, South Carolina: Charles A. Calvo, Jr., 1895), 298, 487; Tindall, *South Carolina Negroes*, 82.
34. Jimmie Frank Gross, "Alabama Politics and The Negro, 1874–1901" (Ph.D. thesis, University of Georgia, 1969), 244; Malcolm Cook McMillan, *Constitutional Development in Alabama, 1798–1901: A Study in Politics, The Negro, and Sectionalism* (Chapel Hill, North Carolina: University of North Carolina Press, 1955), 275. That this delegate, John Fielding Burns, was undoubtedly grossly exaggerating only strengthens the case for the racist motivation behind the provision.
35. *Allen v. Ellisor*, No. 79-1539, Fourth Circuit Court of Appeals (en banc) 6 January 1981; *Underwood v. Hunter*, No. 80-7084, Fifth Circuit Court of Appeals, 15 July 1980, and, on remand, 23 December 1981. *Underwood* is currently being appealed for the third time.
36. Rabinowitz, *Race Relations in the Urban South*, 323; *Montgomery Advertiser*, 9 October, 24 November 1900.
37. Rice, *Negro in Texas*, 88–89.
38. Anderson, *Race and Politics in North Carolina*, 162–65. For other examples, see Wiggins, "Democratic Bulldozing," 67; Allen J. Going, *Bourbon Democracy in Alabama, 1874–1890* (University, Alabama: University of Alabama Press, 1951), 33; Cartwright, *Triumph of Jim Crow*, 152–53.
39. Wiggins, "Democratic Bulldozing," 71–72. For examples of such tactics in South Carolina, see Tindall, *South Carolina Negroes*, 72; in Mississippi, see the contested congressional election cases of *Buchanan v. Manning* and *Chalmers v. Morgan*, in Chester H. Rowell, comp., *Digest of Contested Election Cases, 1789–1901* (Washington, D.C.: Government Printing Office, 1901), 373–75, 457–58; in Virginia, see *Stovell v. Cabell*, *Waddill v. Wise*, and *Langston v. Venable*, in Rowell, *Digest*, 393, 452–54, 457–60.
40. Anderson, *Race and Politics in North Carolina*, 3; Harris, *Day of the Carpetbagger*, 694–98; Tindall, *South Carolina Negroes*, 15–18.
41. Rabinowitz, *Race Relations in the Urban South*, 267–69; Wiggins, "Democratic Bulldozing," 68; *Montgomery Advertiser*, 23 April 1899. For a similar, earlier avowal of the racist intent of the Dallas County judgeship abolition, see *Selma Southern Argus*, 24 December 1875.
42. Rabinowitz, *Race Relations in the Urban South*, 269–70; Anderson, *Race and Politics in North Carolina*, 56–57.
43. *Lodge v. Buxton*, 639 F. 2d 1358 (1981); *Kirksey v. City of Jackson* (Former Fifth Circuit, 11 December 1981); *Underwood v. Hunter* (23 December 1981 decision); *Palmer v. Thompson*, 403 U.S. 217; *Brown v. Board* (15 April 1982 decision).
44. 100 S.Ct. 1490 at footnote 15 of Mr. Justice Stewart's opinion; Edward C. Banfield and James Q. Wilson, *City Politics* (Cambridge, Mass.: Harvard University Press and Massachusetts Institute of Technology Press, 1963), 151, 307–08. What Banfield and Wilson actually say on p. 151 is merely that "nonpartisanship, the council-manager plan, and at-large election are all expressions of the reform ideal and of the middle-class political ethos." That they are not uncritical of that ideal and that ethos is one of the signal features of their book.
45. Weinstein's "Organized Business and The Commission and Manager Movements" first appeared in *The Journal of Southern History*, 28 (1962), and was reprinted in his book, *The Corporate Ideal and The Liberal State, 1900–1918* (Boston: Beacon Press, 1968), in which the quoted passage appears on 109–10, 115.
46. Hays' "The Politics of Reform in Municipal Government in The Progressive Era" first appeared in *Pacific Northwest Quarterly*, 55 (1964), and was reprinted in his book, *American Political History as Social Analysis* (Knoxville: University of Tennessee Press, 1980), in which the quoted passage appears on 215–16.
47. Bradley Robert Rice, *Progressive Cities: The Commission Government Movement in America, 1901–1920* (Austin and London: University of Texas Press, 1977), 5.
48. Ibid., 29. For a similar treatment, see Martin J. Schiesl, *The Politics of Efficiency:*

Municipal Administration and Reform in America, 1800–1920 (Berkeley, Los Angeles, and London: University of California Press, 1977), 133–48.
49. Quoted in Rice, *Progressive Cities*, 47.
50. For figures on postdisfranchisement black registration, see Kousser, *Shaping of Southern Politics*, 61.
51. See ibid., 72–82.
52. Willard B. Gatewood, Jr., *Theodore Roosevelt and the Art of Controversy* (Baton Rouge: Louisiana State University Press, 1970), 62–89.
53. Ibid., 90–134.
54. On this point, virtually all modern scholarship follows the Woodward thesis expressed in a chapter title in his *Origins of The New South*: "Progressivism—For Whites Only." Similarly, see his testimony before the House Judiciary Committee in its 1981 hearings, p. 2024.
55. National Archives file on *Williams v. Mississippi*, 170 U.S. 213 (1898).
56. As Justice McKenna noted for a unanimous court, the laws "do not on their face discriminate between the races, and it has not been shown that their actual administration was evil; only that evil was possible under them." Ibid.
57. *Giles v. Harris*, 189 U.S. 475 (1903).
58. See the House Elections Committee cases of *Brown v. Allen*, *Newman v. Spencer*, *Ratliff v. Williams*, *Carter Glass*, *Dantzler v. Lever*, *Prioleau v. Legare*, and *Myers v. Patterson* in Rowell, *Digest of Contested Election Cases*, 540–41, and Merrill Moores, *A Historical and Legal Digest of All the Contested Election Cases in the House of Representatives . . . 1901–1917* (Washington, D.C.: Government Printing Office, 1917), 3, 16, 25–28. See also H.R. 2915, 57th Cong., 2 Sess.; and H.R. 1638, 1639, and 1640, 60th Cong.
59. 175 U.S. 528 (1899).
60. See J. Morgan Kousser, "Separate But *Not* Equal: The Supreme Court's First Decision on Racial Discrimination in Schools," *Journal of Southern History*, 46 (1980), 17–44.
61. 379 U.S. 433 (1965).
62. Italics supplied. See the discussion in Lawrence H. Tribe, *American Constitutional Law* (Mineola, N.Y.: The Foundation Press, Inc., 1978), 750–55.
63. 403 U.S. 124 (1971).
64. 407 U.S. 191 (1972).
65. 412 U.S. 755 (1973).
66. 402 U.S. 690 (1971).
67. 403 U.S. 217 (1971).
68. Tribe, *American Constitutional Law*, 1025–28.
69. 426. U.S. 229 (1976)
70. Tribe, *American Constitutional Law*, 1028–32; Aviam Soifer, "Complacency and Constitutional Law," *Ohio State Law Journal*, 42 (1981): 388.
71. 97 S Ct. 555 (1977).
72. 442 U.S. 256, 279 (1979).
73. Soifer, "Complacency and Constitutional Law," 404.

3

History in the Courts
The Significance of The City of Mobile v. Bolden

Peyton McCrary

The wine-red carpet, rich mahogany furnishings, Sienna marble columns, and dark velour hangings of its courtroom provide the United States Supreme Court a regal setting for its pronouncements on constitutional issues. Against this backdrop it has granted many a victory to the cause of racial justice since outlawing the white primary in *Smith v. Allwright* in 1944. When Justice Potter Stewart read the Court's decision in *City of Mobile v. Bolden* on 22 April 1980, however, many observers concluded that the cause of black voting rights had suffered a major defeat. The central thrust of the opinion was to erect a new, more difficult standard of proof in cases such as this where black plaintiffs challenged the constitutionality of at-large election laws. During the 1970s the lower federal courts in the South had frequently ruled in favor of such claims, if plaintiffs demonstrated that citywide or countywide elections "diluted" the vote of a racial minority and thus minimized the chances for black candidates to win public office. Now the Court ruled that, in addition to proving that an at-large election system had this discriminatory effect, plaintiffs must show that the system was created or maintained for a racial purpose. Thus, it remanded the case (and a companion suit challenging at-large school board elections in Mobile County) to the lower courts for a new trial to consider evidence of discriminatory intent.[1]

Bolden did not, in truth, rank among the Court's great opinions. Justice Stewart spoke only for a plurality of four, with two other justices concurring in the decision to remand but disagreeing about the issue of intent. The three surviving liberals filed dissenting opinions. The result was an ambiguous, if not downright confused, new standard that left civil rights lawyers scratching their heads in dismay. Over the next year at numerous conferences, both formal and informal, they debated what the justices were trying to say and how to prove discriminatory intent.[2]

Most immediately affected were James U. Blacksher and Larry T. Menefee, principal attorneys for the black plaintiffs in Mobile. Edward Still was an associate counsel who practiced in Birmingham. Meeting the new standard, they decided, would require a dramatic departure from earlier cases. Under the old "effect" standard associated with *Zimmer v. McKeithen*, they had used political scientists, sociologists, and economists to present primarily statistical evidence