

# VOTING RIGHTS IN ALABAMA 1982-2006

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PREPARED BY JAMES BLACKSHER, EDWARD STILL, NICK  
QUINTON, CULLEN BROWN AND ROYAL DUMAS

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**JAMES BLACKSHER<sup>1</sup>, EDWARD STILL<sup>2</sup>, NICK QUINTON<sup>3</sup>, CULLEN BROWN<sup>4</sup>, ROYAL DUMAS<sup>5</sup>**

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<sup>1</sup> Civil Rights Litigator

<sup>2</sup> Civil Rights Litigator

<sup>3</sup> University of Alabama student

<sup>4</sup> University of Alabama student

<sup>5</sup> University of Alabama student

## INTRODUCTION TO THE VOTING RIGHTS ACT

For decades, Alabama has been at the center of the battle for voting rights equality. Several of the pre-1965 voting cases brought by the Department of Justice and private parties were in Alabama. The events of Bloody Sunday in Selma, Alabama, in 1965 served as a catalyst for the introduction and passage of the Voting Rights Act of 1965. Between passage of the Act in 1965 and the last major reauthorization of the Act in 1982, the temporary provisions of the Act that apply to Alabama, the Section 5 preclearance provisions and the federal observer provisions, were employed repeatedly to prevent voting discrimination.

Since the 1982 reauthorization, significant voting discrimination in Alabama has continued. Not only has the Department of Justice objected to forty-six submissions under Section 5 and sent observers to Alabama ninety-one times, but the federal courts have found several times that the state of Alabama and/or its political subdivisions have engaged in intentional discrimination. Though there has been significant progress in electoral access and equality for Alabama's African American citizens, it has largely been as the result of extensive voting rights enforcement. Indeed, voting remains largely racially polarized, and black candidates rarely get elected in majority-white districts. The recent unsuccessful efforts in 2003 and 2004 to remove discriminatory aspects of Alabama's 1901 Constitution through voter referenda are indicative of the racial cleavage that exists in Alabama to this day. Under the circumstances, the preclearance and observer provisions continue to be needed.

### **I. The Temporary Provisions of the Voting Rights Act that Apply to Alabama**

Alabama is one of nine states that is covered under the formula found at Section 4(a) of the Act that subjects the state and each of its political subdivisions to the preclearance provision of Section 5 of the Act and the observer and examiner provisions of Sections 6-9 and 13.<sup>6</sup> Since the 1965 inception of the Act, Alabama has been subject to these temporary provisions, which expire in August 2007 if not reauthorized by Congress.

For statewide covered jurisdictions like Alabama, Section 5 requires federal preclearance of any voting change made by any political jurisdiction. Any proposed changes in voting or electoral procedures must be submitted either to the Attorney General or to a three-member panel of the U.S. District Court for the District of Columbia for preclearance before the changes can be implemented.<sup>7</sup> The submitting authority must demonstrate that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" or membership in a language minority group.<sup>8</sup> Unless and until preclearance is

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<sup>6</sup> 42 U.S.C. § 1973 *et seq.*, as amended.

<sup>7</sup> 42 U.S.C. § 1973c.

<sup>8</sup> *Id.*

obtained, the change cannot be implemented.

The observer provisions enable the Attorney General to send observers to monitor polling place and vote counting activities in any Alabama jurisdiction that has been certified for coverage.<sup>9</sup> The Attorney General can certify a jurisdiction for coverage under one of two circumstances: (1) the Attorney General has received twenty or more complaints from residents of a jurisdiction “that they have been denied the right to vote on account of race or color” or membership in a language minority group and the Attorney General believes the complaints to be meritorious; or (2) the Attorney General determines that certification is necessary to enforce the guarantees of the fourteenth or fifteenth amendment.<sup>10</sup>

## II. Alabama Demographics

According to the 2000 Census, Alabama has a total population of 4,447,100, of whom 3,125,819 (70.3 percent) are white and 1,150,076 (25.9 percent) are black. The state has a voting age population of 3,323,678, of whom 2,414,670 are white (72.7 percent) and 792,634 (23.8 percent) are black. The remainder of the population is divided amongst Latinos (1.7 percent of total population), American Indians (0.5 percent), and Asians (0.7 percent). Those of other races or multiple races comprise the remaining 1 percent.<sup>11</sup> Over 98 percent of the voting age population is citizens.<sup>12</sup> Alabama ranks sixth amongst states in its percentage of black population.

Though the African-American population is relatively dispersed throughout the state, a large portion of the population is located in the so-called Alabama “Black Belt,” which runs from east to west in the center of the state and, according to the University of Alabama, contains the following counties: Barbour, Bullock, Choctaw, Clarke, Conecuh, Dallas, Escambia, Greene, Hale, Lowndes, Macon, Marengo, Monroe, Perry, Pickens, Sumter, Washington, and Wilcox.<sup>13</sup> The Black Belt, which extends throughout the South from Texas to Virginia, was originally used to refer to the richness of the soil, but over time the term has also been used to refer to counties

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<sup>9</sup> 42 U.S.C. § 1973f.

<sup>10</sup> 42 U.S.C. § 1973d.

<sup>11</sup> United States Census Bureau, “*Table QT-PL. Race, Hispanic or Latino, and Age: 2000 – Alabama*,” available at <[http://factfinder.census.gov/servlet/QTTable?\\_bm=y&-qr\\_name=DEC\\_2000\\_PL\\_U\\_QTPL&-geo\\_id=04000US01&-ds\\_name=DEC\\_2000\\_PL\\_U&-\\_lang=en&-format=&-CONTEXT=qt](http://factfinder.census.gov/servlet/QTTable?_bm=y&-qr_name=DEC_2000_PL_U_QTPL&-geo_id=04000US01&-ds_name=DEC_2000_PL_U&-_lang=en&-format=&-CONTEXT=qt)> (last viewed June 27, 2006).

<sup>12</sup> United States Census Bureau, “*Total – Voting-Age Population and Citizen Voting-Age Population by Sex, for the United States and States: 2000*,” available at <<http://www.census.gov/population/cen2000/phc-t31/tab01-01.pdf>> (last viewed June 27, 2006). In this paragraph, the numbers and percentages for whites, blacks, American Indians, and Asians includes only those who are not also Hispanic.

<sup>13</sup> University of Alabama, Institute for Rural Health Research, “*Blackbelt Fact Book*,” available at <<http://irhr.ua.edu/blackbelt/intro.html>> (last viewed June 27, 2006).

with a large black population.<sup>14</sup> The Black Belt counties have had some of the worst records of discrimination in voting and many are discussed below.

### III. A Brief History of Pre-1982 Voting Discrimination in Alabama

Alabama has historically been in the forefront of discriminating against minority voters.<sup>15</sup> In 1901, as part of a Constitutional Convention, Alabama adopted several devices designed to disfranchise black voters, including a poll tax and literacy test. These devices resulted in the virtual elimination of the black electorate in Alabama – the number of black registered voters decreased from more than 180,000 voters in 1900 to less than 3,000 in 1903.<sup>16</sup>

Beginning in the 1940s, when the courts started taking the first steps to recognize the voting rights of black voters, the Alabama legislature took several counter-steps designed to disfranchise black voters. The legislature passed, and the voters ratified, a state constitutional amendment that gave local registrars greater latitude to disqualify voter registration applicants. Black citizens in Mobile successfully challenged this amendment as a violation of the Fifteenth Amendment.<sup>17</sup> The legislature also changed the boundaries of Tuskegee to a 28-sided figure designed to fence out blacks from the city limits. The Supreme Court unanimously held that this racial “gerrymandering” violated the Constitution.<sup>18</sup> In 1961, as discussed more fully below, the Alabama legislature also intentionally diluted the effect of the black vote by instituting numbered place requirements for local elections.<sup>19</sup>

When the Department of Justice was first given authority to bring voting rights cases on behalf of black citizens in 1957, Alabama jurisdictions were a primary area of focus. In Dallas County, Alabama, the Department of Justice instituted litigation in April 1961. At the time, only 1 percent of blacks in Dallas County were registered. The Department of Justice would successfully eliminate one disfranchising device in court, after which Dallas County would implement one or more new disfranchising devices. As a result, by 1965, less than 5 percent of blacks in Dallas County were registered. The experience in Dallas County was used as a prime example by Congress in 1965 for the necessity of Section 5, a provision designed to prevent jurisdictions from devising new ways to discriminate against minority voters.<sup>20</sup>

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<sup>14</sup> *Id.*; *Hale County v. United States*, 496 F. Supp. 1206, 1207 & n.3 (D.D.C. 1980) (three-judge court).

<sup>15</sup> The history recounted in this section is indebted to the discussion in Peyton McCrary, Jerome A. Gray, Edward Still, and Huey L. Perry, “Alabama,” in *QUIET REVOLUTION IN THE SOUTH*, 38-52 (Chandler Davidson and Bernard Grofman eds. 1994).

<sup>16</sup> *Id.* at 44.

<sup>17</sup> *Davis v. Schnell*, 81 F. Supp. 872 (S.D. Ala. 1949) (three judge court), *aff’d*, 336 U.S. 933 (1949).

<sup>18</sup> *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960).

<sup>19</sup> McCrary et al., at 46-47.

<sup>20</sup> H. Rep No. 89-439, at 10-11.

Of course, Dallas County came to have an even more significant meaning pertaining to the Act. The nationally televised images of the violent assault on unarmed marchers crossing the Edmund Pettus Bridge in Selma – the county seat of Dallas County – on March 7, 1965, provided the impetus for President Lyndon Johnson to announce eight days later that he would be sending a voting rights bill to Congress. Less than five months later, the Voting Rights Act was signed into law.

Between the 1965 enactment of the Voting Rights Act and the 1982 reauthorization, the temporary provisions had a substantial impact. The Department of Justice objected 59 times to Section 5 submissions by the state of Alabama or one of its political subdivisions.<sup>21</sup> In addition, the Department of Justice sent observers to Alabama jurisdictions 107 times during the same period of time.

Moreover, just as Alabama litigation played a substantial role in the 1965 enactment, it played a similar role in the 1982 reauthorization. The amendment of Section 2 of the Voting Rights Act – a major permanent provision of the Act – in 1982<sup>22</sup> was Congress' response to the Supreme Court's decision in *City of Mobile v. Bolden*<sup>23</sup>, which imposed a discriminatory intent requirement on constitutional vote dilution claims. Mobile had changed from a mayor-alderman form of government to a city commission form of government in 1911, in which commissioners were elected at large, and each ran separate executive departments of the government. This was a period of intense political struggle between white propertied and working classes in Alabama. A coalition of urban industrialists and Black Belt planters had used race to get enough of the white yeoman and working classes to vote against their own interests and approve the disfranchising 1901 Alabama Constitution. In Mobile, the district court found, "the desire to place the business and professional classes in control of Mobile's government and to exclude the lower classes from participation was an important factor in adopting the commission government in 1911. . . ."<sup>24</sup> Mobile's white middle and working classes, whose numbers mushroomed in the port city's defense industries during and after World War II, had been trying for years to wrest political power from the old-family elites, who were able to use the at-large city commission form of government to install officials beholden to them. Alabama's white yeomanry had historically favored single-member districts to elect candidates of their choice, but their ancestral dedication to the subordination of African Americans had caused them to relent to the widespread use of at-large election schemes promoted by the monied classes.<sup>25</sup> This heritage of white supremacy effectively blocked electoral reform in Mobile, which became one of the last cities in the United States to retain the city commission form of government. Indeed, in 1981,

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<sup>21</sup> The National Commission on the Voting Rights Act, *Protecting Minority Voters: The Voting Rights Act at Work, 1982-2005*, Map 5A (2006).

<sup>22</sup> Pub.L. 97-205, § 3, 96 Stat. 134 (June 29, 1982) .

<sup>23</sup> 446 U.S. 55 (1980).

<sup>24</sup> 542 F. Supp. 1950, 1075 (S.D. Ala. 1982).

<sup>25</sup> "In 1876 the Democratic legislature eliminated elections altogether for county commissions in eight black-majority counties, authorizing the governor to appoint county commissioners." McCrary et al., at 42-43.

while the *Bolden* case was still pending on remand, Mobile's white electorate defeated a referendum proposal to change the commission form of government.<sup>26</sup>

The district court's April 1982 decision on remand in *Bolden*, which found that the 1911 change was adopted with a discriminatory intent, finally provided a federally-imposed reason to reform the outmoded commission government. It pointed out that, unless a legislative remedy was forthcoming, the court would force the three Mobile city commissioners to run from single-member districts, and the practice of dividing executive department functions among the commissioners would become constitutionally suspect.<sup>27</sup> This gave Mobile's local legislative delegation in 1985 the impetus it needed to enact a mayor-council system with single-member council districts, which the voters subsequently approved.<sup>28</sup> By this time, Congress had amended Section 2 of the Voting Rights Act to create the discriminatory results standard. The message sent by this strengthening of the Act was a national determination, finally, to provide racial minorities effective access to political power.

#### **IV. Voting Discrimination in Alabama Since 1982**

As in the pre-1982 period, Alabama has continued to be a battleground in the effort to achieve voting rights equality in the last 24 years. The temporary provisions have been employed frequently: the Department of Justice has objected to 46 Section 5 submissions from Alabama, seven from the state, and 39 from local jurisdictions. A map showing where the local objections have been interposed is appended to the back of this report. Moreover, Department of Justice observers have been dispatched to monitor elections 91 times.

Beyond this quantitative data, since 1982, federal courts have found that the system of appointing pollworkers and methods of election for local jurisdictions arose from an intentionally discriminatory state policy. The remedies to these policies affected virtually every county in

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<sup>26</sup> Mobile Register, July 15, 1981, at A1, col. 5.

<sup>27</sup> *Bolden*, 542 F. Supp. at 1077-78.

<sup>28</sup> Ala. Act 85- 229, p. 96; Ala. Code § 11-44C-2 (setting "a special election to be held on May 14, 1985, said call for the purpose of determining whether such city shall adopt the court ordered district commission form of government in accordance with the consent decree entered into by the parties and approved by the court on April 7, 1983, in the case of *Bolden vs. City of Mobile*, Civil Action No. 75-297, or in the alternative the mayor-council form of government, authorized by this chapter. . . ."). The Hobson's choice produced by the federal court's remedy also gave the black caucus of the local delegation, led by the late Senator Michael Figures, the leverage to negotiate the famous super-majority provision in Mobile's charter, which requires five votes on the seven-member council to conduct any business. Ala. Code § 11-44C (supp. 2005). Because three of the seven districts have black voting majorities, the council members elected by African Americans have a potential veto power on matters vital to the interests of the black community. See e.g., Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. CR-CL L. REV. 173, 247 (1989).

Alabama. Some jurisdictions proved to be defiant in adopting a method of election that would provide minority voters an equal opportunity to elect candidates of choice. Others attempted to nullify the effect of the affirmative litigation, and in some cases were prevented from doing so by Section 5. Additionally, in 1987, the Supreme Court found that the city of Pleasant Grove – a racial enclave with no black citizens – failed to demonstrate under Section 5 that its annexation policy was nondiscriminatory. The Congressional and legislative redistrictings in the past three decades have also demonstrated the significant impact that the Voting Rights Act has had in creating and maintaining opportunities for minority voters to elect candidates of their choice.

While active enforcement of the Voting Rights Act has led to a significant expansion in equality for African-American voters, there remains a strong undercurrent of racial division that affects voting. Voting remains racially polarized, and in two recent referenda Alabama voters refused to remove segregationist and discriminatory provisions of the Alabama constitution.

A. Summary of enforcement of the temporary provisions

1. Section 5

Since 1982, Section 5 has had a significant impact on the electoral process in Alabama. As noted above, there have been objections to 46 Section 5 submissions. In addition, Section 5 prevented an additional 181 voting changes from being implemented through the more information request (“MIR”) process: after the Department of Justice issued a MIR letter regarding a change or changes that had been submitted, the submitting Alabama jurisdictions formally withdrew the change, adopted a new change which superceded the prior change, or did not respond to the letter. This was the third highest number of changes blocked by MIRs in any state.<sup>29</sup> In addition, there were 22 successful Section 5 enforcement actions. This is where the Department of Justice or private plaintiffs filed a suit alleging that a voting change had not been submitted for Section 5 preclearance. This is the second highest state total.<sup>30</sup>

The types of changes blocked include redistrictings, changes to methods of election, candidate qualifying and nominating procedures, voter registration procedures, voter purge and reidentification procedures, annexations, and the creation of a separate city school district within a county.<sup>31</sup> Many of the objections are described in the subsections below. In addition, the following are two good examples of Section 5 objections that took place in the context of other racially discriminatory actions.

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<sup>29</sup> Luis Ricardo Fraga and Maria Lizet Ocampo, *More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act*, 14 (2006)(publication forthcoming).

<sup>30</sup> *Protecting Minority Voters*, at Table 4.

<sup>31</sup> See Department of Justice, Voting Section, *Section 5 Objection Determinations – Alabama*, available at <[http://www.usdoj.gov/crt/voting/sec\\_5/al\\_obj2.htm](http://www.usdoj.gov/crt/voting/sec_5/al_obj2.htm)> (last viewed June 26, 2006).



After contested litigation that lasted a decade and after two Section 5 objections,<sup>32</sup> the system for electing the Dallas County Commission and Dallas County School Board switched from at-large to a racially fair single-member districting plan where black voters had a realistic opportunity to elect a majority of the members on each body. Rather than accept this possibility, the county attempted to prevent the election of a majority-black commission by instituting procedures that would be likely to decrease black participation. After originally representing that it would not require registered voters to send in forms re-establishing their eligibility to vote, the county implemented procedures that had the effect of requiring voters to do so: “[T]he voter update program has resulted in a voter registration list that actually includes many voters who have been and continue to be qualified to vote, but may not have been permitted to vote on June 5 and may be purged and thus disqualified from voting in subsequent elections simply because they failed to pick up or return a voter update form, when there was no valid requirement that they do so.”<sup>33</sup> In 1990, the Department of Justice objected to the “additional procedures for the 1990 implementation of the voter reidentification and purge program” in Dallas County because Dallas County failed to show this change was not motivated by a discriminatory purpose.<sup>34</sup>

In Chambers County, a new city, Valley, was incorporated in 1980. According to the Department of Justice, “the incorporation was especially motivated by the desire to create a separate city school system. That incorporation defined an irregularly shaped city which included the six schools intended for the Valley Schools System, but which excluded significant areas of black population concentration.”<sup>35</sup> At the same time, as discussed more fully below, the city was resisting the efforts of black citizens to annex into Valley. The Department of Justice objected to the creation of the new school system under Section 5.<sup>36</sup> It is worth noting that the Department of Justice later withdrew the objection after the city remedied its racially selective annexation policy – in response to both Section 5 objections and Section 2 litigation – and permitted black residents to annex into the city.

## 2. Observer provisions

The Department of Justice began sending observers to monitor elections in Alabama in 1966, and it has never stopped – most recently sending observers to Hale County in June 2006.<sup>37</sup> Since

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<sup>32</sup> See *United States v. Dallas County Comm’n*, 850 F.2d 1430 (11th Cir. 1988); *United States v. Dallas County Comm’n*, 850 F.2d 1433 (11th Cir. 1988); Letter from William Bradford Reynolds to Cartledge E. Blackwell, Jr. (June 2, 1986); Letter from William Bradford Reynolds to John E. Pilcher, Esq (June 1, 1987).

<sup>33</sup> *Id.* at 3.

<sup>34</sup> Letter from John R. Dunne to Debbie Barnes (June 22, 1990).

<sup>35</sup> Letter from John R. Dunne to David R. Boyd, at 1 (October 12, 1990).

<sup>36</sup> *Id.* at 3.

<sup>37</sup> The information in this paragraph and the following paragraph is taken from a Department of Justice list of where it has sent observers as well as a press release indicating that observers

1966, almost 5,000 observers have been sent to Alabama to observe 176 elections in twenty counties. Since 1982, there have been 91 observer coverages in 15 counties.

Not surprisingly, the Black Belt counties have received the bulk of the observer coverage. Fourteen Black Belt counties (twelve counties since 1982) have had observers monitoring elections. The following counties – all in the Black Belt – have had the most observer activity since 1982:

<u>County</u>	<u>Total number of observer coverages</u>	<u>Coverages since 1982</u>
Conecuh	13	11
Dallas	25	19
Hale	22	12
Lowndes	18	9
Marengo	12	4
Sumter	19	9
Wilcox	20	3

B. Intentional discrimination in pollworker appointment

Shortly after the 1982 reauthorization, black citizens in Alabama challenged the method of appointing poll officials under Section 2 of the Voting Rights Act. By means of a preliminary injunction, the federal court ordered 65 of Alabama’s 67 counties to institute programs aimed at appointing more African Americans as poll officials.<sup>38</sup> The court based its ruling on these findings of fact:

The past reality in Alabama has been that black citizens of the state were not only prohibited from participating in the political process, they were taught that this was the rule of law and society, the transgression of which merited severe punishment. In effect, state and local governments intentionally created an atmosphere of fear and intimidation to keep black persons from voting.

The present reality in Alabama is that many black citizens, in particular the elderly and uneducated, still bear the scars of this past, and are still afraid to engage in the simple act of registering to vote and voting. However, these fears can often be substantially allayed by the open and substantial presence of other black persons in the role of poll officials at voting places. Nevertheless, black persons are grossly underrepresented among poll officials, with the result that

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where sent to Hale County in 2006. The list can be obtained from the Lawyers’ Committee for Civil Rights Under Law.

<sup>38</sup> *Harris v. Graddick*, 593 F. Supp. 128 (M.D. Ala. 1984).

polling places across the state continue to be viewed by many blacks as areas circumscribed for whites and off-limits for blacks.<sup>39</sup>

The claims against the state of Alabama went to trial. In 1988, the district court held that Alabama laws and processes related to appointing election officials were intentionally discriminatory.<sup>40</sup>

### C. Intentional discrimination in methods of electing local bodies

By far the biggest advance in equal access for African Americans came after May 28, 1986, when a federal district court made findings that, in the century following Reconstruction, the Alabama Legislature had purposefully switched from single-member districts to at-large election of local governments as needed to prevent black citizens from electing their candidates of choice, and that the general laws of Alabama governing all at-large election systems throughout the state had been manipulated intentionally during the 1950s and 1960s to strengthen their ability to dilute black voting strength.<sup>41</sup> The court concluded: “From the late 1800’s through the present, the state has consistently erected barriers to keep black persons from full and equal participation in the social, economic, and political life of the state.”<sup>42</sup> Based on these findings, the district court expanded the *Dillard v. Crenshaw County* litigation to include a defendant class of 17 county commissions, 28 county school boards, and 144 municipalities who were then employing at-large election systems tainted by the racially motivated general laws.<sup>43</sup> Appended to the back of this report are the county commissions, school boards, and municipalities that were affected by the *Dillard* cases; a substantial majority of the counties had at least one electoral body that was affected.

A discussion of the *Dillard* litigation shows how entrenched discrimination in voting was in Alabama. Section 5 played a major role in preventing several *Dillard* jurisdictions from

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<sup>39</sup> *Id.* at 133.

<sup>40</sup> *Harris v. Siegelman*, 695 F. Supp. 517, 526 (M.D. Ala. 1988).

<sup>41</sup> *Dillard v. Crenshaw County*, 640 F. Supp. 1347, 1356-60 (M.D. Ala. 1986). The court even found that, following adoption of the 1875 Alabama “Redeemer” Constitution, elections in some Black Belt counties were suspended altogether. “Following this ‘redemption’ by the white-supremacist Democratic party, the state legislature passed a series of local laws that eliminated elections for county commission and instead gave the governor the power to appoint the commissioners. This system of gubernatorial appointment was particularly favored in black belt counties threatened with black voting majorities. According to the plaintiffs’ historian, the gubernatorial appointment system is widely understood to have been designed to prevent the election of black county commissioners.” *Id.* at 1358. The rules imposed by general law on all at-large elections, which still remain in place, included anti-single-shot provisions, numbered places, and a majority-vote requirement. *Id.* at 1360.

<sup>42</sup> *Id.* at 1360.

<sup>43</sup> *Dillard v. Crenshaw County*, CA No. 85-1332 Doc 491 and 492 (M.D. Ala., April 3, 1987).

implementing racially unfair districting systems. This is particularly true in Alabama's Black Belt counties, where white political control was nearly everywhere threatened by majority-black populations. For example, in Camden, county seat of Wilcox County, on the eve of trial, the city council, which had been maneuvering to preserve a white voter majority, finally agreed to annex long excluded African-American neighborhoods, including the neighborhood called Wilson Quarters.<sup>44</sup> The council's assent to the 1990 consent decree resulted not only from the threat of protracted trial proceedings, but from close scrutiny by the Department of Justice, which declined to preclear white neighborhood annexations to Camden in the 1960s until the city adequately explained why it had refused to annex adjacent black neighborhoods.<sup>45</sup>

The city of Valley, a new municipality that carved white residential areas out of Chambers County, was challenged by the *Dillard* plaintiffs to justify its refusal to annex several adjacent black neighborhoods. The district court stayed the city's 1988 elections pending resolution of the dispute, and on December 12, 1988, it approved a consent decree in which Valley agreed to facilitate annexation of the black neighborhoods.<sup>46</sup> The terms of the consent decree provided that Valley would not change to single-member districts until the 1992 elections. Before the districts were drawn, Valley tried to annex another 243 persons, only two of whom were black, but the Department of Justice denied preclearance pending completion of the transition to district elections.<sup>47</sup> Finally, after all the black annexations were completed, the Valley City Council adopted a seven single-member district plan that included two majority-black districts, and the case was dismissed.<sup>48</sup>

The city of Foley provides yet another example. In 1989, a federal district court found that Foley's at-large method of election violated Section 2, and the city moved to districts.<sup>49</sup> In 1989 and 1993, the Department of Justice objected to the city's submission of proposed annexations because the city had engaged in a racially selective annexation policy of encouraging majority-white areas to seek annexation and denying the annexation petitions from majority-black areas.<sup>50</sup> This led to the adoption of a consent decree between the Section 2 plaintiffs and the city whereby the city agreed to annex the majority-black areas if they sought annexation.<sup>51</sup>

After publication of the 1990 Census, Section 5 played a significant role in the battle to preserve

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<sup>44</sup> *Dillard v. City of Camden*, CA No. 87-T-1169-N (M.D. Ala, Jan. 17, 1990).

<sup>45</sup> See letter from James P. Turner to Lynda K. Oswald (Jan. 31, 1989); letter from James P. Turner to Andrew W. Cromer, Jr. (March 13, 1989) (requesting additional information in § 5 preclearance process).

<sup>46</sup> *Dillard v. Crenshaw County (City of Valley)*, CA No. 85-T-1332-N (M.D. Ala., Dec. 12, 1988).

<sup>47</sup> Letter from John R. Dunne to David R. Boyd (Dec. 31, 1990).

<sup>48</sup> *Dillard v. Crenshaw County (City of Valley)*, CA No. 85-T-1332-N (M.D. Ala., Jan. 6, 1992).

<sup>49</sup> *Dillard v. City of Foley*, 926 F. Supp. 1053, 1058 (M.D. Ala. 1989).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 1059-60.

white control in the Black Belt, which focused on Selma and Dallas County, the city and county where the Voting Rights Act was born in 1965 after the assault of peaceful marchers on the Edmund Pettus Bridge. The black population of Selma had increased from 52.1 percent to 58.4 percent,<sup>52</sup> and the black population of the entire county had increased from 54.5 percent to 57.8 percent.<sup>53</sup> The Department of Justice refused to grant Section 5 preclearance to three different redistricting plans submitted by the Dallas County Board of Education<sup>54</sup> and two different redistricting plans submitted by the city of Selma<sup>55</sup> on the ground that they exhibited a purpose to prevent African Americans from electing candidates of their choice to a majority of the seats on both bodies. All the plans packed as many black voters as possible into a minority of districts, and then fragmented the remainder of the black population. The plans that eventually were precleared at last provided black citizens an equal opportunity in these racially polarized constituencies and resulted in the election of black majorities on the Dallas County School Board and the Selma City Council.

In 1988, the Chilton County Commission, with the consent of the state, agreed not only that its at-large election system violated the Voting Rights Act, but also to a remedy that increased the number of commissioners from four to seven, all to be elected at large by cumulative voting rules.<sup>56</sup> The consent decree expressly provided:

The defendant shall request the local legislative delegation to enact legislation providing for the form of government agreed to herein. This court ordered form of government shall remain in effect only until such legislation is enacted by the legislature and precleared in accordance with the provisions of the Voting Rights Act of 1965.<sup>57</sup>

Fifteen years later, the Chilton County Commission still had not asked its local delegation to procure passage of a local act adopting the consent decree election system, and members of an all-white group calling themselves Concerned Citizens of Chilton County intervened to demand a return to the old at-large, numbered-place system.<sup>58</sup> They had been following developments in

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<sup>52</sup> Letter from John R. Dunne to Philip Henry Pitts (Nov. 12, 1992).

<sup>53</sup> Letter from John R. Dunne to John E. Pilcher (May 1, 1992).

<sup>54</sup> Letters from John R. Dunne to John E. Pilcher (May 1, 1992; July 21, 1992; and December 24, 1992).

<sup>55</sup> Letter from John R. Dunne to Philip Henry Pitts (Nov. 12, 1992); Letter from James P. Turner (March 15, 1993).

<sup>56</sup> *Dillard v. Chilton County Commission*, 694 F. Supp. 836 (M.D. Ala.1988), *aff'd summarily*, 863 F.2d 878 (11th Cir. 1988).

<sup>57</sup> CA No. 2:87-1179-T (M.D. Ala.), Doc. 26 at 1-1.

<sup>58</sup> Chilton County is the home of one of the more active klaverns of the Ku Klux Klan and the site of a huge Confederate battle flag erected by the Sons of Confederate Veterans to fly over Interstate 65 between Montgomery and Birmingham, which black legislators have condemned as

*Dillard v. Baldwin County Commission*<sup>59</sup> in which the Eleventh Circuit held that federal courts under the Voting Rights Act could not order a non-consenting local governing body to increase the number of commissioners or to use cumulative voting.<sup>60</sup> They took the argument made in *Baldwin County* a big step further, contending that a court-approved agreement entered into by black citizens and their county and state governments could not be enforced, if a remedy the state agreed to exceeds what a federal court could impose had the case gone to trial. This position is contrary to Supreme Court precedents, but the district court has kept the issue under submission for more than a year, obviously concerned about the rulings that have been coming from the Eleventh Circuit.<sup>61</sup> The Alabama Attorney General, instead of urging the district court to uphold the state's 1988 agreement, sided at first with the white intervenors and then withdrew from any participation in the matter.<sup>62</sup>

If there had been no federal requirement that changes in election practices not cause retrogression in the electoral opportunities of protected minorities, and that the jurisdiction must seek and receive preclearance before the changes can be implemented, black voters in Chilton County today would be completely shut out of county commission office. Confronted with the anti-consent decree campaign of the Concerned Citizens, the Chilton County Commission in 2003 adopted a resolution, over the objection of the sole black commissioner, asking the local legislative delegation to pass a local act reducing the size of the commission to four, restoring the probate judge as *ex officio* chair, repealing cumulative voting, and thus ending any opportunity for African Americans to elect a candidate of their choice.<sup>63</sup> The U.S. Attorney General refused to consider Chilton County's submission of the 2003 local act for preclearance until and unless

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offensive. Julie Arrington, "Lawmakers declare war on battle flag," MONTGOMERY ADVERTISER, July 3, 2005 (online edition).

<sup>59</sup> *Dillard v. Baldwin County Commission*, 222 F. Supp.2d 1283 (M.D. Ala. 2002), *aff'd*, 376 F.3d 1260 (11th Cir. 2004).

<sup>60</sup> The successful operation of Chilton County's cumulative voting system has received considerable scholarly comment. See e.g., Richard L. Engstrom et al., *One Person, Seven Votes: The Cumulative Voting Experience in Chilton County, Alabama*, in AFFIRMATIVE ACTION AND REPRESENTATION: SHAW V. RENO AND THE FUTURE OF VOTING RIGHTS 285 (Anthony Peacock ed., 1997); Richard H. Pildes and Kristen A. Donoghue, *Cumulative Voting in the United States*, U. OF CHI. LEG. FORUM 241 (1995). Bobby Agee, the African-American county commissioner stated: "Cumulative voting has done a lot to portray Chilton County in a positive light. I would rather have reporters to interview us for C.V. as opposed to having them come down to talk about the headquarters of the Klan." Interview with Commissioner Agee, January 2006.

<sup>61</sup> By order entered June 13, 2006, the Eleventh Circuit held in abeyance for 60 days the white intervenors' petition for writ of mandamus requiring the district court to rule on their complaint. *In re Green*, No. 06-12939-E (11<sup>th</sup> Cir., June 13, 2006).

<sup>62</sup> Hearing, April 22, 2005, in *Dillard v. Chilton County Commission*, CA No. 2:87cv1179-T (M.D. Ala.).

<sup>63</sup> Ala. Act No. 2003-217.

the district court dissolved the 1988 consent decree.<sup>64</sup> This scenario demonstrates that, without the protections of Section 5 of the Voting Rights Act, some white-majority state and local governments in Alabama will bow to pressure from their white constituents and return to the racially discriminatory election practices of the past. “We would be having a totally different conversation if it didn’t exist,” said Chilton Commissioner Bobby Agee. “A very important protection. We would have been at ground zero without Sec. 5.”<sup>65</sup>

The preclearance provisions of Section 5 of the Voting Rights Act were indispensable to the ability of black political leaders at the state and local level and their lawyers to ensure that all the court-ordered single-member district plans in *Dillard* and other voting rights cases were redrawn fairly with 1990 census data. The no-retrogression rule and the requirement of obtaining preclearance of redistricting plans before holding new elections empowered representatives of black voters to negotiate on an equal basis with white-majority local governments. As a result, with some oversight by the Department of Justice, the gains achieved in the 1980s were protected, and in some instances, there were further advances in the ability of African Americans to elect candidates of their choice.

On June 29, 1986, one month after the initial *Dillard* decision, the U.S. Supreme Court gave enforcement of Section 2 a big boost when it handed down *Thornburg v. Gingles*.<sup>66</sup> The legal standards established by *Gingles* simplified the elements of proof for racial vote dilution claims. But in Alabama it was not so much the new legal particulars that influenced majority-white government throughout the state as it was the Supreme Court’s broad message that, in an environment of racially polarized voting, protected minorities have a right to election structures that will provide them an equal opportunity to participate in the political process and to elect candidates of their choice. This resounding national mandate essentially provided the political cover Alabama’s elected officials might have needed to justify to their majority-white constituencies their decisions not to continue defending racially discriminatory election systems when they were challenged in court. Most of the local jurisdictions in the defendant class entered into consent decrees negotiated by state and local black political leaders, although a few proceeded to trial and judgment.<sup>67</sup> Twelve of the 17 county commissions changed to single-

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<sup>64</sup> Letter from Joseph D. Rich to John Hollis Jackson and Dorman Walker (Oct. 29, 2003).

<sup>65</sup> Interview with Commissioner Agee, January 2006.

<sup>66</sup> 478 U.S. 30 (1986).

<sup>67</sup> *Dillard v. City of Greensboro*, 865 F. Supp. 773, 870 F. Supp. 1031 (M.D. Ala. 1994); *vacated and remanded*, 74 F.3d 230 (11th Cir. 1996) (voting rights), *on remand*, 946 F. Supp. 946 (M.D. Ala. 1996), 956 F. Supp. 1576 (M.D. Ala. 1997), 996 F. Supp. 1576 (M.D. Ala. 1997); *Dillard v. City of Foley*, 926 F. Supp. 1053 (M.D. Ala. 1995); *Dillard v. Crenshaw County (Calhoun County)*, 831 F.2d 246 (11th Cir. 1987); *Dillard v. Baldwin County Commission*, 694 F. Supp. 836, 837 (M.D. Ala. 1988), *aff’d summarily*, 863 F.2d 878 (11<sup>th</sup> Cir. 1988); *Dillard v. Baldwin County Bd. of Educ.*, 701 F. Supp. 808, 686 F. Supp. 1459 (M.D. Ala. 1988); *Dillard v. Town of North Johns*, 717 F. Supp. 1471 (M.D. Ala. 1989).

member districts, one agreed to use cumulative voting rules with its at-large elections<sup>68</sup>, and four are still pending judgment. Twenty-three of the 28 county boards of education changed to single-member districts, one agreed to use cumulative voting rules with its at-large elections, and four are still pending judgment. One hundred two of the 144 municipalities changed to single-member districts, 13 agreed to change to multimember districts, 20 agreed to use limited voting rules with their at-large elections<sup>69</sup>, five agreed to use cumulative voting rules with their at-large elections, two agreed to use plurality-win rules with their at-large elections, and two are still pending judgment.<sup>70</sup>

Some of the *Dillard* jurisdictions would not agree to consent decrees providing a complete remedy for the dilution of black citizens' votes, and the district court had to adjudicate the remedy issues based on the jurisdictions' admissions of liability. For example, the Baldwin County Board of Education proposed five single-member districts, none of which had an effective black voter majority.<sup>71</sup> The court cited both its earlier intent findings<sup>72</sup> and the results standard for proving a Section 2 violation<sup>73</sup> recently announced in *Thornburg v. Gingles* as bases for adopting the plaintiffs' proposed seven single-member district plan. It interpreted the

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<sup>68</sup> *Dillard v. Chilton County Bd. of Education*, 699 F. Supp. 870, 875 (M.D. Ala. 1988), *aff'd* 868 F.2d 1274 (11<sup>th</sup> Cir. 1989) (table) ("The cumulative voting system proposed by the parties cures the plaintiffs' § 2 claims to the extent the claims rest on intentional discrimination. . . . [T]he system provides black voters in the county with a realistic opportunity to elect candidates of their choice, even in the presence of substantial racially polarized voting. As stated above, the court must address whether the cumulative voting scheme proposed by the parties is illegal or against public policy. There is nothing in federal constitutional or statutory law that prohibits its use. The scheme is acceptable under federal law.") (footnote omitted).

<sup>69</sup> *Dillard v. Town of Cuba*, 708 F. Supp. 1244, 1246 (M.D. Ala. 1988) ("The court believes that the proposed limited voting system offers all black citizens of Cuba the potential to elect candidates of their choice, even in the face of substantial racially polarized voting, which apparently exists in the town.").

<sup>70</sup> See attached lists.

<sup>71</sup> *Dillard v. Baldwin County Bd. of Education*, 686 F. Supp. 1459 (M.D. Ala. 1988).

<sup>72</sup> The court stated: "The plaintiffs have relied on this court's earlier findings in *Crenshaw County*, unchallenged here, that the Alabama legislature adopted numbered place laws in 1961 in order to make local at-large elections systems 'more secure mechanisms for discriminations' against the state's black citizens. 640 F. Supp. at 1357. In other words, the state adopted numbered place laws and continued to maintain at-large systems across the state for the specific purpose of racial discrimination. The evidence is undisputed that the Baldwin County Board of Education's at-large system, including the numbered-place feature, is a product of these racially discriminatory efforts of the Alabama legislature. Moreover, as demonstrated in Part III of this opinion, the evidence is overwhelming that the enactments continue today to have their intended racist effect. The plaintiffs have therefore established a prima facie case of intentional racial discrimination." *Id.* at 1468.

<sup>73</sup> *Id.* at 1462-63.



mandate of the 1982 Voting Rights Act to require full and effective relief. “Congress has made clear that a ‘court should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice.’”<sup>74</sup> And it rejected the school board’s contention that the sole majority-black district in the plan it ordered was not sufficiently compact:

The court therefore believes, especially in light of § 2's strong national mandate, that a district is sufficiently geographically compact if it allows for effective representation. For example, a district would not be sufficiently compact if it was so spread out that there was no sense of community, that is, if its members and its representative could not effectively and efficiently stay in touch with each other; or if it was so convoluted that there was no sense of community, that is, if its members and its representative could not easily tell who actually lived within the district. Also of importance, of course, is the compactness of neighboring districts; obviously, if, because of the configuration of a district, its neighboring districts so lacked compactness that they could not be effectively represented, the *Thornburg* standard of compactness would not be met. These are not, however, the only factors a court should consider in assessing a proposed district; because compactness is a functional concept, the number and kinds of factors a court should consider may vary with each case, depending on the local geographical, political, and socio-economic characteristics of the jurisdiction being sued.

The seven-member redistricting plan proposed by the plaintiffs meets this functional standard.<sup>75</sup>

In other *Dillard* jurisdictions, extended trial proceedings and court rulings were necessary before and after all-white local governing bodies finally agreed to consent decrees. In North Johns, a tiny municipality near Birmingham, after the mayor agreed to a consent decree that changed the method of electing council members from at-large voting to single-member districts, the district court found that he intentionally withheld state mandated ethics forms from the African-American candidates:

The mayor was aware that Jones and Richardson, as black candidates, were seeking to take advantage of the new court-ordered single-member districting plan and that their election would result in the town council being majority black. The court is convinced that Mayor Price acted as he did in order to prevent this result, or at least not to aid in achieving it.<sup>76</sup>

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<sup>74</sup> *Id.* at 1469 (quoting 1982 U.S.Code Cong. at 208).

<sup>75</sup> *Id.* at 1466.

<sup>76</sup> *Dillard v. Town of North Johns*, 717 F. Supp. 1471, 1476 (M.D. Ala. 1989).

A particularly egregious example was the effort of Etowah County to sidestep the effect of the *Dillard* cases. The Etowah County Commission was one of the *Dillard* jurisdictions that had agreed in a consent decree to change its at-large election system to single-member districts, one of which had a black voter majority.<sup>77</sup> But as soon as a black commissioner was elected, the white-majority commission voted to exclude its new member from the traditional practice of giving each commissioner executive powers over the road construction and maintenance operations in his district. Instead of control over a road camp and crew, “Coach” Presley, the first African American ever elected to the Etowah County Commission, was assigned the executive functions of maintaining the county courthouse building and grounds; in effect, he was put in charge of the janitorial staff.<sup>78</sup> Fortunately, in Etowah County, the 1986 consent decree contained this saving provision: “[W]hen the District 5 [the majority-black district] and 6 Commissioners are elected in the special 1986 election, they shall have all the rights, privileges, duties and immunities of the other commissioners, who have heretofore been elected at-large, until their successors take office.”<sup>79</sup> Based on this judicially enforceable contractual commitment, on remand the district court ordered the Etowah County Commission to negotiate a fair division of powers that complied with the consent decree.<sup>80</sup>

#### D. Intentional discrimination in annexations

In *City of Pleasant Grove v. U.S.*,<sup>81</sup> the United States Supreme Court affirmed the district court’s denial of Section 5 preclearance to two annexations to the city of Pleasant Grove on the ground that the city had engaged in a racially selective annexation policy. Pleasant Grove was at that time an all-white city with a long history of discrimination located in an otherwise racially mixed part of Alabama. The Supreme Court stated that “in housing, zoning, hiring, and school policies [the city’s] officials have shown unambiguous opposition to racial integration, both before and

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<sup>77</sup> *Dillard v. Crenshaw County*, Civil Action No. 85-T-1332-N (M.D. Ala. Nov. 12, 1986).

<sup>78</sup> *See Presley v. Etowah County Commission*, 869 F. Supp. 1555, 1560-63 (M.D. Ala. 1994).

When the county commission refused to submit for § 5 preclearance the resolutions making these changes, black citizens asked a three-judge district court to rule that the resolutions could not be enforced until they had been precleared. (In the same civil action, plaintiffs also challenged similar changes on the Russell County Commission that had not been submitted for § 5 preclearance. *See Presley*, 502 U.S. 491, 498-99 (1992); *Mack v. Russell County Commission*, 840 F. Supp. 869 (M.D. Ala. 1993)). The district court enjoined enforcement of one resolution but not another, based on their respective practical impacts on the electoral power of black voters. *Presley*, 502 U.S. at 497-98. However, the Supreme Court held that none of the commission’s resolutions met the statutory definition of a “voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting.” *Id.* at 502 U.S. at 491, 504 (quoting 42 U.S.C. § 1973c).

<sup>79</sup> *Presley v. Etowah County Commission*, 869 F. Supp. at 1559.

<sup>80</sup> *Id.* at 1574.

<sup>81</sup> 479 U.S. 462 (1987).

after the passage of the civil rights laws.”<sup>82</sup> The city sought preclearance for two annexations, one for an area of white residents who wanted to attend the all-white Pleasant Grove school district instead of the desegregated Jefferson County school district, the other for a parcel of land that was uninhabited at the time but where the city planned to build upper income housing that would likely be inhabited by whites only.<sup>83</sup> At the same time, the city refused to annex two predominantly black areas. The district court held “that the city failed to carry its burden of proving that the two annexations at issue did not have the purpose of abridging or denying the right to vote on account of race.”<sup>84</sup> In affirming the district court’s decision, the Supreme Court stated:

It is quite plausible to see appellant’s annexation [of the two parcels] as motivated, in part, by the impermissible purpose of minimizing future black voting strength. Common sense teaches that appellant cannot indefinitely stave off the influx of black residents and voters – indeed, the process of integration, long overdue, has already begun. One means of thwarting this process is to provide for the growth of a monolithic white voting block, thereby effectively diluting the black vote in advance. This is just as impermissible a purpose as the dilution of present black voting strength. To hold otherwise would make appellant’s extraordinary success in resisting integration thus far a shield for further resistance. Nothing could be further from the purposes of the Voting Rights Act.<sup>85</sup>

The *Pleasant Grove* case is a modern example of what occurred decades ago in *Gomillion* – the manipulation of city borders to fence out blacks.

#### E. Hale County: An Example of the Voting Rights Act at Work

Hale County, a Black Belt county, serves as an example of a majority-black county where the effort to suppress full black electoral participation has persisted, and only because of the Voting Rights Act -- particularly the preclearance and the examiner/observer provisions – have African Americans been able to overcome this entrenched and continuing discrimination.

Prior to the passage of the Voting Rights Act, African Americans in Hale County who wanted to register and vote faced tremendous obstacles – the poll tax, literacy tests, and harassment. As of May 1964, only 3.9 percent of the black voting age population was registered to vote.<sup>86</sup> On August 9, 1965, three days after the Voting Rights Act was passed, the Department of Justice certified Hale County as a jurisdiction where a federal examiner had the authority to register

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<sup>82</sup> *Id.* at 465.

<sup>83</sup> *Id.* at 465-66.

<sup>84</sup> *Id.* at 467. The district court also stated that even if the burden had been on the United States, it would have found discriminatory intent on behalf of the city. *Id.* at 467 n.7.

<sup>85</sup> *Id.* at 471-72.

<sup>86</sup> *United States v. Hale County*, 496 F. Supp. 1206, 1211 (D.D.C. 1980) (three-judge court).

black voters.<sup>87</sup> Not coincidentally, on August 10, 1965, the Alabama Legislature passed legislation changing the method of electing Hale County commissioners from single-member districts to at-large voting.<sup>88</sup>

Though Hale County began to elect its commissioners at large, Hale County did not submit this voting change to at-large elections until 1974. The Department of Justice objected to the change.<sup>89</sup> Hale County then sought preclearance from the U.S. District Court of the District of Columbia. In reviewing the change, the court found black candidates lost all 30 times they ran for county-wide office, including 11 times for county commissioner. The court found that the elections were characterized by racial bloc voting; that black citizens suffered from educational and economic impediments traceable to a history of discrimination that impacted their right to vote; and that black voters were subjected to intimidation and harassment in trying to exercise their right to vote. These factors, when combined with at-large voting, prevented black candidates from getting elected county commissioner.<sup>90</sup> The court held that Hale County failed to show that the change did not have a discriminatory purpose or effect and it denied preclearance.<sup>91</sup>

Since the 1982 reauthorization, much of the focus has been on the elections in the city of Greensboro, the county seat in Hale County, where the Voting Rights Act has played a major role. The city attempted to deannex property “shortly after it became known that subsidized public housing would be built on the property and that there was a strong perception in both the black and white communities that such housing would be occupied largely or exclusively by black persons. . . .”<sup>92</sup> The Department of Justice objected to the change.

In 1987, the city’s at-large method of electing its five county commissioners was challenged as part of the *Dillard* litigation. Though the city admitted to a Section 2 violation shortly after the litigation was filed, it took *ten* years for a final remedial plan to be implemented.<sup>93</sup> During the litigation, the Department of Justice objected to two different plans under Section 5 adopted by the city council on the grounds that, given the history of discrimination and the pattern of racially

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<sup>87</sup> The federal examiner provisions, contained at Sections 6-9 and 13, apply to all the jurisdictions subject to the coverage formula in Section 4(a). Examiners have the authority to register voters and to monitor elections by utilizing federal observers. In the early years of the Act, examiners were used for both purposes. Over time, the registration function of the examiner has become used less frequently, to the point where it is not used at all today, whereas the monitoring function has continued. See United States Department of Justice, Voting Section, “*About Federal Examiners and Observers*,” <available at [http://www.usdoj.gov/crt/voting/examine/activ\\_exam.htm](http://www.usdoj.gov/crt/voting/examine/activ_exam.htm)> (last viewed July 5, 2006).

<sup>88</sup> *Hale County*, 496 F. Supp. at 1210.

<sup>89</sup> Letter from J. Stanley Pottinger to Sue W. Seale (Apr. 23 1976).

<sup>90</sup> *Hale County*, 496 F. Supp. at 1212-15.

<sup>91</sup> *Id.* at 1215-16.

<sup>92</sup> Letter from William Bradford Reynolds to John C. Jay, Jr. (October 21, 1985).

<sup>93</sup> *Dillard v. City of Greensboro*, 956 F. Supp. 1576 (M.D. Ala. 1997).

polarized voting, the plans limited black voters to the opportunity to elect two of the five council members even though blacks comprised 62 percent of the total population and 56 percent of the voting age population. The Department found that both plans fragmented the black population.<sup>94</sup> Ultimately, the plan ordered by the court was drawn by a court-appointed Special Master. Although the Special Master did not consider race at all when drawing the plan and instead followed “traditional redistricting criteria,” the plan contained three districts where two-thirds or more of the population was black.<sup>95</sup>

Observers have played a critical role in elections in Hale County. Beginning in 1966, observers have monitored elections in Hale County 22 times, including 12 times since 1982. In the June 5, 2006, primary election, the Department of Justice sent observers to “ensure that the right of voters to participate in the primary election is not denied on the basis of their race.”<sup>96</sup> Testifying before the National Commission on the Voting Rights Act, Alabama State Senator Bobby Singleton spoke of the significance of federal observers, and described a particularly intense election in 1992:

We had at that time, still, white minorities . . . in that community who were still in control of the electoral process, holding the doors, closing the doors on African-American voters before the . . . voting hours were over. I . . . had to go to jail because I was able to snatch the door open and allow people who was coming from the local fish plant . . . whom they did not want to come in, that would have made a difference in the . . . votes on that particular day. We’ve experienced that in the city of Greensboro . . . over and over again, and even in the county of Hale.<sup>97</sup>

Singleton further testified about how critical observers were in enabling minority voters to elect a majority on most of the elected bodies in Hale County, including the school board, county government, most city councils; as well as to elect a black circuit court judge, black circuit clerk, and state representative.<sup>98</sup> Hale County exemplifies both the continuing persistence of voting discrimination against African Americans in Hale County and the success of Voting Rights Act in remedying and preventing that discrimination.

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<sup>94</sup> Letter from John R. Dunne Nicholas H. Cobbs, Jr. (December 4, 1992); letter from James P. Turner to Nicholas H. Cobbs, Jr. (January 3, 1994).

<sup>95</sup> *City of Greensboro*, 956 F. Supp. at 1581-82.

<sup>96</sup> U.S. Department of Justice, “Justice Department to Monitor Elections in Alabama, California, New Jersey, New Mexico and South Dakota,” June 5, 2006, available at <[http://www.usdoj.gov/opa/pr/2006/June/06\\_crt\\_347.html](http://www.usdoj.gov/opa/pr/2006/June/06_crt_347.html)> (Last viewed July 5, 2006)

<sup>97</sup> *Protecting Minority Voters*, at 62-63.

<sup>98</sup> *Id.* at 63.

F. The Voting Rights Act and Congressional and Legislative Redistricting in Alabama

The 1982 reauthorization of Section 5 had an immediate impact on the ability of African Americans in Alabama to elect their favored candidates to the Alabama Legislature. Alabama is the state in which the Supreme Court established “one person, one vote” as a substantive constitutional requirement for all state elective representation systems.<sup>99</sup> Even though the disfranchising 1901 Alabama Constitution called for the Legislature to redistrict after every decennial census, this mandate had simply been ignored, and the original 1901 House and Senate boundaries were still in place after publication of the 1960 census. Federal courts were forced to draw the legislative districts in use during the 1960s and 1970s.<sup>100</sup> As a result of court-ordered redistricting, the first two African Americans to serve in the Alabama Legislature since Reconstruction, Fred Gray and Thomas Reed, were elected to the House in 1970.<sup>101</sup> In the first election following the 1980 Census, 17 African Americans were elected to the House and three to the Senate.<sup>102</sup> This first election in 1982 was carried out using districts adopted by the Alabama Legislature and slightly modified by a federal court pending Section 5 preclearance of the statutory plans.<sup>103</sup> The Department of Justice, through Assistant Attorney General William Bradford Reynolds, had denied preclearance to the redistricting plan the Legislature had enacted in 1981, because it had reduced the number of majority-black districts and the size of black majorities in other districts.<sup>104</sup> On June 1, 1982, the Alabama Legislature, sitting in an emergency special session, adopted a second redistricting bill, Act No. 82-629, in an effort to meet the U.S. Attorney General’s objections.<sup>105</sup> This was the plan the federal court modified for use in the 1982 election, on the condition that it would impose its own plan in a special 1983 election if the Legislature was unable to satisfy Section 5 of the Voting Rights Act. But on August 2, 1982, Mr. Reynolds also objected to Act No. 82-629, even though it arguably cured

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<sup>99</sup> *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (quoting Justice Douglas in [Gray v. Sanders](#), 372 U.S. 368 (1963) *Gray v. Sanders*, 372 U.S. 368, 381 (1963)).

<sup>100</sup> See generally *Burton v. Hobbie*, 561 F. Supp. 1029, 1030-32 (M.D. Ala. 1983) (3-judge court).

<sup>101</sup> Fred Gray, *BUS RIDE TO JUSTICE* 237-53 (1995); Robert J. Norrell, *REAPING THE WHIRLWIND: THE CIVIL RIGHTS MOVEMENT IN TUSKEGEE* 190-200 (1986).

<sup>102</sup> See James U. Blacksher and Larry Menefee, *From Reynolds, v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HAST. L.J. 1 (1982); James U. Blacksher and Larry Menefee, *From Reynolds, v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HAST. L.J. 1, 39 n.261 (1982).

<sup>103</sup> *Burton v. Hobbie*, 543 F. Supp. 235 (M.D. Ala.) (3-judge court), *aff’d* 459 U.S. 961 (1982).

<sup>104</sup> § 5 objection letter, William Bradford Reynolds to Charles A. Graddick (May 6, 1982).

<sup>105</sup> *Burton v. Hobbie*, 543 F. Supp. at 236-37.

the retrogression problems, because it appeared intentionally to fragment black voting strength in the western Black Belt counties.<sup>106</sup> There is no doubt that the Attorney General's objection was influenced by the ringing mandate of the 1982 Voting Rights Act to provide protected minorities equal access to the electoral process. And there is no doubt this federal mandate of full equal access, under both Section 2 and Section 5, strengthened the negotiating hand of African-American legislators and political leaders in the Legislature's next attempt to obtain Section 5 preclearance prior to the federal court's 1983 deadline.

The result was Act No. 83-154, a compromise plan to which black legislators agreed, an historic first for Alabama. The legislative leaders, black and white, flew to Washington, D.C. to attend a congratulatory press conference called by Assistant Attorney General Reynolds after the plan received § 5 preclearance.<sup>107</sup> The federal court gave its blessing to the 1983 plan in an opinion by Judge Frank Johnson which began:

The day may have now arrived to which the late Judge Richard T. Rives referred when expressing his feelings and the feelings of many of us in *Dent v. Duncan*, 360 F.2d 333 (5th Cir.1966):

I look forward to the day when the State and its political subdivisions will again take up their mantle of responsibility, treating all of their citizens equally, and thereby relieve the federal Government of the necessity of intervening in their affairs. Until that day arrives, the responsibility for this intervention must rest with those who through their ineptitude and public disservice have forced it.

Id. at 337-38. Enactment of Act No. 83-154 marks the first time in Alabama's history that its Legislature has provided an apportionment plan that is fair to all the people of Alabama.<sup>108</sup>

In the ensuing 1983 special election, 20 African Americans were elected to the 105-member House, and five were elected to the 35-member Senate.

In 1992, the U.S. Attorney General also objected to the congressional redistricting plan enacted by the Alabama Legislature, on the ground that the fragmentation of black population concentrations in the state was evidence of "a predisposition on the part of the state political

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<sup>106</sup> § 5 objection letter, William Bradford Reynolds to Charles A. Graddick (August 2, 1982).

<sup>107</sup> "Alabama Voting Plan Cleared," NEW YORK TIMES (March 1, 1983) (available at <http://select.nytimes.com/search/restricted/article?res=F1061EFC3D5D0C728CDDAA0894DB484D81>).

<sup>108</sup> *Burton v. Hobbie*, *supra*, 561 F. Supp. at 1030.

leadership to limit black voting potential to a single district.”<sup>109</sup> However, because of a deadline imposed by a three-judge federal district court, there was insufficient time for the Legislature to attempt to cure the Section 5 objection, and the court proceeded to order implementation of a congressional plan that also contained only a single majority-black district.<sup>110</sup>

The racial gerrymandering Fourteenth Amendment jurisprudence introduced by the Supreme Court in *Shaw v. Reno* in 1993 came into play in Alabama in the 1990s.<sup>111</sup> African-American members of the Alabama House and Senate and the leaders of longstanding, predominately black political organizations in Alabama had parlayed their gains under the 1983 legislative redistricting plans into often effective coalitions with some white elected officials. They were able to negotiate a post-1990 Census legislative redistricting plan that passed the House but was blocked in the Senate. Relying on the mandates of both Section 2 and Section 5 of the Voting Rights Act, black plaintiffs filed suit in state court to obtain a racially fair redrawing of the House and Senate districts. Only a month before *Shaw* was handed down, the state court approved a consent decree negotiated by black political leaders and white state officials.<sup>112</sup> The consent decree plan increased the number of majority-black House districts to 27 (of 105) and the number of majority-black Senate districts to eight (of 35). In 1997, however, white plaintiffs filed a federal lawsuit claiming, among other things, that the 1993 state court consent decree plan violated the *Shaw* principles.<sup>113</sup> After lengthy, complicated proceedings in both federal and state courts, a three-judge federal court “ultimately held that seven of the challenged *majority-white* districts were the product of unconstitutional racial gerrymandering and enjoined their use in any election.”<sup>114</sup> On direct appeal, the U.S. Supreme Court vacated the district court judgment and remanded the case with instructions that the complaint be dismissed for failure to satisfy the standing requirements of *U.S. v. Hays*.<sup>115</sup> The Court did not address the merits of the *Shaw* claims, nor did it respond to the contentions of African-American defendants that, because of the decades-long history of black communities in Alabama organizing to pursue their legitimate political objectives, the plan their representatives successfully negotiated reflected a

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<sup>109</sup> Letter from John R. Dunne to Jimmy Evans, March 27, 1992, p. 1.

<sup>110</sup> *Wesch v. Hunt*, 785 F. Supp. 1491 (S.D. Ala. 1992) (3-judge court), *aff’d sub nom. Camp v. Wesch*, 504 U.S. 902 (1992), and *Figures v. Hunt*, 507 U.S. 901 (1993).

<sup>111</sup> 509 U.S. 630 (1993). The subsequent cases in the *Shaw v. Reno* line include *United States v. Hays*, 515 U.S. 737 (1995); *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Hunt*, 116 S.Ct. 1894 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996) (“*Shaw II*”); *Bush v. Vera*, 116 S.Ct. 1941 (1996); *Bush v. Vera*, 517 U.S. 952 (1996); *Abrams v. Johnson*, 117 S.Ct. 1925 (1997); *Abrams v. Johnson*, 521 U.S. 74 (1997); *Hunt v. Cromartie*, 526 U.S. 541 (1999); *Sinkfield v. Kelley*, 531 U.S. 28 (2000); *Easley v. Cromartie*, 532 U.S. 234, 121 S.Ct. 1452 (2001).

<sup>112</sup> *Sinkfield v. Camp*, CA No. 93-689-PR (Cir. Ct. Montgomery County, May 12, 1993).

<sup>113</sup> See generally the procedural history of this litigation in the jurisdictional statement filed by the State defendants in *Sinkfield v. Kelley*, 531 U.S. 28 (2000)

<sup>114</sup> *Sinkfield v. Kelley*, 531 U.S. 28, 29 (2000) (emphasis added).

<sup>115</sup> 515 U.S. 737 (1995).



constitutionally protected exercise of African Americans' First Amendment rights. For the time being, the gains Alabama's black citizens had won under the Voting Rights Act were preserved.

Section 5 of the Voting Rights Act played a decisive role in the redrawing of congressional and state legislative districts in Alabama following publication of the 2000 Census. For the first time since 1901, without supervision of a federal court, the Alabama Legislature passed, and the governor signed into law redistricting statutes for congressional, House, Senate and state Board of Education seats. All four of these statutes received Section 5 preclearance and survived court challenges by white voters contending that they systematically discriminated against whites by overpopulating their districts and that they violated the *Shaw v. Reno* racial gerrymandering standards.<sup>116</sup> Black legislators were able to leverage the no-retrogression command of Section 5 successfully "to pull, haul, and trade to find common political ground" with their white Democratic and Republican colleagues.<sup>117</sup> Instead of attempting to maximize the number of seats black voter majorities control, African-American legislators were able to maintain the overall electoral power of blacks, while working with white legislators to consciously balance both racial and partisan interests with fair, neutral districting criteria.<sup>118</sup> Without the protection of Section 5, in Alabama's racially polarized environment, there would be little or no incentive for white legislators to bargain with the African-American minority in the Alabama Legislature.

#### G. The Persistence of Racially Polarized Voting

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<sup>116</sup> See [http://www.legislature.state.al.us/reapportionment/districts\\_2001.html](http://www.legislature.state.al.us/reapportionment/districts_2001.html); *Montiel v. Davis*, 215 F. Supp.2d 1279 (S.D. Ala. 2002) (3-judge court); *Rice v. English*, 835 So.2d 157 (Ala. 2002); *Gustafson v. Johns*, \_\_ F.Supp. \_\_, 2006 WL 1409083 (S.D. Ala., May 22, 2006) (3-judge court).

<sup>117</sup> Brief of Amici Curiae Leadership of the Alabama Senate and House of Representatives filed in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), 2003 WL 22490664 at \*9 (citing *Georgia v. Ashcroft*, 539 U.S. 461, 483 (2003) (quoting *Johnson v. De Grandy*, 512 U.S. 997 (1994) *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994) (quoted in *LULAC v. Perry*, \_\_ U.S. \_\_, 2006 WL 1749637 at 74 (June 28, 2006) (Roberts, C.J., concurring and dissenting)).

<sup>118</sup> *Montiel v. Davis*, 215 F. Supp.2d 1279 (S.D. Ala. 2002) (three-judge court).

Highly racially polarized voting patterns persist to the present day in Alabama. The pattern has been found to exist on a statewide basis by the U.S. Attorney General,<sup>119</sup> expert voting witnesses<sup>120</sup> and federal courts.<sup>121</sup> Without exception, based on numerous analyses by expert witnesses, federal courts<sup>122</sup> and the Department of Justice<sup>123</sup> have found severe racial

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<sup>119</sup> Section 5 objection letter, John R. Dunne, Assistant Attorney General for Civil Rights, to Jimmy Evans, Attorney General of Alabama, p. 2 (March 27, 1992).

<sup>120</sup> Report of Gordon G. Henderson, PhD., Sinkfield defendants Exhibit 184, in *Kelley v. Bennett and Sinkfield*, 96 F. Supp.2d 1301 (M.D. Ala.) (three-judge court), *rev'd on other grnds*, *Sinkfield v. Kelley*, 531 U.S. 28, 121 S.Ct. 446 (2000).

<sup>121</sup> *White v. Alabama*, 867 F. Supp. 1519, 1552 (M.D. Ala. 1994), *vacated on other grnds*, 74 F.3d 1058 (11<sup>th</sup> Cir. 1996) (citing testimony of Dr. Gordon Henderson and Letter from Assistant Attorney General Deval L. Patrick to Alabama Attorney General Jimmy Evans, dated April 14, 1994 (file document no. 65), at 5).

<sup>122</sup> *Dillard v. Baldwin County Commission*, 222 F. Supp.2d 1283, 1290 (M.D. Ala. 2002), *aff'd*, 376 F.3d 1260 (11th Cir. 2004) (“The plaintiffs have shown that black citizens of Baldwin County still suffer from the racially polarized voting and from historically depressed conditions, economically and socially.”); *Wilson v. Jones*, 45 F. Supp.2d 945, 951 (S.D. Ala. 1999), *aff'd sub nom. Wilson v. Minor*, 220 F.3d 1297 (11th Cir. 2000) (Dallas County); *Dillard v. City of Greensboro*, 946 F. Supp.2d 946, 952 (M.D. Ala. 1996); *Dillard v. Town of Louisville*, 730 F. Supp. 1546, 1549 (M.D. Ala. 1990); *Dillard v. Town of Cuba*, 708 F. Supp. 1244, 1246 (M.D. Ala. 1988); *Dillard v. Chilton County Bd. of Education*, 699 F. Supp. 870, 874 (M.D. Ala. 1988), *aff'd* 868 F.2d 1274 (11th Cir. 1989) (table); *Dillard v. Crenshaw County*, 649 F. Supp. 289, 295 (M.D. Ala.), *vacated on other grnds*, 831 F.2d 246 (11th Cir. 1986), *reaff'd*, 679 F. Supp. 1546 (M.D. Ala. 1988) (“the evidence reflects that racially polarized voting in Calhoun, Lawrence, and Pickens Counties is severe and persistent, and that this bloc voting has severely impaired the ability of blacks in the three counties to elect representatives of their choice.”); *Clark v. Marengo County*, 623 F. Supp. 33, 37 (S.D. Ala. 1985); *Brown v. Board of School Comm'rs of Mobile County*, 542 F. Supp. 1078, 1091 (S.D. Ala. 1982), *aff'd*, 706 F.2d 1103 (11th Cir.), *aff'd*, 464 U.S. 1005 (1983); *Bolden v. City of Mobile*, 542 F. Supp. 1050, 1076-77 (S.D. Ala. 1982).

<sup>123</sup> Section 5 objection letter, Bill Lann Lee to J. Frank Head (Aug. 16, 2000) (City of Alabaster); Section 5 objection letter, Bill Lann Lee to E. Paul Jones (Feb. 6, 1998) (Tallapoosa County); Section 5 objection letter, James P. Turner to Lynda K. Oswald (Nov. 16, 1993) (Tuscaloosa County); Section 5 objection letter, John R. Dunne to Nicholas H. Cobbs, Jr. (Dec. 4, 1992) (Hale County); Section 5 objection letter, John R. Dunne to Philip Henry Pitts (Nov. 12, 1992) (city of Selma); Section 5 objection letter, John R. Dunne to John E. Pilcher (May 1, 1992) (Dallas County); Section 5 objection letter, John R. Dunne to David R. Boyd (Dec. 23, 1991) (Jefferson County); Section 5 objection letter, John R. Dunne to David R. Boyd (Nov. 8, 1991)

polarization at the county and municipal levels in Alabama. Federal courts in Alabama have acknowledged the causal connection between racial bloc voting and the history of *de jure* segregation. “Racial bloc voting by whites is attributable in part to past discrimination, and the past history of segregation and discrimination affects the choices of voters at the polls.”<sup>124</sup>

An expert analysis of the 2004 general election for the seven members of the Chilton County Commission, who, pursuant to a 1987 consent decree, are elected at large using cumulative voting rules, provides dramatic evidence of how white voters in Alabama remain unwilling to vote for African-American candidates. Commissioner Bobby Agee, an African American, has served continuously on the commission since 1988 and has earned the respect of his fellow commissioners. But even the power of incumbency and familiarity has earned him no support from the white electorate:

The [expert’s] tables reveal that Mr. Agee, a long time incumbent on the county commission, is the overwhelming choice of the African American voters. His support among African American voters in the county ranges, across the analyses, from an estimated 5.2 votes per voter to 5.6. He is the first choice of African American voters to represent them on the commission in every analysis. In contrast, his support among the non-African American voters is minimal. The estimates of their support for Mr. Agee based on the ecological inference and regression analyses range from 0.1 to 0.2 votes per voter, and he finishes last in this election in the votes cast by non-African Americans in each type of analysis. The correlation coefficient between the racial composition of the precincts and the votes per voter in them for Mr. Agee, as noted above, is a statistically significant .991. This is much higher than those for any of the non-African American candidates in this election.<sup>125</sup>

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(Houston and Henry Counties); Section 5 objection letter, John R. Dunne to Dorman Walker (Dec. 3, 1990) (Perry County); Section 5 objection letter, William Bradford Reynolds to Gladys D. Prentice (May 4, 1987) (city of Leeds); Section 5 objection letter, William Bradford Reynolds to Charles E. Bailey (Dec. 1, 1986) (Alexander City); Section 5 objection letter, William Bradford Reynolds to John C. Jay., Jr. (Oct. 21, 1985) (city of Greensboro); Section 5 objection letter, William Bradford Reynolds to David F. Steele (Feb. 17, 1984) (Monroe County); Section 5 objection letter, William Bradford Reynolds to E. Paul Jones (May 10, 1983) (Tallapoosa County); Section 5 objection letter, William Bradford Reynolds to Robert G. Kendall (July 26, 1982) (Conecuh County); Section 5 objection letter, William Bradford Reynolds to Calvin Steindorff (July 19, 1982) (Butler County).

<sup>124</sup> *Brown v. Board of School Comm’rs of Mobile County*, 542 F. Supp. 1078, 1094 (S.D. Ala. 1982), *aff’d*, 706 F.2d 1103 (11th Cir.), *aff’d*, 464 U.S. 1005 (1983).

<sup>125</sup> Supplemental report of Richard L. Engstrom, PhD., Dillard Trial Exhibit 1, *Dillard v. Chilton County Commission*, CA No. 2:87-1179-T (M.D. Ala.) (Doc.148), at 7.

The scatterplot of the election returns for Agee by precinct taken from the expert's report<sup>126</sup> provides a pictorial display of this stark racially polarized voting in Chilton County (copy attached).

Because of white bloc voting against black candidates, only two African Americans have been elected to statewide office in the entire history of Alabama. The late Oscar Adams was appointed to a place on the Alabama Supreme Court in 1980; he won re-election in 1982 and 1988.<sup>127</sup> When Justice Adams retired in 1993, the governor appointed another African American, Ralph Cook, to replace him. Justice Cook was re-elected in 1994. Subsequently, a second African American, John England, was appointed to the Alabama Supreme Court, but both Cook and England were defeated by white challengers when they stood for re-election in 2000. Currently no African American holds a statewide elected office. There are 27 African Americans serving in the Alabama House of Representatives and eight African Americans in the Alabama Senate. All but one have been elected from majority-black districts. The sole exception is House District 85, which is 47.8 percent black, and in which the incumbent African-American member was re-elected in 2002.<sup>128</sup>

On November 2, 2004, voters in Alabama defeated proposed amendments to the 1901 Alabama Constitution that would have removed language requiring the racial segregation of schools, struck language inserted in 1956 as part of Alabama's official campaign of massive resistance to federally imposed desegregation, and repealed the poll tax provisions.<sup>129</sup> Federal and state court decrees over the years have made all these segregationist provisions unenforceable<sup>130</sup>, and the business, civic and education leaders of the state, backed by Alabama's Republican Governor, urged the electorate to remove these relics of official white supremacy as a sign to the world that Alabamians were ready to put their racist past behind them. Their plan backfired when, in the racially polarized referendum election, the majority-white electorate refused to go along.

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<sup>126</sup> *Id.* at 6.

<sup>127</sup> *SCLC v. Sessions*, 56 F.3d 1281, 1288 (11<sup>th</sup> Cir. 1995).

<sup>128</sup> See generally, <http://www.legislature.state.al.us/house/housemaps2001/Act%20No.%202001-729%20Letter.pdf> and <http://www.legislature.state.al.us/senate/senatemaps2001/Act%20No.%202001-727%20Preclearance%20Letter.pdf>.

<sup>129</sup> Ala. Act No. 2003-203; Referendum results certified Dec. 17, 2004, <http://www.sos.state.al.us/downloads/dl3.cfm?trgturl=election/2004/general/statecert-amendment2-recount-12-17-2004.pdf&trgtfile=statecert-amendment2-recount-12-17-2004.pdf>.

<sup>130</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954); *Opinion of the Justices No. 333*, 624 So.2d 107 (1993); *Knight v. Alabama*, 787 F. Supp. 1030, 1104 (N.D. Ala. 1991), *aff'd in relevant part*, 14 F.3d 1534 (11<sup>th</sup> Cir. 1994); *United States v. Alabama*, 252 F. Supp. 95 (M.D. Ala. 1966).

In the campaign leading up to the November 2, 2004, vote on what was called “Amendment Two,” white religious conservatives told voters that striking the 1956 segregationist amendments, which took away the right of all children to a public education, would open the door for courts to order an increase in taxes.<sup>131</sup> The opponents of Amendment Two contended that education was not a right but a gift. “Every child in the state of Alabama has the gift [of education] given to them at taxpayers’ expense. . . .”<sup>132</sup> This was the same message that had rallied Alabama’s electorate a year earlier to defeat Governor Riley’s proposed amendments to the Alabama Constitution relaxing some of the racially inspired provisions that prevent state and local government from raising property taxes, which in Alabama are by far the lowest in all fifty states.<sup>133</sup> In the 2003 referendum election on “Amendment One,” only thirteen predominately black counties had voted to amend the property tax restrictions.<sup>134</sup>

Later in 2004, a federal district court made findings of fact that Alabama’s antiquated 1901 Constitution, which disfranchised African Americans and retained Reconstruction era tax restrictions, was directly linked with the Voting Rights Act of 1965 and the continuing underfunding of public education in Alabama:

The convergence in one year, 1971, of four federal mandates requiring re-enfranchisement of African-Americans, reapportionment of the Alabama legislature, fair reassessment of all property subject to taxes, and school desegregation, had thus created a “perfect storm” that threatened the historical constitutional scheme whites had designed to shield their property from taxation by officials elected by black voters for the benefit of black students.<sup>135</sup>

Enforcement of the Voting Rights Act in Alabama thus placed increased demands on the 1901 Constitution to block state and local governments, now subject to black voter influence or

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<sup>131</sup> *E.g.*, Phillip Rawls, “50 years after Brown, Alabama votes on segregation language,” AP, Oct. 9, 2004 (online edition).

<sup>132</sup> Taylor Bright, “Language stems from 1956 session,” BIRMINGHAM POST-HERALD, Nov. 27, 2004 (online edition).

<sup>133</sup> Jeffrey Gettleman, “A Tax Increase? \$1.2 Billion? Alabamians, It Seems, Say No,” THE NEW YORK TIMES, Sept. 6, 2003 (online edition).

<sup>134</sup> Glenn Feldman, *The Status Quo Society, The Rope of Religion, and the New Racism*, in GLENN FELDMAN (ED.), *POLITICS AND RELIGION IN THE WHITE SOUTH* 287, 335 (Lexington, KY: University of Kentucky Press, 2004).

<sup>135</sup> *Knight v. Alabama*, CA No. 2:83-cv-1676-HLM (N.D. Ala., Oct. 5, 2004) (Doc. 3294) manu. op. at 44, *appeal pending*, No. 05-11527-BB (11th Cir.) (citations omitted). *See* [http://www.knightsims.com/pdf/05\\_03\\_08/DC%20Opinion%2010-5-04%20entire.pdf](http://www.knightsims.com/pdf/05_03_08/DC%20Opinion%2010-5-04%20entire.pdf).

control, from using the democratic process to improve public education and other public services. The federal court found:

There is a direct line of continuity between the property tax provisions of the 1875 Constitution, the 1901 Constitution, and the amendments up to 1978. . . . The historical fears of white property owners, particularly those residing in the Black Belt, that black majorities in their counties would eventually become fully enfranchised and raise their property taxes motivated the property tax provisions in the 1901 Constitution and the amendments to it in 1971 and 1978...

Indeed, Black Belt and urban industrial interests successfully used the argument that it is unfair for white property owners to pay for the education of blacks to produce all the state constitutional barriers to property taxes from 1875 to the present, including the 1971 and 1978 Lid Bill amendments.<sup>136</sup>

Thus, the defeat in 2003 of some of the racially discriminatory property tax provisions in the Alabama Constitution and the defeat in 2004 of constitutional amendments that would have removed segregation era provisions demonstrate the stranglehold Alabama's history of discrimination still has on its electorate. The State Superintendent of Education complained that demagogues had convinced voters that state government could not be trusted with their money, and historians at Alabama universities said the vote "had clear racial meaning."<sup>137</sup> State legislators did not try to pass another bill to remove the racist constitutional provisions in the 2006 regular session, because 2006 is an election year and "[e]veryone is scared to do anything."<sup>138</sup>

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<sup>136</sup> *Id.* at 47-49.

<sup>137</sup> Glenn Feldman, *The Status Quo Society, The Rope of Religion, and the New Racism*, in GLENN FELDMAN (ED.), *POLITICS AND RELIGION IN THE WHITE SOUTH* 287, 335 (Lexington, KY: University of Kentucky Press, 2004). Auburn historian Wayne Flynt said the 1956 amendment the voters refused to strike from the state constitution was "right at the core of the whole racist defense. In many ways it is the centerpiece of the whole racist defense of segregation." Taylor Bright, "Language stems from 1956 session," *BIRMINGHAM POST-HERALD*, Nov. 27, 2004 (online edition).

<sup>138</sup> AP, "Legislators: segregation language likely won't be issue in 2006," *MONTGOMERY ADVERTISER*, Dec. 12, 2005 (online edition) (quoting Rep. John Rogers).

Rep. James Buskey, D-Mobile, who pushed for the 2004 constitutional amendment, said he's afraid groups would hyperpoliticize the issue during a year when the Legislature, governor and many other state offices are up for election. "It needs to come up, but based on the climate that's out there now it would not do any good for the state of Alabama to suffer a second defeat on that amendment," Buskey said.

## CONCLUSION

The overall lesson to be taken from Alabama's experience with the Voting Rights Act since 1982 is clear: The preclearance provisions of Section 5 have become the most important guarantors of equal political and electoral power for African Americans in Alabama, first, in their recurring negotiations with white officials and, second, in their ability to restrain the efforts of white elected officials, reacting to their majority-white constituents, to reverse the progress in voting rights and restore the old, discriminatory practices.

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*Id.* See also Editorial, "'Tis the season (for politics)," BIRMINGHAM NEWS, Dec. 17, 2005 (online edition); Editorial, "Time to do their duty," HUNTSVILLE TIMES, Dec. 9, 2005 (online edition). The Speaker of the House agreed: "What the state can ill afford is another failed effort to remove the racist language," House Speaker Seth Hammett, D-Andalusia, said. "I don't want us to announce around the world that we are doing this unless we know this time that we can get it done." Phillip Rawls, "Constitution wording may wait," MONTGOMERY ADVERTISER, Jan. 23, 2006 (online edition).

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE  
MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

JOHN DILLARD, et al., )  
 )  
 Plaintiffs, )  
 )  
 v. ) CIVIL ACTION NO.  
 ) 2: 85cv1332-MHT  
 CRENSHAW COUNTY, etc., et al., )  
 )  
 Defendants. )

**LIST OF LOCAL JURISDICTIONS INCLUDED IN DEFENDANT CLASS**

In 1987 most of the defendant class members received separate civil action numbers, ranging from 87cv1150 to 87cv1316.

Legend for types of election systems:

SMD	single-member districts
MMD	multi-member districts
LV	limited voting (each voter casts one vote)
LV2	limited voting (each voter casts two votes)
CV	cumulative voting
PAL	plurality at-large voting (no runoff)
A	no change ordered (claim still pending)



All Dillard county commissions

JURISDICTION	CA Number	TYPE	SEATS	FINAL JUDG
Baldwin	87-T-1159-N	SMD	7	09/03/02
Bibb	87-T-1162-N	SMD	5	
Butler	92-T-243-N	SMD	5	
Calhoun	85-T-1332-N	SMD	5	
Chilton	87-T-1179-N	CV	7	
Coffee	85-T-1332-N	SMD	7	
Colbert	87-T-1186-N	SMD	6	12/09/05
Covington	85-T-1332-N	A	5	
Crenshaw	85-T-1332-N	SMD	5	
Escambia	85-T-1332-N	SMD	5	?
Etowah	85-T-1332-N	SMD	6	
Fayette	87-T-1208-N	SMD	6	
Geneva	85-T-1332-N	A		
Lawrence	85-T-1332-N	SMD	5	
Lee	85-T-1332-N	SMD	5	
Morgan	85-T-1332-N	A		
Pickens	85-T-1332-N	SMD	5	
Shelby	85-T-1332-N	SMD	9	
St. Clair	85-T-1332-N	A		
Talladega	85-T-1332-N	SMD	5	

Dillard v. Crenshaw county boards of education

JURISDICTION	Jurisdiction	TYPE	SEATS
Baldwin	Baldwin	SMD	7
Bibb	Bibb	SMD	5
Calhoun	Calhoun	SMD	5
Chilton	Chilton	CV	7
Coffee	Coffee	SMD	7
Colbert	Colbert	SMD	6
Covington	Covington	SMD	7
Crenshaw	Crenshaw	SMD	5
Elmore	Elmore	SMD	7
Escambia	Escambia	SMD	7
Fayette	Fayette	SMD	6
Geneva	Geneva	A	
Hale	Hale	SMD	5
Houston	Houston	SMD	7
Jefferson	Jefferson	A	
Lamar	Lamar	SMD	7
Lee	Lee	SMD	7
Limestone	Limestone	SMD	7
Montgomery	Montgomery	SMD	6
Pickens	Pickens	SMD	5
Pike	Pike	SMD	6
Randolph	Randolph	SMD	7
Shelby	Shelby	A	
St. Clair	St. Clair	A	
Talladega	Talladega	SMD	5
Tallapoosa	Tallapoosa	SMD	5
Tuscaloosa	Tuscaloosa	SMD	7
Washington	Washington	SMD	5

Dillard v. Crenshaw Municipalities

JURISDICTION	COUNTY	TYPE	SEATS
Abbeville	Henry	SMD	5
Alex City	Tallapoosa	SMD	6
Aliceville	Pickens	SMD	5
Ariton	Dale	LV	5
Ashland	Clay	SMD	5
Athens	Limestone	SMD	5
Atmore	Escambia	SMD	5
Autaugaville	Autauga	MMD	5
Bay Minette	Baldwin	SMD	5
Boligee	Greene	MMD	5
Brantley	Crenshaw	MMD	5
Brent	Brent	SMD	5
Brewton	Escambia	SMD	5
Calera	Shelby	SMD	5
Camden	Wilcox	SMD	5
Carbon Hill	Walker	SMD	7
Carrollton	Pickens	SMD	5
Castleberry	Conecuh	MMD	5
Cedar Bluff	Cherokee	SMD	5
Centre	Cherokee	CV	7
Centreville	Bibb	SMD	5
Cherokee	Colbert	SMD	5
Childersburg	Talladega	SMD	5
Citronelle	Mobile	SMD	5
Clayton	Barbour	SMD	5
Clio	Barbour	SMD	5
Coffeeville	Clarke	MMD	5
Collinsville	Dekalb	SMD	5
Columbia	Houston	SMD	5
Columbiana	Shelby	SMD	5
Cottonwood	Houston	SMD	5
Courtland	Lawrence	SMD	5
Cuba	Sumter	LV	5
Dadeville	Tallapoosa	SMD	5
Daleville	Dale	PAL	5
Daviston	Tallapoosa	SMD	5
Decatur	Morgan	SMD	5
Detroit	Lamar	SMD	5
Dora	Walker	LV	7
Dozier	Crenshaw	MMD	6
Elba	Coffee	SMD	5
Eufaula	Barbour	SMD	5
Faunsdale	Marengo	CV	5
Fayette	Fayette	SMD	5
Five Points	Chambers	MMD	5
Flomaton	Escambia	SMD	5
Floral	Covington	SMD	5
Florence	Lauderdale	SMD	6
Foley	Baldwin	SMD	5
Fort Deposit	Lowndes	SMD	5
Frisco City	Monroe	SMD	5
Fulton	Clarke	LV2	5
Geneva	Geneva	SMD	7
Georgiana	Butler	SMD	5
Glenwood	Crenshaw	MMD	5
Gordo	Pickens	SMD	5

Dillard v. Crenshaw Municipalities

Goshen	Pike	LV	5
Graysville	Jefferson	SMD	5
Greensboro	Hale	SMD	5
Grove Hill	Clarke	SMD	5
Guin	Marion	CV	7
Guntersville	Marshall	SMD	7
Harpersville	Shelby	MMD	5
Hartford	Geneva	SMD	5
Hayneville	Lowndes	MMD	5
Headland	Henry	SMD	5
Heath	Covington	CV	5
Heflin	Cleburne	SMD	5
Helena	Shelby	A	
Hueytown	Jefferson	SMD	5
Irondale	Jefferson	SMD	7
Jemison	Chilton	SMD	5
Kinsey	Houston	LV	7
Leeds	Jefferson	SMD	5
Lincoln	Talladega	SMD	5
Linden	Marengo	SMD	5
Lineville	Clay	SMD	5
Lipscomb	Jefferson	SMD	5
Livingston	Sumter	SMD	5
Loachapoaka	Lee	LV	5
Louisville	Barbour	SMD	5
Lowndesboro	Lowndes	LV	5
Luverne	Crenshaw	SMD	5
Madison	Madison	SMD	7
Madrid	Houston	LV	5
Maplesville	Chilton	SMD	5
Margaret	St. Clair	MMD	5
McKenzie	Butler	SMD	5
Midland City	Dale	SMD	5
Millport	Lamar	SMD	5
Millry	Washington	MMD	5
Monroeville	Monroe	SMD	6
Moulton	Lawrence	SMD	5
Moundville	Hale	SMD	5
Mount Vernon	Mobile	SMD	5
Muscle Shoals	Colbert	A	
Myrtlewood	Marengo	CV	5
New Brockton	Coffee	SMD	5
Newton	Dale	SMD	5
Newville	Henry		5
North Johns	Jefferson	SMD	5
Notasulga	Macon	SMD	5
Opp	Covington	SMD	5
Orrville	Dallas	LV	5
Parrish	Walker	SMD	5
Pell City	St. Clair	SMD	5
Pennington	Choctaw	LV	5
Pickensville	Pickens	LV	5
Piedmont	Calhoun	SMD	7
Pinckard	Dale	SMD	5
Pine Apple	Wilcox	LV	5
Pine Hill	Wilcox	A	
Prattville	Autauga	SMD	7

Dillard v. Crenshaw Municipalities

Providence	Marengo	LV	5
Ragland	St. Clair	SMD	5
Reform	Pickens	SMD	5
River Falls	Covington	MMD	5
Riverside	St. Clair	SMD	5
Rockford	Coosa	MMD	5
Russellville	Franklin	SMD	5
Rutledge	Crenshaw	LV	5
Sheffield	Colbert	SMD	5
Silas	Choctaw	LV	5
Springville	St. Clair	SMD	7
Sulligent	Lamar	SMD	5
Tallassee	Elmore	SMD	7
Tarrant	Jefferson	SMD	5
Thomaston	Marengo	SMD	5
Thomasville	Clarke	SMD	5
Town Creek	Lawrence	SMD	5
Toxey	Choctaw	LV	5
Tuscumbia	Colbert	SMD	5
Valley	Chambers	A	
Vincent	Shelby	SMD	5
Wadley	Randolph	SMD	5
Waldo	Talladega	LV	5
Warrior	Jefferson	SMD	5
Waverly	Chambers	LV	5
Webb	Houston	LV	5
Wedowee	Randolph	SMD	5
West Blocton	Bibb	SMD	5
Wetumpka	Elmore	SMD	5
Wilsonville	Shelby	PAL	7
Wilton	Shelby	SMD	5

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE  
MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

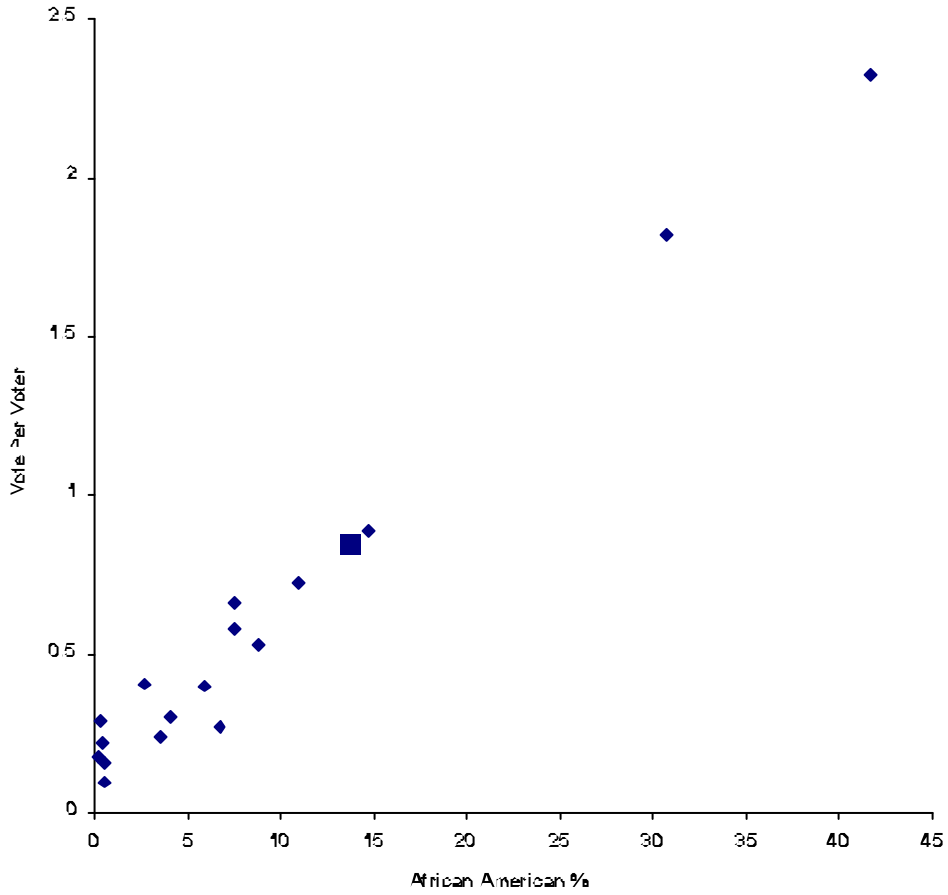
JOHN DILLARD, et al., )  
 )  
 ) Plaintiffs, )  
 )  
 ) ROBERT R. BINION and JOHN WRIGHT, )  
 )  
 ) Plaintiffs-Intervenors, )  
 )  
 ) GILBERT GREEN and CALVIN JONES, )  
 ) JR., )  
 )  
 ) Plaintiffs-Intervenors )  
 )  
 ) v. ) CIVIL ACTION NO.  
 ) 2:87-1179-T  
 )  
 ) CHILTON COUNTY COMMISSION, and )  
 ) PROBATE JUDGE ROBERT B. MARTIN, in )  
 ) his official capacity, )  
 )  
 ) Defendants. )

**DILLARD AND BINION PLAINTIFFS' TRIAL BRIEF  
EXHIBIT B**

**Scatterplot from Dillard Trial Exhibit 1  
Supplemental Report of Dr. Richard L. Engstrom**

FIGURE 1

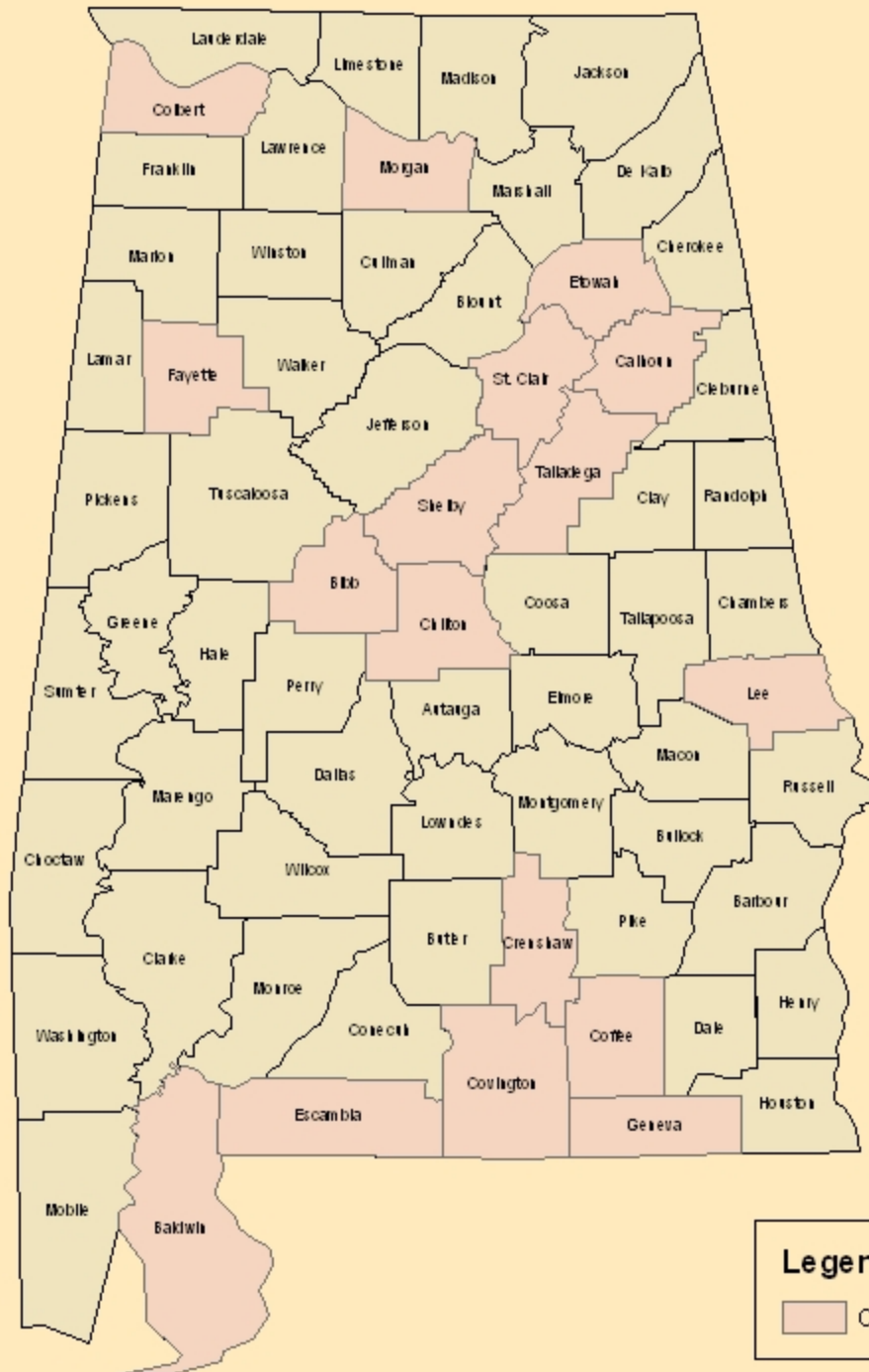
**Agee Vote by % African American**






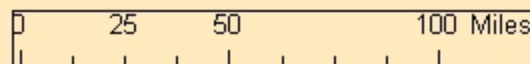


# Dillard Impact: County Commissions



## Legend

 Change in election



Map prepared by:  
Nick Quinton  
Data provided by:  
James Blaksher

