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THE 1982 AMENDMENTS TO THE VOTING RIGHTS ACT: A LEGISLATIVE HISTORY

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This [A]ct flows from a clear and simple wrong. Its only purpose is to right that wrong. Millions of Americans are denied the right to vote because of their color. This law will ensure them the right to vote. The wrong is one which no American, in his heart, can justify. The right is one which no American, true to our principles, can deny.¹

President Lyndon B. Johnson
August 6, 1965

Probably the "most important civil rights bill [ever] enacted by Congress,"² the Voting Rights Act of 1965³ marked the "end of the beginning"⁴ in the drive for black access to the ballot box. The Act was, and following the enactment of the 1982 amendments still is, a complex statute. The temporary provisions apply principally to Southern States, and the permanent provisions affect voting practices throughout the country.⁵ First amended in 1970,⁶ then again in 1975,⁷ the Act underwent a dramatic substantive transformation in June of 1982.⁸ In order to understand fully how the 1982 amendments came about, and how the legislative process

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The editorial views expressed in this article are those of the authors and are not intended to reflect the position of any member of the Congress of the United States.

¹ Public Papers of the Presidents of the United States, Book II, at 840 (1965) U.S. Government Printing Office: 1966 (Washington, D.C.) [hereinafter cited as *Public Papers*].

² *Committee on the Judiciary*, H.R. REP. No. 227, 97th Cong. (1965), reprinted in 1st Sess. 3 (1981) [hereinafter cited as *House Report*].

³ 42 U.S.C. §§ 1973(a)-(p) (1976).

⁴ See *Public Papers*, supra note 1, at 636 (paraphrasing Winston Churchill).

⁵ 42 U.S.C. §§ 1973(a)-(p) (1976). The national provisions of the Act include a permanent ban of literacy tests, added in 1975 to the temporary ban in effect until that time, § 4(e)(1); elimination of the poll tax, § 10(a); criminal penalties for using intimidation or the like to influence the exercise of the vote, § 11(b), et seq.; criminal penalties for altering ballots once cast, § 12(b) et seq.; and, in Title II, provisions that apply requirements for bilingual ballots through a nationwide "trigger," § 203(b). *Id.* Title III provides for enforcement of the Twenty-sixth Amendment's grant of suffrage to eighteen year-olds. *Id.*

⁶ Pub. L. No. 91-285, 84 Stat. 315 (1970).

⁷ Pub. L. No. 94-73, 89 Stat. 400 (1975).

⁸ Pub. L. No. 97-205, 96 Stat. 131 (1982).

affected their form and content, it is necessary to review the original act, its early amendments, and the Supreme Court decision that galvanized support for change.

I. THE ACT

As originally passed, the Voting Rights Act sought to suspend the use of certain tests and devices⁹ that historically frustrated blacks¹⁰ from exercising their Fifteenth Amendment rights.¹¹ The Act accomplished this feat by eliminating the use of such tests or devices in states and counties, including all parts of covered states,¹² (a) that maintained them as a precondition to registration and voting on November 1, 1964, and (b) in which less than fifty percent of the total voting-age population was registered on November 1, 1964, or in which less than fifty percent of those registered voted in the Presidential election held in that month.¹³ These jurisdictions were subsequently required to submit all new qualifications, prerequisites, standards, practices, or procedures with respect to voting¹⁴ to the Justice

⁹ 42 U.S.C. § 1973b(c) (1976). As defined in § 4(c), the phrase "test or device" means "that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class." *Id.*

¹⁰ 42 U.S.C. § 1973b(a) (1976). In the first sentence of § 4(a), which is 257 words long, only citizens who face voting discrimination "on account of race or color" were protected. *Id.* The second sentence, added in 1975, extends the protection by reference to members of a "language minority group," as defined in § 14(c)(3). *Id.*

¹¹ 42 U.S.C. § 1973b(a) (1976). Ratified on February 3, 1870, but often unenforced, the provisions of the Fifteenth Amendment are as follows:

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XV.

¹² See *United States v. Sheffield*, 435 U.S. 110, 117-34 (1978) (§ 5 applies to all entities having power over any aspect of electoral process).

¹³ 42 U.S.C. § 1973b(b) (1976) (§ 4(b) of Act).

¹⁴ 42 U.S.C. § 1973c (1976) (§ 5 of Act). In *Allen v. State Board of Elections*, the Supreme Court analyzed the legislative history to support the view "that Congress intended to reach any State enactment which altered the election law of a covered State in even a minor way." 393 U.S. 544, 566 (1976). Section 5 now provides in relevant part:

Whenever a State or political subdivision . . . [covered under § 4] . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on . . . [the applicable date of comparison: *i.e.*, November 1, 1964 for jurisdictions covered in 1965; November 1, 1968 for those covered in 1970; and November 1, 1972 for those covered in 1975] . . . such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the ef-

Department or to the Federal District Court for the District of Columbia to assure that the proposed change did not discriminate against covered minorities.¹⁵ The "preclearance" requirement suggested that pre-existing standards and practices that discriminated against minorities were not subject to federal approval unless altered. The Act contained no affirmative language requiring jurisdictions to review and discard practices, such as the election of candidates on an at-large basis, because of their possible impact on the weight of the minority vote.

The only means of escape for jurisdictions covered by preclearance was through a little-used process commonly known as "bailout". Under section 4(a) of the Act, a covered state or political subdivision could bailout only if it could prove, to the satisfaction of the Federal Court for the District of Columbia, that it had not used a discriminatory test or device for a specified period of years prior to the filing of a declaratory judgment petition. At first, the applicable period of years lasted from 1965 until 1970, or five years. Then, with the extension of the Act until 1975, the time period was similarly extended to ten years. In 1975, when the Act was extended a second time for seven additional years, the time period became seventeen years, once again reaching back to 1965. Few jurisdictions that came under the original coverage of section 4(a), therefore, could qualify for bailout. Those jurisdictions which qualified for bailout were required to establish that, while they may have maintained a prohibited test or device in 1964, they did not operate it in a discriminatory manner within the prescribed period.¹⁶ Since subdivisions of states were ineligible for bailout until the states themselves became eligible,¹⁷ no legislative

fact of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in [§ 4(f)(2), protecting language minorities], and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice or procedure: *Provided*, That such qualification . . . has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2248 of Title 28 and any appeal shall lie to the Supreme Court.

42 U.S.C. § 1973b(b) (1976).

¹⁵ 42 U.S.C. § 1973b(b) (1976).

¹⁶ Since the last extension of the Act in 1975, several jurisdictions have been able to bail out. *See, e.g.*, *Oklahoma v. United States*, No. 76-1250 (D.D.C. May 12, 1978) (Choctaw and McCurtain Counties); *New Mexico v. United States*, No. 76-0067 (D.D.C. July 30, 1976) (Curry, McKinley, and Otero Counties); and *Maine v. United States*, No. 75-2125 (D.D.C. Nov. 25, 1975) (eighteen municipalities in Maine).

¹⁷ *See City of Rome v. United States*, 446 U.S. 156 (1980). In *City of Rome*, the Supreme Court observed that:

[T]he city [of Rome, Georgia] comes within the Act because it is part of a covered State. Under the plain language of the statute, then, it appears that any bailout action to exempt the city must be filed by, and seek to exempt all of, the State of Georgia.

Id. at 167.

incentive existed for positive change to local election practices. Many covered jurisdictions, while quick to complain about the onus of submitting their election changes to federal scrutiny, nevertheless were content to retain the *status quo*.

The first major shift in the focus of the Act took place in 1975 when Hispanics, Asian-Americans, Native Alaskans, and Native Americans (Indians), formed a coalition with black civil rights organizations to be included under the umbrella of the Act.¹⁸ Since Hispanics were often the objects of discriminatory voting tactics, they properly argued that the formulas that triggered administrative preclearance for blacks should protect them as well. The thrust of the 1975 amendments, however, went

¹⁸ 42 U.S.C. § 1973b(b) (1976). The inclusion of Hispanics, and other similarly situated "language minorities," was not based on Fifteenth Amendment considerations, as were the Act's original provisions, but rather flowed from equal protection considerations under the Fourteenth Amendment. Section 4(f) of the Act provides:

(f)(1) The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English. In addition they have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language. The Congress further finds that, where State and local officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process. In many areas of the country, this exclusion is aggravated by acts of physical, economic, and political intimidation. The Congress declares that, in order to enforce the guarantees of the [F]ourteenth and [F]ifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting English-only elections, and by prescribing other remedial devices.

(2) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.

(3) In addition to the meaning given the term under subsection (c) of this section, the term "test or device" shall also mean any practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language, where the Director of the Census determines that more than five per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority. With respect to subsection (b) of this section, the term "test or device," as defined in this subsection, shall be employed only in making the determinations under the third sentence of that subsection.

(4) Whenever any State or political subdivision subject to the prohibitions of the second sentence of subsection (a) of this section provides any registration or voting notices, forms, instructions, assistance, or other materials or information, relating to the electoral process, including ballots, it shall provide them in the language of the applicable language minority group as well as in the English language: *Provided*, That where the language of the applicable minority group is oral or unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.

well beyond addressing the Hispanics' demands. A new Title II broadened the sweep of the Act to establish a nationwide requirement that entire states and local governments provide bilingual "registration of voting notices, forms, instructions, assistance, or other materials of information relating to the electoral process, including ballots."¹⁹ Eligibility for special bilingual treatment essentially was based on the heritage of the voter, and not on his or her inability to speak or read English.²⁰ In 1965, no one group was specifically identified. Journalist Theodore H. White described the expansion of civil rights objectives during the subsequent decade as "the explosive renaissance of the idea of equality that transformed American politics"²¹

As the expiration date for the preclearance provisions neared, groups within the institutional civil rights community began to organize for what they anticipated would be a difficult political fight. The Leadership Conference on Civil Rights, to which 165 organizations belonged, hired its first full-time executive director in preparation for the legislative campaign which lay ahead.²² Moreover, elements of the Leadership Conference, most notably the National Urban League, began to mobilize their local affiliates for the purpose of contacting congressional offices in affected states and applying political and media pressure designed to achieved a voting majority on the House and Senate floors.²³ Seventy-five percent of all League affiliates did so during 1981-82.²⁴

¹⁹ 42 U.S.C. § 1973aa-1a(b) (1976) (§ 203(b) of Act).

²⁰ *Id.* The trigger under which this requirement operated was a determination by the director of the census that more than five percent of the citizens of voting age in the jurisdiction in question were members of a single language minority and that the illiteracy rate of such persons as a group was higher than the nation at large. The underlying presumption at work here was the belief that failure to complete the fifth grade, which defined illiteracy in the Act, was caused by a language deficiency or, that illiteracy in English implied that the voter was literate in another tongue. The definition of "single language minority," contained in § 203(e) does not, however, mention language, saying only that the term encompasses "persons who are American Indian, Asian American, Alaskan Natives, or of Spanish *heritage*." (emphasis added) 42 U.S.C. § 1973aa-1a(e) (1976).

²¹ WHITE, AMERICA IN SEARCH OF ITSELF 103 (1982). White enumerated several aspects of this expansion of civil rights goals, emphasizing that:

[O]ld phrases only dimly recall the transformation of the times: "Liberation," "Participation," "Affirmative Action," "Outreach," "Goals and Timetables." And all of them added up to a paradox. What began as a quest to expand the definition of freedom was to end in the centralization of federal controls on a scale never envisioned by those who dreamed the dreams of the early sixties and still remembered John F. Kennedy calling, "I say this country must move again." New words like "quotas," "entitlements," and the officialese "protected classes" replaced older words, changing the nature of the American government.

Id.

²² Pinderhughes, *Interest Groups and the Extension of the Voting Rights Act in 1982*, Paper delivered at the Annual Meeting of the American Political Science Association, Chicago, Illinois, September 1-4, 1983, at 13 [hereinafter cited as *Pinderhughes Paper*].

²³ *Id.* at 14. See also *infra* note 61.

²⁴ *Id.*

Two other members of the conference, the National Education Association (NEA) and the NAACP, would become instrumental in transmitting local sentiment to the Congress. For this purpose, the NEA organized mailings to two contact members in each of the country's 435 congressional districts,²⁵ and the NAACP set up telephone banks so that local members could notify their representatives of their feelings. These banks were set up for a week prior to action in the House subcommittee, full committee, and on the floor.²⁶ In all, the banks were available to local members for nearly nine months.²⁷

II. *Mobile v. Bolden*

The portion of the Act that generated the most intense interest during congressional consideration of the 1982 amendments was section 2, a little-used provision that tracked the language of the Fifteenth Amendment.²⁸ The nationwide applicability of section 2 was originally designed to appease Southerners who felt that their constituencies were being singled out for extraordinary federal action. Section 2, however,

²⁵ *Id.* at 15.

²⁶ *Id.* at 16.

²⁷ *Id.*

²⁸ As originally enacted, § 2 provided:

Sec. 2. No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f) (2).

42 U.S.C. § 1973 (1976).

In his plurality opinion, joined by Chief Justice Burger and Justices Powell and Rehnquist (Justices Blackmun and Stevens filed separate opinions concurring in the result), Justice Stewart concluded that:

[A]ssuming, for present purposes, that there exists a private right of action to enforce this statutory provision, it is apparent that the language of § 2 no more than elaborates upon that of the Fifteenth Amendment, and the sparse legislative history of § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself.

Section 2 was an uncontroversial provision in proposed legislation whose other provisions engendered protracted dispute. The House Report on the bill simply recited that § 2 "grants . . . a right to be free from enactment or enforcement of voting qualifications . . . or practices which deny or abridge the right to vote on account of race or color." H.R. Rep. No. 439, 89th Cong., 1st Sess. 23 (1965). See also S. Rep. No. 162, 89th Cong., 1st Sess. pt. 3 at 19-20 (1965). The view that this section simply restated the prohibitions already contained in the Fifteenth Amendment was expressed without contradiction during the Senate hearings. Senator Dirksen indicated at one point that all states, whether or not covered by the preclearance provisions of §5 of the proposed legislation, were prohibited from discriminating against Negro voters by §2, which he termed "almost a rephrasing of the [Fifteenth] [A]mendment." Attorney General Katzenbach agreed. See Voting Rights: Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., pt. 1, p. 208 (1965).

had never been successfully used as the basis for litigation.²⁹ When the Supreme Court issued its 1980 plurality opinion in *Mobile v. Bolden*,³⁰ nine months preceeding the start of the 97th Congress, new and important issues surrounding the Act came into focus for the first time.

In three separate opinions which agreed on the holding, the *Mobile* Court ruled that a jurisdiction such as Mobile, Alabama, though possessed of a significant minority population,³¹ could not be found to have violated the Fourteenth or Fifteenth Amendment (or section 2) unless its election machinery, including the procedures which accompanied it, were conceived or operated with a discriminatory intent or purpose.³² In *Mobile*, the governing body was a city commission composed of three members elected at-large. Since 1911, when the city created the commission under authorization from the Alabama legislature,³³ no black had ever been elected under the at-large system, and until 1973, none had tried.³⁴

The suit in *Mobile* was originally brought as a class action "on behalf of all Negro citizens of Mobile." The complaint alleged that the at-large election process "unfairly diluted the voting strength of Negroes in violation of §2 of the Voting Rights Act of 1965, of the Fourteenth Amendment, and of the Fifteenth Amendment."³⁵ The plaintiffs prevailed in both the district court and upon appeal before the Fifth Circuit Court of Appeals. The Fifth Circuit, though, like the Supreme Court,³⁶ found the statutory claim "at best problematic," since no successful dilution claim expressly founded on section 2 had been made previously.³⁷

The Supreme Court reversed the holdings of both lower courts. The plurality found that it did not have to go back to 1911 to determine *Mobile's* original purpose. The district court had already held that, since the Alabama Constitution had officially disenfranchised blacks in 1901, the city's adoption of an at-large system of elections in 1911 occurred in a

²⁹ *Mobile v. Bolden*, 446 U.S. 55, 60-61 (1980). See *Mobile v. Bolden*, 571 F.2d 238, 243 (5th Cir. 1978). The Fifth Circuit held against *Mobile* on Fourteenth Amendment grounds. *Id.* See generally Christopher, *The Constitutionality of the Voting Rights Act of 1965*, 18 STAN. L. REV. 1 (1965) (discussion of constitutionality of Act's unique provisions); Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523 (1973); Thernstrom, *The Odd Evolution of the Voting Rights Act*, 55 PUB. INTEREST 49 (1979) (comments on Act's history and present effect).

³⁰ 446 U.S. 55 (1980).

³¹ *Id.* at 58 n. 1. The *Mobile* Court found that the city's population was 35.4% black. *Id.*

³² See *id.* at 70 (citing *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1970)).

³³ *Id.* at 59.

³⁴ *Id.* at 73 n. 19.

³⁵ *Id.* at 58.

³⁶ See *supra* note 29.

³⁷ See *Bolden v. Mobile*, 571 F.2d 238, 243 (5th Cir. 1978). Dilution claims are based on the charge that electoral procedures, such as at-large systems in which one candidate is elected by a majority of those voting, may be used to "dilute," or to break down the voting power of a racial or ethnic minority. *Id.* at 243 n. 3.

"race-proof" environment and, therefore, "on its face was neutral" on the issue of discriminatory purpose.³⁸

The Supreme Court then examined whether Mobile's at-large system was being operated for a discriminatory purpose. The Justices began by noting that multimember districts such as Mobile's never have been unconstitutional *per se*³⁹ and that no official obstacles were present to prevent blacks from becoming candidates.⁴⁰ Moreover, the Court found that blacks voted and registered without hindrance⁴¹ and that blacks comprised the only active slating organization in the city.⁴² Lastly, the Court quoted the district court's finding that the only black candidates who had run for election to the commission "were young, inexperienced, and mounted extremely limited campaigns," receiving only "modest support from the black community."⁴³ The district court's findings led the Justices to the conclusion that, while black candidates had been defeated in their only attempt to gain membership to the city commission, the plaintiffs had failed in their argument that racial prejudice was the motivating cause.⁴⁴

The Court's decision in *Mobile*⁴⁵ reaffirmed its 1976 decision in *Washington v. Davis*⁴⁶ and reversed the view, previously held only in the Fifth Circuit, that Fourteenth and Fifteenth Amendment violations could be proven under an "effects" test.⁴⁷ The effects test was articulated in the Fifth Circuit's pre-*Washington* opinion in *Zimmer v. McKeithen*.⁴⁸ The plaintiffs in *Mobile* had hoped to have the effects test, proven principally through the use of statistical evidence, applied nationally. In order to bolster their position, they contended that the Court's 1973 decision in *White v. Regester*⁴⁹ had given license to the effects interpretation contained in *Zimmer*.

³⁸ *Bolden v. Mobile*, 423 F.Supp. 384, 397 (1976). See *Bolden v. Mobile*, 571 F.2d 238, 245 (5th Cir. 1978).

³⁹ *Mobile v. Bolden*, 446 U.S. 55, 66 (1980).

⁴⁰ *Id.* at 73.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 73 n. 19.

⁴⁴ *Mobile v. Bolden*, 446 U.S. 55, 73 n.19 (1980).

⁴⁵ See Note, 32 CASE W. RES. L. REV. 500 (1982) (more complete discussion of case law surrounding *Mobile* and dilution controversies generally).

⁴⁶ 426 U.S. 229 (1976). Although *Washington* was not a voting dilution case, the Supreme Court nevertheless held that *Washington's* requirement that Fourteenth Amendment violations be proved by a showing of discriminatory purpose "applies to claims of racial discrimination affecting voting just as it does to other claims of racial discrimination." *Mobile v. Bolden*, 446 U.S. 55, 67 (1980). See 426 U.S. at 240.

⁴⁷ *Mobile v. Bolden*, 446 U.S. 55, 71 (1980).

⁴⁸ 485 F.2d 1297 (5th Cir. 1973) (en blanc), *aff'd on other grounds sub nom.*, *East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976). *Zimmer* was approved by the Supreme Court "without approval of the constitutional view expressed" by the Fifth Circuit. *Mobile v. Bolden*, 446 U.S. 55, at n. 16 (1980) (citing *East Carroll*, *supra*, at 638).

⁴⁹ *White v. Regester*, 412 U.S. 755 (1973). *White* pre-dated the Fifth Circuit's decision in *Zimmer* and led to what the Supreme Court in *Mobile* labeled a "misunderstanding" of the law. *Mobile v. Bolden*, 446 U.S. 55, 71 (1980).

The Supreme Court, however, rejected the effects test, noting that previous decisions clarified that state action "that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose."⁵⁰ The *Mobile* Court also stated that dilution claims brought under the Equal Protection Clause of the Fourteenth Amendment were valid only if the purpose of the state action was "invidiously to minimize or cancel out the voting potential of racial or ethnic minorities."⁵¹ In his dissent, Justice White, who authored the Court's holding in *White v. Regester*, similarly pronounced that the intent test was indeed the proper standard.⁵² Justice White differed with the plurality, not in the test to be applied, but in their conclusions and in their application of the test to the facts.

The Supreme Court's decision in *Mobile* produced an avalanche of criticism, both in the media and within the civil rights community. The *Washington Post's* coverage described *Mobile* as a "major defeat for blacks and other minorities fighting electoral schemes that exclude them from office."⁵³ The *New York Times* similarly expressed concern, quoting the remarks of the plaintiff's attorney, James Blackshear, that the opinion represented "the biggest step backward in civil rights to come from the Nixon court."⁵⁴

Five days after the *Mobile* decision, on April 28, the *Post* took an editorial position which directly contradicted its news coverage, saying that:

[I]t is not at all clear that what the [J]ustices did was, from the legal point of view, wrong or even that their decision represented a serious setback to civil rights.

By opting for intent, or something close to it, a majority of the [C]ourt has cut down dozens, perhaps hundreds, of legal challenges that would have been made against existing systems or government or multimember districts. *It has also avoided the logical terminal point of those challenges: that election district lines must be drawn to give proportional representation to minorities.*⁵⁵

During the next few years, Blacksher's charge that *Mobile* was a step back

⁵⁰ *Mobile v. Bolden*, 446 U.S. 55, 62 (1980).

⁵¹ *Id.* at 66.

⁵² *Id.* at 101. In *Mobile*, Justice White stated:

[A] plurality of the Court agreed with the lower courts "that maintenance of *Mobile's* at-large system for election of City Commissioners violates the Fourteenth and Fifteenth Amendments only if it is motivated by a racially discriminatory purpose.

Id.

⁵³ *Washington Post*, Apr. 23, 1980, § A, at 5.

⁵⁴ *N.Y. Times*, Apr. 23, 1980, § A, at 22.

⁵⁵ *Washington Post*, Apr. 28, 1980, § A, at 16 (emphasis added) (entitled, *The Mobile Decision*).

in civil rights enforcement and the *Post's* assertion that the Court's fear of the potential for proportional representation was well taken,⁵⁶ would come to summarize the divergent sides of a hotly contested political conflict. Eventually, the *Post* reversed its position, without explanation, in favor of the political position held by most of the civil rights spokesmen. Throughout consideration in the House of Representatives of amendments designed to alter section 2, the Reagan Administration was silent, as it had been during the 1980 campaign. As the Senate pondered the issues, the Administration became outspoken in support of a position rejected by the House. The amendments to section 2 ultimately became law, along with other changes in the Act, though many remain uncertain of their actual meaning.

II. HOUSE OF REPRESENTATIVES CONSIDERATION

A. *The Subcommittee*

On April 7, 1982, Congressman Peter W. Rodino, Jr., the longtime chairman of the House Judiciary Committee, introduced a bill (H.E. 3112) designed to implement substantive changes in the Voting Rights Act supported by the leadership of the civil rights community. The first of the bill's three sections again extended the number of years in which a jurisdiction covered by the preclearance provisions of section 5 would have to establish that it had not discriminatorily used a prohibited test or device. Under the 1975 amendments, the qualifying period had been seventeen years, or from August 6, 1965 until August 6, 1982. The Rodino bill proposed to extend the period of another ten years, or until August 6, 1992, for a total of twenty-seven years. The second section of H.R. 3112 similarly proposed extension of the bilingual requirements of Title II from August 6, 1985 until August 6, 1992, to coincide with the expiration of the preclearance qualifying period.⁵⁷ The third section of H.R. 3112 contained an amendment to section 2 of the Act. If adopted, it would have deleted the words "to deny or abridge" from the existing Act, substituting in their place "in a manner which results in a denial or abridgement of." As amended, section 2 would read:

⁵⁶ See *Mobile v. Bolden*, 446 U.S. 55, 75-76 (1980). The *Mobile* Court answered what the plurality believed to be Justice Marshall's quest for a federal constitutional right to elect candidates in proportion to its numbers by saying that "[w]hatever appeal the dissenting opinion's view may have as a matter of political theory, it is not the law. The Equal Protection Clause of the Fourteenth Amendment does not require proportional representation as an imperative of political organization." *Id.*

⁵⁷ H.R. 6219, 94th Cong., 1st Sess. (1975). In 1975, the House bill, H.R. 6219 extended the qualifying period for preclearance under § 5 for ten years, and created the bilingual requirements of title II, giving them the same expiration date. *Id.* The Senate bill, S. 1279, likewise extended the qualifying period for preclearance, though only for a five year period. S. 1279, 94 Cong., 1st Sess. (1975). The conferees compromised on the preclearance period, settling at seven years, or until August 6, 1982. The bilingual provisions, however, remained at the House-passed term of ten years.

No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision *in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2).*⁵⁸

Shortly after introduction, H.R. 3112 was referred to the House Judiciary Subcommittee on Civil and Constitutional Rights, the Subcommittee that reviewed the earlier amendments. The chairman was Congressman Don Edwards of California. The Democrats on the Subcommittee were Congressmen Robert W. Kastenmeier of Wisconsin, a senior member who, like Edwards, had supported the original Act as well as the 1970 and 1975 amendments; Patricia Schroeder of Colorado, not yet senior enough to chair a subcommittee like Edwards and Kastenmeier, but a veteran of the 1975 amendments which she had endorsed; and Harold Washington of Chicago, Illinois, the Subcommittee's only black member, serving his first term in Congress. The minority, or Republican side on the House,⁵⁹ had three members on the Subcommittee. The senior minority representative, or Ranking Member, was Henry J. Hyde, also of Chicago, a conservative fourth-term representative who had first encountered the Act during consideration of the 1975 amendments, and had voted for their adoption despite concern over section 5. The other Republicans were two members who had never been recorded on the Act while in the Congress: F. James Sensenbrenner, Jr. of Wisconsin, and Dan Lungren, of California, both in their second terms.

Two days after H.R. 3112 was introduced, Congressman Hyde submitted what he called a compromise bill (H.R. 3198). H.R. 3198 proposed a nationwide plan that would give any aggrieved party, as well as the Attorney General of the United States, the right to bring suit against jurisdictions then covered by the Act, for the purpose of instituting judicial preclearance to penalize a pattern or practice of voting rights abuse.⁶⁰

On May 6, 1982, the first of eighteen days of hearings before the Subcommittee began. The tone of the debate was immediately clear. Chair-

⁵⁸ Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2, 96 Stat. 131, 134 (1982) (emphasis added to designate new language). See *supra* note 22 (discussion of § 2 in *Mobile*).

⁵⁹ In the Senate, the Republicans had seized majority control with Ronald Reagan's victory in the 1980 Presidential elections. In the House, Republicans remained a minority party. As of June 20, 1981, when the Voting Rights Act Amendments were nearing full Judiciary Committee consideration, there were 242 Democrats and 190 Republicans (with three vacancies) in the House, and 53 Republicans and 47 Democrats in the Senate.

⁶⁰ H.R. 3198, 97th Cong., 1st Sess. (1981). In addition to the Hyde and Rodino bills, three others were referred to the Subcommittee: H.R. 1407, introduced on January 28, 1981, by Paul N. McCloskey, Jr. (R-Cal.); H.R. 1731, introduced on February 5, 1981, by Robert McClory (R-Ill.); and H.R. 2942, introduced on March 31, 1981, by William M. Thomas (R-Cal.), *et al.* All three bills involved changes to the bilingual ballot provisions of titles I and II.

man Edwards' opening statement noted that, prior to the passage of the Act in 1965, only twenty-nine percent of the eligible blacks were registered to vote in states covered by the preclearance provisions of section 5, while seventy-three percent of their white counterparts were registered. He compared those statistics with the 1980 figures, which estimated that fifty-seven percent of black voters had become registered.⁶¹ Citing similar statistics in Texas, a state drawn under preclearance by the 1975 amendments, Chairman Edwards sought to demonstrate that the progress had been made over the seven-year life of its experience under the Act.⁶²

Congressman Hyde's opening statement focused on preclearance, a departure from the traditional constitutional allocation of electoral responsibilities to the states. Preclearance was a precedent that had also bothered him in 1975. While endorsing the Act's record, he called for a middle ground between the Rodino bill and a total abolition of preclearance, a position favored by some Senators.⁶³ Congressman Washington was next to speak. The issue, he explained, "is not whether the law should be extended for all time, but whether it should be extended for a mere ten years."⁶⁴ Con-

⁶¹ *Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 97th Cong., 1st Sess., Part I at 1-2 (1981)[hereinafter cited as *House Hearings*].

According to Ms. Pinderhughes, *supra*, note 22, the lobbying campaign in favor of H.R. 3112 was orchestrated principally by 25 groups known as the "Voting Rights Act Steering Committee." The Steering Committee was chaired by the Leadership Conference's newly appointed executive director, Ralph Neas (*see supra* text accompanying notes 22-24) and its members met each Friday for several hours throughout the sixteen months of congressional consideration. *Id.* at 18. The Steering Committee "worked very hard to control the testimony" before the Edwards Subcommittee and, according to one participant, both Edwards and Rodino cooperated. *Id.* at 19. *See infra* text accompanying note 293.

⁶² *Id.* Although President Lyndon B. Johnson signed the original Act in 1965, the preclearance formula was drafted in a fashion that effectively excluded Texas.

⁶³ *Id.* Congressman Hyde explained his position on the compromise as a proposal:

[T]o substitute for the mandatory preclearance imposed on a few States a new requirement which would permit the Attorney General, or an aggrieved private party, to bring an action in any Federal court, not only the District Court for the District of Columbia, as present law requires, and, if a pattern or practice of voting rights abuses can be shown, impose preclearance for a maximum of 4 [additional] years.

This sanction would apply to all areas of the country where such activity can be shown. The salutary effect of my bill would be that all States would be treated equally, and would recognize the fact that voting rights abuses in those previously selected jurisdictions are no better or worse than the rest of the country.

It would, in effect, grant parole to States and localities which have sought to rehabilitate themselves, because improvements have occurred, and recognition of this is overdue.

My bill also permits the intervention by the Attorney General in any private voting rights suit anywhere in the country. It prospectively broadens the nationwide definition of voting rights abuse beyond just intent, attaching to the rest of the country the same effects test which has applied selectively since 1965.

Id. at 2-3; *see infra* note 114.

⁶⁴ *House Hearings*, *supra* note 61, at 4.

gressman Sensenbrenner expressed no apprehensions about preclearance, but did state his concern about applying bilingual provisions in jurisdictions in which little demand existed for ballots in a language other than English.⁶⁵ Congressman Lungren, the only remaining member present, endorsed the Hyde proposal, saying that it should be used as a vehicle for discussion. Moreover, Lungren noted that the bilingual provisions of the Act did not expire until 1985 and suggested that an extension in 1982 might be premature.⁶⁶

Witnesses appearing that first day, and for several days thereafter, represented virtually every component of a political coalition that called itself the Leadership Conference on Civil Rights. This was the umbrella group that had become largely responsible for the articulation of civil rights policy before the Congress and the public. Vernon Jordan was the first to appear before the Subcommittee, on behalf of the National Urban League. Jordan immediately raised the point that in 1965, "none of the 106 Congressmen from the 11 Southern States [which the Act subsequently covered] voted for final passage" and that one, South Carolina Senator Strom Thurmond, "was opposed to the Voting Rights Act in 1965 . . . [and] is opposed to it now."⁶⁷ Although everyone knew, Jordan did not mention that Senator Thurmond was then the new Chairman of the House Judiciary's sister committee in the Senate, through which the 1982 amendments would inevitably have to pass before becoming law.

Elaine Jones, appearing with Jordan, represented the NAACP Legal Defense Fund, and argued against the Hyde proposal in response to a question from Majority counsel. "Mr. Hyde's bill," she said, would mean that, in order to apply preclearance, "you would have to go into court on a case-by-case basis and engage in long, protracted litigation, costing a lot of money."⁶⁸ Under the administrative process then operative in section 5, the burden of proof lay upon the covered jurisdictions, and the federal government provided the legal expertise. Hyde replied that Jones' statement was fair concerning the difference between his bill and H.R. 3112. Congressman Hyde, however, added that he had "a preference for court proceedings where the rights and rules of evidence and burdens of proof have full play."⁶⁹

⁶⁵ *Id.* at 5.

⁶⁶ *Id.* at 6.

⁶⁷ *Id.* at 9. States wholly covered by the § 4 trigger in 1965 were Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina and Virginia. The amendments adopted in 1975 brought the States of Alaska, Arizona and Texas under the preclearance requirements of section 5. See *House Report, supra* note 2, at 4-7.

⁶⁸ *Id.* at 14.

⁶⁹ *Id.* Congressman Hyde emphasized that quick justice is available in: [A]n administrative proceeding with one man sitting behind the desk, but I think we have a court system to adjudicate rights under the rule of law.

I am for all the rights for all the parties that a court proceeding can provide. When they are with you, it's great, but when they are against you, you may want someone more impartial.

Later that same day, Rolando L. Rios, speaking for the Southwest Voter Registration Education Project (SVREP), placed the change of the Rodino bill to section 2 in context. "We would ask," he said, "for an amendment to section 2 in such a way that the effects test would apply similar to the one the Department of Justice uses [under preclearance in section 5]."⁷⁰ William Taylor, from the Center for National Policy Review at Catholic University Law School, later said the change would have an even broader application.⁷¹ Harvard Law School Professor Archibald Cox, representing Common Cause, was asked about the potential for mandatory proportional representation flowing from the adoption of the Rodino amendments to section 2. Professor Cox replied, "I haven't thought of that question, to be honest."⁷²

On May 6, 1982, Congressman Hyde introduced a second bill (H.R. 3473) that made the Rodino amendment to section 2 prospective only. H.R. 3473, therefore, applied to future changes in election laws and procedures in much the same way that section 5 did, and altered pattern of practice jurisdiction to allow private plaintiffs to require preclearance for any jurisdiction for a four-year maximum. The next day, Atlanta Mayor Maynard Jackson accused Congressman Hyde on national television of being "anti-black." The charge came in answer to a question about the Hyde bills when the two appeared together on *The MacNeil-Lehrer Report*.⁷³ Hyde's response was delayed by the comments of others, but just before the program ended, he expressed his view that such charges were "not helpful" in securing the compromise he felt inevitable if the Act's preclearance provisions were to be retained after Senate consideration.⁷⁴ Without congressional action most of the jurisdictions originally covered in 1965 would become eligible for bailout on August 6, 1982.

On June 5, and again a week later, the Subcommittee moved its hearings to Austin, Texas, and Montgomery, Alabama, respectively, as an early consensus for support for the Act began to emerge. Hyde and Sensen-

⁷⁰ *Id.* at 53.

⁷¹ *Id.* at 277. Professor Taylor said that the effects test in the Rodino bill would apply to "any current practice regardless of when it was originally enacted." *Id.*

⁷² *Id.* at 190. In a carefully worded letter sent to the Subcommittee two months later, on July 8, 1981, Professor Cox wrote "that the Rodino proposal would not make proportional representation a per se test of the legality of an electoral arrangement." *Id.* at Part 3, 2665.

⁷³ Transcript, *Voting Rights on Trial 6, The MacNeil-Lehrer Report* (Air date: May 7, 1981). Jackson accused Hyde, saying:

I think [the Hyde bills are] totally unjustified. The idea, by the way, of killing the guts of the [A]ct, I think, will achieve exactly what the opponents of the [A]ct want to achieve, and that is to gut the [A]ct, to reduce the growing but still inadequate, fair, constitutional, political rights of Afro-Americans. *I think the motivation is anti-black*; I believe it is discriminatorily intended, and I think it stinks.

Id. (emphasis added).

⁷⁴ *Id.* at 7. See *infra* text accompanying notes 186-97.

brenner accompanied Edwards and Washington to Austin, where all-day hearings produced a legion of support for H.R. 3112 from within the Hispanic community. Joaquin Avila, Associate Counsel to the Mexican-American Defense and Educational Fund (MALDEF), argued that Texas still needed administrative preclearance under section 5. Avila cited a case involving Medina County (Texas) as an example of the expense and difficulty MALDEF had repeatedly encountered. In Medina County, white county officials had tried to restrict Hispanic political influence through gerrymandering efforts, not once but four times in the seven years since the Act was amended to include the State.⁷⁵ Alfredo Arriola, the next witness, outlined similar difficulties encountered in Jim Wells County (Texas), in which after three attempts, the county commissioners still had not adopted a redistricting plan that could pass muster with the Department of Justice.⁷⁶

Though the principal focus of the Austin hearing was on section 5, most of the witnesses also endorsed the Rodino language on section 2. The lone exception was University of Texas Law School Professor William H. White. Speaking for himself and Former Texas Congressman and Ambassador-at-Large Robert Krueger, Professor White answered a query by Congressman Sensenbrenner, saying that he was against the proposed language, principally because of the difficulty of applying a "results" test nationwide. Professor White equated the results language with the effects standard in section 5.⁷⁷

When the Subcommittee met in Montgomery on June 12, rumors existed about the possibility of a demonstration orchestrated by local chapters of the Ku Klux Klan that might be held outside the United States Courthouse where the hearings were scheduled. Though no demonstration ever materialized, the presence of the Subcommittee in the capital of Alabama, which had been the destination of Dr. Martin Luther King's famous Selma march for voting rights in 1965, added dramatic flavor to the occasion. As the testimony unfolded in a packed courtroom, allegations of ongoing voting rights abuses within the State of Alabama began to surface.

The first witness, Montgomery Mayor Emory Folmar, was immediately put on the defensive by Congressman Washington.⁷⁸ The subject was "reidentification," a sometimes selectively applied procedure under which voters must re-register in order to allow registrars to purge the registration rolls of those who are deceased, have moved to another jurisdiction, or are otherwise ineligible to vote. Noting that the number of registered

⁷⁵ See *House Hearings*, *supra* note 61, at Part 2, 932.

⁷⁶ *Id.* at 1183-85.

⁷⁷ *Id.* at 923. See *infra* text accompanying notes 239-93.

⁷⁸ Mayor Folmar was the Republican nominee for Governor of Alabama in November, 1982, losing to his Democratic opponent, former Governor George C. Wallace. Congressman Washington, meanwhile, was elected the first black mayor of Chicago, Illinois on that same date.

blacks often seemed to fall following re-identification, Washington asked how Mayor Folmar could account for the disproportionate reduction in the number of black registrants.⁷⁹ Mayor Folmar denied that he was appearing as a supporter for re-identification or that any "chicanery" was involved in the scheme. Chairman Edwards broke in, however, emphasizing the "hardship" to working blacks caused by registration hours limited to 9:00a.m. to 4:00p.m.⁸⁰

The testimony of another witness, Dr. Joe Reed, Chairman of the Alabama Democratic Conference, seemed to have an immediate impact on Congressman Hyde. Dr. Reed complained that, though a 1978 Alabama law permitted "each county Board of Registrars to appoint deputy registrars to assist the county in the registration process," only a dozen had done so.⁸¹ Moreover, polling places were often located "in white private establishments such as stores, churches and other private businesses." The locations, he argued, had a chilling effect on black participation and the distance which black voters had to travel in order to vote often required that they have transportation.⁸² Congressman Hyde, who had hinted at a shift in position in Austin, erupted, embracing Dr. Reed's and Chairman Edwards' concerns.⁸³

⁷⁹ See *Mobile v. Bolden*, 446 U.S. 55 (1980); *House Hearings*, *supra* note 61, at Part 2.

⁸⁰ *House Hearings*, *supra* note 61, at 1521-22. Chairman Edwards further challenged Mayor Folmar, saying:

In Choctaw County, in Alabama, how do you explain this? In Choctaw County the re-registration bill that was passed by the legislature puts the burden on the voter to register to vote from the hours of 9 to 4.

Now, this is when a poor black is working, perhaps out in the field, 30, 40 miles from home. He or she has to find his or her way 20, 30, 40 miles and re-identify or re-register or something like that when it is very easy for most white people in Choctaw County to reregister.

They have much better transportation and so forth.

How can we sitting up here look at that in any way and say that it is designed and does not reduce the number of black people who can vote?

Id.

⁸¹ *Id.* at 1530.

⁸² *Id.* at 1531.

⁸³ *Id.* at 1584. Congressman Hyde stated:

I want to say that I have listened with great interest and concern, and I will tell you, registration hours from 9 to 4 [are] outrageous. It is absolutely designed to keep people who are working and who have difficulty in traveling from registering.

If that persists and exists, it is more than wrong

The lack of deputy registrars, only 12 counties have them, demonstrates a clear lack of enthusiasm for getting people registered, obviously.

The location of voting places, if what Mr. Reed says is true—and I don't doubt that it is—is a subtle intimidation of black people and is also wrong.

The lack of blacks working as polling officials is wrong.

On assistance voting, I have very mixed feelings because I can tell you that [it] is very abused up in my area [Chicago] where the polling worker does the voting for the voter [and] makes sure they vote for the right party. [Now], we have heard where it is all done on the table; there is no privacy.

Maggie Bozeman, from Aliceville, Alabama, next spoke of white policemen stationed inside polling places, taking pictures of people who assist blacks. Again, Hyde exploded, "Taking pictures is outrageous! That is nonsense!" He asked whether the secret ballot existed in Pickens County, Alabama: "You vote on a table in front of everybody?"

"Yes," Bozeman replied, "Open house. Just like here now."

"Does that still go on?" asked Hyde.

"1980."

"Everybody sees how you vote?"

"Yes."

"No booths, no curtains, nothing like that?"

"In one precinct where there were the Justice Department, the last election, the Presidential election, they had little curtains in Aliceville, but in other parts of the county, still open house in 1980."

"How widespread is that?" Hyde continued. "How many polling places does that occur in?"

"Give or take, about 15."⁸⁴

The testimony continued in much the same vein for the balance of the morning and throughout the afternoon, when witnesses from nearby Mississippi appeared. On June 17, five days later, Congressman Hyde introduced a third bill (H.R. 3948) this time moving still further toward the position of Rodino and the Leadership Conference.⁸⁵

That is outrageous, absolutely outrageous.

Id. at Part 2, 1584. *See id.* at Part 2, 1196-97 (exchange between Minority Counsel and Texas State Representative Al Edwards).

⁸⁴ *Id.* at 1585-87.

⁸⁵ *Id.* at Part 3, 1815-17.

In a hearing that same day, Congressman Hyde explained why he had adopted his new position:

Mr. Chairman, during the past 2 months, two things have become very clear to me about the Voting Rights Act.

First, there are some jurisdictions which deserve to remain covered, both because there are persistent vestiges of discrimination present in their electoral system and because no constructive steps have been taken to alter that fact.

Second, the bailout provision which is contained in the law now serves as a disincentive to progressive change, while locking in those jurisdictions which have tried to improve conditions and which have been [covered] by the law for nearly 17 years.

I intend to submit a new proposal, pursuant to an evolutionary process which my thinking has undergone during these hearings. My bill would extend the administrative preclearance provision indefinitely, subject to a possibility for a jurisdiction to bailout, effective immediately.

In my judgement, this new proposal would strengthen the [A]ct, not weaken it, by providing incentives for jurisdictions now covered to do more than maintain the status quo presently required under the 1965 [A]ct.

Under my proposal, a covered jurisdiction, be it a State or political subdivision thereof, will be eligible to file for a bailout if it can show to the satisfaction of the local Federal court that:

One, it has not discriminated by way of a test or device for 10 years preceding the filing of the action.

Throughout the hearings, the Department of Justice had declined to appear before the Subcommittee to express its views on any of the bills being considered. Publicly, the reason given was the pending nomination before the Senate of the Civil Rights Division's new chief, William Bradford Reynolds. Privately, some sources reportedly feared that Reynolds might say something that would endanger his confirmation.⁸⁶ On June 15, as if to delay taking a position even further, President Reagan sent a letter to Attorney General William French Smith asking for comprehensive recommendations by October 1.⁸⁷ On June 30, reporters quoted Justice Department spokesman Kenneth Starr as saying that the Hyde bailout outlined in H.R. 3948 was among the alternatives the Attorney General was considering.⁸⁸ In the *New York Times*, columnist Tom Wicker categorized the Hyde proposal as "reasonable" and urged the President to embrace it.⁸⁹ The editorial page of the *Washington Star* also endorsed the Hyde proposal.⁹⁰ When the President subsequently addressed the NAACP's annual convention on June 29 in Denver, Colorado, he simply

Two, that it has not had a substantial objection during that same 10-year period.

And three, that it submitted all proposals which it was legally obligated to submit.

My bill would also require one last category. It would require that a local Federal court be satisfied that the covered jurisdiction applying for bailout had made constructive efforts to enhance minority participation in the electoral process. Such efforts could include the lengthening of registration hours, the lengthening of voting hours, creating of same-day registration, a shift from at-large to single-member districts and the like. This provision is designed to encourage jurisdictions to [re]evaluate their existing practices with an eye toward making the electoral system more accessible to all eligible voters.

My bill also provides that the court granting bailout would retain jurisdiction for 5 years and that the case could be reopened upon notice of the Attorney General or an aggrieved party should any backsliding occur. . . .

I think we must, in fairness, recognize progress and compliance with the letter and the spirit of the law where it has occurred and provide an incentive for jurisdictions to comply, while retaining administrative preclearance for those areas as yet recalcitrant.

Id.

⁸⁶ Babcock, *White House Delays Taking Stand on Voting Rights Act*, *Washington Post*, June 30, 1981, § A, at 7.

⁸⁷ Broder, . . . *And the Voting Act*, *Washington Post*, July 1, 1981, § A, at 25. David S. Broder explained the President's political problem as a controversy that:

has divided Reagan's own Republican Party. Some Republicans favor a straight extension of the law as it stands. Others seek to remove the regional onus by making the same pre-clearance requirements apply nationwide. And still others seek to make it easier for the covered areas to bail out of federal supervision by demonstrating their recent adherence to non-discriminatory practices.

Id.

⁸⁸ *Id.*

⁸⁹ Wicker, *No Ambiguity Justified*, *N.Y. Times*, July 21, 1981, § A, at 15.

⁹⁰ *Washington Star*, June 30, 1981, § A, at 11 (entitled, *Devious Strategy on Voting Rights*).

referred to the report he had requested from the Justice Department.⁹¹

On June 24, the Subcommittee gathered for the only day of hearings devoted exclusively to the section 2 issue.⁹² In preparation for this day,

⁹¹ See *Public Papers, supra* note 1, at 699 (Administration of Ronald Reagan). President Reagan told the NAACP that:

Until a decision is announced, you should know this: I regard voting as the most sacred right of free men and women. We have not sacrificed and fought and toiled to protect that right so that now we can sit back and permit a barrier to come between a secret ballot and any citizen who makes a choice to cast it. Nothing—nothing will change that as long as I am in a position to uphold the Constitution of the United States.

Id.

⁹² See *House Hearings, supra* note 61, at Part 3, 1981-2067. Congressman Hyde later said that an “intimidating” style of lobbying on the part of the civil rights lobby “limit[ed] serious debate” on such issues in the House. He cited as an example the experience of a black witness who supported an alternative to the Rodino/Leadership Conference approach. See Keady & Cochran, *Section 5 of the Voting Rights Act: A Time for Revision*, 69 Ky. L. J. 4 (1981). See also *Hearings on the Voting Rights Act Before the Senate Subcommittee on the Constitution of the Committee on the Judiciary*, 97th Cong., 2nd Sess. 342-66 [hereinafter cited as *Senate Hearings*].

When he appeared before the Subcommittee, Mr. Wilbur O. Colom, an attorney from Columbus, Mississippi, engaged in the following exchange with Hyde:

MR. HYDE: Now, Mr. Colom, if I may make a statement. I think it took some courage on your part to come up here today and differ with the views that we have repeatedly heard that no reasonable person would wish to alter the existing act because nothing has changed in the covered jurisdictions.

Since you decided to testify, have you encountered any pressure not to testify?

MR. COLOM: I think I called up and I talked to the [M]inority counsel. It stopped being pressure and started being intimidation at some point. Apparently, someone called most of my colleagues in Mississippi and I found my friends, my black friends in the Republican Party, calling me up asking if I was coming up here to testify against the Voting Rights Act. They just simply didn't believe it, and even went so far, that my father — who's cochairman of the Democratic Party in one county—said that he had [never] heard such vicious things about his son.

MR. HYDE: You were getting calls trying to persuade you not to come and testify?

MR. COLOM: Yes. They were calls of disbelief. Actually, that's the reason it was so interesting. I mean, I do a great deal of controversial litigation. I'm an ACLU attorney.

MR. HYDE: You're what we call a civil rights type.

MR. COLOM: I do a great deal of civil rights litigation, but it was offensive to me when friends of mine called me and told me such things. It would be like someone, to use an example, a John Bircher having one of his friends call him up and say I understand you are Communist.

MR. HYDE: That's the way you felt?

MR. COLOM: That's the way I felt. I consider myself a strong advocate of civil rights. I think people are operating off of labels.

I'm also offended by this premise that blacks must be uniform, that we must all march to the same drummer, that when someone blows the horn up in New York or Washington or Atlanta, that we must all line up like ants and not say a word, contrary to what's being put forth as “the national black view.”

MR. HYDE: These attempts were made to discourage you from coming up here and testifying?

Mr. Edwards requested that Chairman Rodino and Congressman Hyde state their positions on section 2 before the witnesses appeared. Hyde's response, dated June 23, supported the intent standard articulated in *Mobile*, contending that it was totally consistent with the Court's earlier ruling in *White v. Regester*.⁹³ Congressman Hyde also endorsed the *White* requirement that the political process be "equally open" to all and suggested a disclaimer which "specifically states that proportional representation is not necessarily required as a result of statistical imbalance and polarized voting."⁹⁴ Rodino's original letter, in response to Edwards' request, was shelved in favor of another, dated July 14, after the Hyde submission and after the June 24 testimony. Chairman Rodino again claimed that what Congress had intended in 1965 was a broader standard than the Court had interpreted in *Mobile*. Rodino argued that the test for identifying discrimination in section 2 should be governed by the extent to which racial and language minority groups are denied "access" to the political process "through vote dilution and other discriminatory devices and practices."⁹⁵

Dr. C. Vann Woodward of Yale University and Dr. J. Morgan Kousser of the California Institute of Technology opened with largely historical analyses before the Subcommittee. James Blacksher, who had argued *Mobile v. Bolden* before the Supreme Court, and David Walbert, who was scheduled to argue another Fourteenth Amendment case before the Court (*Rogers v. Lodge*),⁹⁶ then appeared with Armand Derfner, coordinator for the Voting Rights Act Project for the Joint Center for Political Studies in Washington, D.C. Blacksher stated that the amended section 2 in the Rodino Bill would restore to black Southerners the right to challenge alleged discriminatory election schemes which were developing before *Mobile*.⁹⁷ Walbert suggested that, notwithstanding the Court's claim to the contrary in *Mobile*, the intent test first became a constitutional standard in 1976 with *Washington v. Davis*, an employment case.⁹⁸

MR. COLOM: I'm kind of a hard knocker. The talk made me more determined than ever.

MR. HYDE: Did you get calls from any political figures?

MR. COLOM: No political figures.

House Hearings, *supra* note 61, at 2102-103.

Mr. Colom later represented the prevailing party before the Supreme Court in *Mississippi University for Women v. Hogan*. 102 S. Ct. 3331 (1982). *Hogan*, in which Justice Sandra Day O'Connor wrote the majority opinion, stands for the proposition that gender-based classifications require "an exceedingly persuasive justification" to sustain their constitutionality. *Id.*

⁹³ See *supra* note 49.

⁹⁴ Letter from Henry J. Hyde to Don Edwards (June 23, 1981); see *House Hearings*, *supra* note 61, at Part 3, 2045-46 (text of letter).

⁹⁵ Letter from Peter W. Rodino, Jr. to Don Edwards (July 14, 1981); see *House Hearings*, *supra* note 61, at Part 3, 2046-47.

⁹⁶ 458 U.S. 613 (1982). See *infra* text accompanying notes 403-21.

⁹⁷ See *House Hearings*, *supra* note 61, at Part 3, 2038.

⁹⁸ *Id.* at 2029. See also *supra* text accompanying notes 46-48.

The focus of much of the testimony was on the meaning of the Court's 1973 decision in *White v. Regester*. Justice White, who authored the opinion in *White*, wrote in *Mobile* that *White* had been governed by an intent test. The plurality of six justices agreed.⁹⁹

White v. Regester, the case that was endorsed by both sides in *Mobile*, actually contained two decisions. The first involved Dallas County, Texas, with a black minority population, and the second centered on Bexar County, Texas, with an Hispanic minority. The case came about as a result of an attempt to reapportion each county into a multimember district, allegedly diluting the voting strength of the resident racial and ethnic minorities.¹⁰⁰ In *White*, no requirement proscribed that candidates reside in subdistricts or wards within Dallas County, therefore permitting all candidates to be selected from outside the black residential area.¹⁰¹ As recently as 1970, the same year that *White* arose, the Dallas Committee for Responsible Government (DCRG), a white-dominated organization, effectively controlled Democratic Party candidate slating and relied on "racial campaign tactics in white precincts to defeat candidates who had the overwhelming support of the black community."¹⁰² The *White* Court sustained the district court's decision to break the Dallas County multimember districts into single member districts.¹⁰³

In Bexar County, the facts were less clear. Justice White, however, writing for a six-member majority including five members of the plurality in *Mobile*, concluded that the "totality of the circumstances" operated to "invidiously exclude[] Mexican-Americans from effective participation in political life [in Bexar County]."¹⁰⁴ Justice White placed the burden of proof on the plaintiffs to:

[P]roduce evidence to support findings that the political processes leading to nomination and election were not *equally open*

⁹⁹ *Mobile v. Bolden*, 446 U.S. 55, 101-102 (1980). In *Mobile*, Justice White's dissent seemed founded on his concern that although:

[T]he plurality . . . apparently reaffirms the vitality of *White v. Regester* and *Whitcomb v. Chavis*, . . . [it] nonetheless casts aside the meticulous application of . . . these cases by both the District Court and the Court of Appeals by concluding that the evidence they relied upon "fell far short of showing" purposeful discrimination.

Id.

He subsequently observed that:

Although the plurality does acknowledge that the presence of the indicia relied on in *Zimmer* may afford some evidence of a discriminatory purpose, it concludes that the evidence relied upon by the court below was most assuredly insufficient to prove an unconstitutional discriminatory purpose in the present case.

Id.

¹⁰⁰ *White v. Regester*, 412 U.S. 755, 759 (1973).

¹⁰¹ *Id.* at 766, 766 n. 10.

¹⁰² *Id.* at 766-67.

¹⁰³ *Id.* at 767.

¹⁰⁴ *Id.* at 769.

to participation by the group in question [and] that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.¹⁰⁵

The Subcommittee's final hearing took place in Washington on July 13. By then, over one hundred witnesses had been heard and two field hearings had taken place. The Administration still had not testified. In a personal memorandum, sent directly to the President on July 20, Congressman Hyde urged President Reagan to support extension of preclearance and bilingual procedures. In the final paragraph of his memorandum, Hyde noted that the President should consider the black

¹⁰⁵ *Id.* at 766 (emphasis added) (citing *Whitcomb v. Chavis*, 403 U.S. 124, 149-50 (1971)). In testimony before the Subcommittee on June 24, Armand Derfner had the following exchange with Minority counsel:

COUNSEL: [T]here's some concern on this side [of the aisle] as to what the Rodino bill purports to say and what it ultimately will be interpreted to say.

Mr. Derfner, you quoted the test in *White v. Regester*, which was set forth in the dissenting opinion of Justice Marshall and also by reference in the pluralist opinion in *Mobile*. Do you have any problem with that burden of proof?

MR. DERFNER: No; again, except for the one issue that did come into a number of cases, which was the issue of responsiveness. And for the reason we discussed, I think responsiveness is just a kind of murky, subjective standard which does put the courts at sea. Apart from that, the *White* standard, I think, was a manageable standard.

COUNSEL: Why shouldn't the subcommittee adopt that, then, in statutory form?

MR. DERFNER: I'd have to look again at the exact language, but that might well be a promising approach.

COUNSEL: Let me read it to you. It says:

It is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiff's burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open—

And I underscore this language for my own purposes of emphasis —

Equally open to participation by the group in question; that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

MR. DERFNER: I think that's a good definition. Again, there is one caveat. Some people have argued that "equally open" has reference to former barriers, such as white primaries or such as formal or legal obstructions. I think that argument is not proper and has not been accepted in general. If there is no problem about that caveat, then I think that standard is good.

COUNSEL: That can take the form of report language, could it not?

MR. DERFNER: Quite properly so.

COUNSEL: That's just a clarification?

MR. DERFNER: I think so.

Id. at 2052-53.

The "equally open" language in *White v. Regester*, which was the subject of their discussion, though ultimately a part of the bill (see *infra* text accompanying notes 328-36), was never integrated into the House bill.

perspective.¹⁰⁶ Following completion of the hearings, negotiations on a bill that could garner bipartisan support immediately began in earnest between the three Republican and four Democratic members of the Subcommittee. On July 21, while talks were still in progress, the seven members unanimously reported H.R. 3112 by voice vote to the full Judiciary Committee.¹⁰⁷

B. *The Full Committee*

During the week following the Subcommittee's action, daily meetings to achieve an acceptable compromise took place, often continuing well into the night. The thrust of the Hyde proposal, in which he was joined by Congressman Lungren, seemed to be acceptable to the Democratic leadership,¹⁰⁸ but efforts to amend the Hyde bailout by requiring a sixty percent minority voter registration and participation level as a precondition to bailout eligibility, combined with vague language suggesting mandatory financial assistance for minority candidates, soon created a deadlock.¹⁰⁹ A persistent flood of proposals and counterproposals continued until the full Committee began "markup," or consideration, of H.R. 3112.

¹⁰⁶ Memorandum from Congressman Henry J. Hyde to the President, at 8 (July 20, 1981). Hyde advised Reagan that:

If you move quickly, you may be able to broaden your constituency by eliminating a fear which plagues the black community most: that the time will soon return when they [are] literally unable to vote, or in the alternative, made to feel that they have no meaningful impact whatsoever on their destiny.

Id.

¹⁰⁷ *House Report*, *supra* note 2, at 3.

¹⁰⁸ *Id.* at 37. *See supra* note 85 (description of Hyde bailout).

¹⁰⁹ Staff Files, Committee on the Judiciary, United States House of Representatives. The actual language, in relevant part, of the Rodino counterproposal reads as follows, with particularly controversial portions in italics:

VOTING RIGHTS

"OUTLINE OF A PROPOSAL ON A BALLOT PROVISION"

Propose to amend Rodino bill on Voting Rights to appear substantially as follows:

Section 1 - [E]nacting clause

Section 2 - Would replace the current bailout procedure with a new bailout formula based on the approach described by Rep. Hyde but largely based on the Butler-Hyde "bailout" proposal of 1975.

- The operation of the new bailout would be delayed 5 years to give jurisdictions incentive to do better.

- Bailout suit or request for declaratory relief would be maintained in the District of Columbia. There is a formula for measuring voter participation—*require that a jurisdiction show that no fewer than 60% of its minority citizens register and vote as measured by most recent Presidential or Congressional election.*

- Showing of a good record of compliance by covered jurisdiction:

- no discrimination in voting
- no judgement of voting rights violations
- no Section 5 violations

During opening statements, hope for a bipartisan compromise still remained high. When the meeting was recessed at ten o'clock so that Democratic members could attend a party caucus, the Committee expected to reconvene at seven o'clock that evening. As it turned out, both that session and another on the next day were cancelled while negotiations between the two sides continued. Late in the evening of July 29, a dramatic meeting took place in the office of Chairman Rodino. Staff from both sides were present along with principals and representatives from the Leadership Conference. An agreement was reached and all present were personally polled. The next morning, the *New York Times* reported the event:

The compromise, negotiated by Representatives Don Edwards, Democrat of California, and Henry J. Hyde, Republican of Illinois, would allow counties within covered states to escape the [preclearance] requirement if they can prove that they have complied with the letter and spirit of the Voting Rights Act for 10 years.¹¹⁰

When the Committee finally met again at 1:45 on the afternoon of July 30, the compromise had collapsed, and frustration at a failure to reach a settlement was evident. During a five-minute speech, Tom Railsback, a moderate Republican from Illinois, expressed the hope that the Com-

- no Federal examiners or observers
- Some affirmative requirements to show that covered jurisdictions have provided:
 - access to polling places
 - *fair apportionment*
 - *no financial barriers to minority candidates*
 - inclusion of minorities as election officials
 - discouragement of at-large elections
 - Court retains jurisdiction for 10 years
- Section 3 - Same as original Rodino bill "results" test
- Section 4 - Same as original Rodino bill extends minority language provisions
- Section 5 - New section to offset possibility of political non-use of objections under Section 5 in anticipation of a bailout.

Id.

Some question arose as to what "fair apportionment" meant as well as what a covered jurisdiction must do to "discourage[] . . . at-large elections." *Id.*

¹¹⁰ Pear, *Accord Reported on Extending Voting Rights Act*, N. Y. Times, July 30, 1981, § A, at 14, col. 1. Robert Pear, who had covered the Act from the beginning, reported that: Mr. Edwards and Mr. Hyde said they had reached the agreement last night after more than five hours of consultations with members of the Congressional Black Caucus and other interested groups.

The compromise appeared to be fragile. Civil rights groups that support a continuation of present law and conservative members of Congress who oppose an extension said they would seek amendments to the proposals. . . .

Civil rights advocates who have been lobbying for continuation of the law in its present form were skeptical because they felt the plan makes exemptions easier to obtain.

Id.

mittee could achieve a compromise before Congress recessed for its early August break, an interlude that might allow interest groups on both sides to unravel agreements which remained unratified. His words acknowledged the good faith of the participants, particularly Chairman Edwards, Congressman Sensenbrenner and Congressman Lungren. Congressman Railsback, however, reserved his most pointed praise for Congressman Hyde, whose support he felt was crucial to success. He noted Hyde's conversion from apprehension over, to acceptance of, administrative preclearance, together with Hyde's creation of an entirely new bailout mechanism. This bailout mechanism went further than the existing Act by requiring adjustments to pre-1965 electoral practices as a precondition to eligibility. Railsback concluded with a plea for Hyde and the others to persevere.¹¹¹

General debate concluded at 2:40 P.M. on the 30th, and the Committee recessed subject to call of the Chair. Edwards then announced that the agreement of the previous night had fallen through. According to Edwards, the failure not only involved a misunderstanding among the participants, a defect which can often be repaired, but a fundamental substantive difference also had surfaced that endangered the entire negotiation.¹¹² This disagreement between the parties involved the threshold for bailout eligibility. The issue was whether state legislatures, which by state law were often prohibited from affecting the voting laws of localities, could escape administrative preclearance as separate entities so long as they independently met the qualifying criteria.¹¹³ Edwards felt that states should remain covered by preclearance until all subdivisions within their boundaries had bailed out. Hyde believed that, since section 5 coverage was made permanent by his amendment, requiring state legislatures to preclear their laws with Washington indefinitely would be unfair if the subdivisions themselves refused to take the affirmative steps necessary in order to qualify for bailout.

At seven o'clock on the evening of the 30th, Hyde sent word to Chairman Rodino indicating that he felt he had gone as far as he could. When the message was received, the majority of the Leadership Conference's Steering Committee, then ensconced in Edwards' office, continued to prefer a compromise that would include Hyde's support. According to an account that subsequently appeared in the *New Republic*, a splinter group, which

¹¹¹ Unofficial Transcript, Committee on the Judiciary, United States House of Representatives, at 8-10 (July 30, 1981) [hereinafter cited as *Unofficial Transcript*].

¹¹² *Id.* at 34.

¹¹³ See U.S. CONST. amend. X. The Tenth Amendment reserves to the states general powers such as authority to enact laws which are "not delegated to the United States." *Id.* See *supra* text accompanying note 63.

In *South Carolina v. Katzenbach*, the Supreme Court upheld the constitutionality of the Voting Rights Act, noting, *inter alia*, that "[a]s against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibitions of racial discrimination in voting." 383 U.S. 301, 324 (1966). Arguably, the same would be true of states.

some felt was more concerned with the purity of its position than compromising with Hyde, already had prepared a press release taking exception with any compromise agreement. In the heated moments that followed, four members of the Subcommittee's majority staff, feeling that forces outside the Congress had taken control of the bill, walked out in protest.

Those who remained worked until four o'clock in the morning on July 31st to draft an entirely new section.¹¹⁴ Approximately six hours later, the full Committee met to vote on the new compromise. When the Committee reconvened, two Republicans, New York Representative Hamilton Fish, Jr., a long-time supporter of the Act, and James Sensenbrenner, who ranked behind Hyde on the Subcommittee, joined Chairman Edwards in co-sponsoring a substitute compromise amendment. Following a lengthy debate on the differences between the new amendment and various drafts that had preceded it, the bill was adopted by a recorded vote of twenty-three to one, including all members of the Subcommittee.¹¹⁵

As reported by the full Committee, H.R. 3112 tracked what originally had been the Hyde format for bailout with alterations of the requisite eligibility criteria. For example, the Edwards-Fish-Sensenbrenner substitute amendment rendered a jurisdiction ineligible for bailout if, for a period of seventeen years prior to the filing of a petition for a declaratory judgment granting bailout, and during its pendency (1) a consent decree, settlement or agreement resulting in the abandonment of allegedly discriminatory practices had been entered into between the parties; (2) an action alleging a denial of voting rights was pending; or (3) voting practices that inhibited or diluted "equal access" to electoral processes had not been eliminated.

Congressman Lungren opposed the presence of a pending case as a bar to bailout because an allegation establishes no fault. He expressed concern that "a \$15.00 filing fee alone can effectively deny bailout to an otherwise deserving jurisdiction."¹¹⁶ Moreover, Lungren and Hyde expressed the view that, if enacted onto law in the present form, a bailout which did not allow reasonable escape might jeopardize the constitutionality of the entire Act.¹¹⁷

¹¹⁴ See generally Gellman, *The New Old Movement*, THE NEW REPUBLIC, Sept. 6, 1982, at 10-13.

¹¹⁵ See *House Report*, *supra* note 2, at 3; e.g., *id.* at 39-45 (language of new compromise).

¹¹⁶ *House Report*, *supra* note 2, at 57. See *Unofficial Transcript*, *supra* note 111, at 39 (July 31, 1981); Supplemental Views of Hon. Henry J. Hyde and Hon. Dan Lungren, *House Report*, *supra* note 2, at 54-58 (outline of concessions made during the bargaining process).

¹¹⁷ *House Report*, *supra* note 2, at 57-58. In their Supplemental Views, Lungren and Hyde outlined the reasons for their fears:

[We] say this because the Act's constitutionality was upheld in the 1966 decision of *Katzenbach v. South Carolina*, and last year in *City of Rome, Georgia v. United States*, on the presence of certain unique factors. One was the belief that the 1965 departure from historical tenets of federalism was only "temporary", but necessary based on pre-1965 conduct in the covered jurisdictions. A great many things have changed in the South since 1965, as our hearings demonstrated,

On the subject of section 2, the Edwards-Fish-Sensenbrenner amendment added a disclaimer to the original Rodino language. The disclaimer provided that "[t]he fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, *in and of itself*, constitute a violation of this section."¹¹⁸ The new language was intended to cool apprehensions about the use of proportional representation as a remedy for section 2 violations.

Despite the fact that only one member of the Committee, Virginia Congressman M. Caldwell Butler, voted against the bill, headlines in the next day's papers suggested continuing friction. The *Washington Post* proclaimed that the "Voting Rights Bill Advances in Anger."¹¹⁹ Congressman Railsback was quoted in the *New York Times* as saying that he had "never seen the [C]ommittee in the shape it's now in."¹²⁰ Arnolado S. Torres of the League of United Latin American Citizens summarized the passage of H.R. 3112 as a "hollow victory."¹²¹

As passed by the full Committee, the Edwards-Fish-Sensenbrenner amendment made numerous changes to the existing Act. First, the amendment extended the present threshold of eligibility for bailout until August 5, 1984, or roughly two years beyond the current seventeen-year requirement. The House Report explained the extension by saying that the additional wait was "essential to allow the Justice Department sufficient time to prepare for the expected increase in bailout litigation."¹²² Second, the amendment inserted new language into section 4 that enabled subdivisions of covered states to independently file for bailout in 1984, thus

and new, more progressive racial attitudes have begun to replace the cultural bias of the past. This change is, as [we] have said, far from complete. It is sufficient, though, to effectively dilute the force of the showing before the court in 1966.

Moreover, the language [we] have discussed, together with other limitations on bailout incorporated into the amendment adopted by the Committee would make its availability highly unlikely, as a practical matter, thereby changing the temporary status of the Act to a more constitutionally suspect permanent condition. In [our] judgement, such a change can only survive constitutional scrutiny if the method of escape is reasonably achievable. What was reported by the Committee cannot possibly satisfy that test.

Id.

¹¹⁸ *Id.* at 45. The disclaimer addresses the burden of proof required to prevail, not the remedy. See *infra* text accompanying notes 264-72.

¹¹⁹ Lyons, *Voting Rights Bill Advances in Anger*, *Washington Post*, Aug. 1, 1981, § A, at 3. The *Post* continued:

[W]hen [the original compromise] failed after several tentative agreements collapsed, the Democratic majority pushed the bill through committee yesterday to keep to its timetable of House passage this year, thus allowing time to get it through the more conservative Senate by next August, when the preclearance provision would expire.

Id.

¹²⁰ Pear, *New Split Looms on Voting Rights*, *N.Y. Times*, Aug. 1, 1981, § A, at 6, col. 1.

¹²¹ *Id.*

¹²² *House Report*, *supra* note 2, at 39. Hyde later stated that "the Department [of Justice] would be ready to administer this [A]ct whenever it is amended." See 127 CONG. REC. H6974 (daily ed. Oct. 5, 1981) (remarks of Rep. Hyde).

creating a liberalization of current law.¹²³ In order to qualify for bailout, however, every unit of government within the petitioning jurisdiction must have been able to meet the new criteria.¹²⁴

As for the bailout requirements themselves, the new amendment provided that a declaratory judgment freeing the petitioning jurisdiction from mandatory preclearance could issue only upon a decision by a three judge federal court located in the District of Columbia.¹²⁵ The amendment required that the federal court find that, for ten years prior to the filing of the petition, and during the pendency of the action (1) no test or device, as defined in section 4(c) of the Act,¹²⁶ had been used within the jurisdiction with either the purpose or the effect of discriminating on the basis of race, color or language minority;¹²⁷ (2) no federal court had determined that covered voting discrimination had occurred anywhere within the territory of the petitioning jurisdiction, whether by final judgment or by a consent decree that called for the abandonment of practices alleged to be discriminatory;¹²⁸ (3) no federal examiners had been sent to the petitioning jurisdiction;¹²⁹ (4) the petitioning jurisdiction and all governmental units within its territory had complied with the preclearance requirements of section 5 of the Act, including restructuring their voting practices or procedures following an objection by the Department of Justice or by the Federal District Court for the District of Columbia;¹³⁰ (5) no objection had been issued with respect to a required submission under section 5, and none were pending;¹³¹ and (6) the petitioning jurisdiction and all governmental units within its territory had taken affirmative steps to integrate racial and language minorities into their political structure. These affirmative steps, or "constructive" efforts, included the elimination of voter intimidation and harassment, the expansion of minority registration opportunities, the appointment of minority election officials throughout the jurisdiction for all phases of the election and registration process, and, most controversially, the elimination of voting procedures

¹²³ See *supra* note 17.

¹²⁴ See *supra* note 17.

¹²⁵ See *supra* note 17.

¹²⁶ See 42 U.S.C. § 1973c(c) (1976).

¹²⁷ *House Report, supra* note 2, at 50.

¹²⁸ *Id.* The second provision prohibited the issuance of a declaratory judgment while a case charging voting discrimination was pending. *Id.*

¹²⁹ *Id.* Section 6 of the Act (42 U.S.C. § 1973d (1976)) provides for the presence of federal examiners by order of a court or following certification by the United States Attorney General that, *inter alia*, the appointment of federal examiners is "necessary to enforce the guarantees of the fourteenth and fifteenth amendment . . .". *Id.*

¹³⁰ *Id.* Several witnesses before the Subcommittee, among them Operation PUSH President Jesse L. Jackson, charged that many southern jurisdictions, including Edgefield County, South Carolina, the home of Senate Judiciary Committee Chairman Strom Thurmond, had made changes in their political process without preclearance from the Department of Justice as required under § 5. *House Hearings, supra* note 61, at 172.

¹³¹ *House Report, supra* note 2, at 51.

and methods of election that frustrate "equal access" to the electoral process.¹³² If the jurisdiction is granted a declaratory judgement for satisfying these criteria, the amendment mandated that the reviewing court retain jurisdiction for an additional ten year "parole" period. The reviewing court may reopen the case if a motion filed by the Attorney General or any aggrieved person alleges that any discriminatory act occurred during the parole period. The conduct must have violated the new criteria if it had happened during the ten-year eligibility period.¹³³

As Congress left Washington for its August break, a major grass roots lobbying campaign accelerated in congressional districts throughout the country. One of the most effective was organized by the NAACP. "Operation Network,"¹³⁴ as it was called, was designed to:

[G]et people more consciously aware of the lobbying process. People commit themselves to the fact that when they get a call from us, they will contact their legislators and feed back what the legislator said in response [W]e also make sure a commitment is followed up We kept worksheets . . . and break the bil (sic) down into components. We call the legislator and get detailed information about their (sic) position at national and grass roots levels. We follow that up with contacts to find out if the legislator needs any more information to help him/her make a decision about voting.¹³⁵

This procedure would prove remarkably effective, as the floor vote later would demonstrate.

C. *The Floor*

On September 17, 1981, following the August recess, the House Rules Committee outlined the procedures by which the amended H.R. 3112 would be put before the entire membership of the House for a vote.¹³⁶ Under the rules adopted by the Committee, two hours of debate (one hour for each side) were allowed, followed by an unrestricted amendment period.

Throughout the early part of the month of September, a quiet dialogue had persisted between Congressman Hyde, Congressman Railsback, and representatives of the civil rights leadership. This dialogue also had included a conservative forty-one year old South Carolina Congressman, Carroll A. Campbell. His state was covered by the preclearance requirements of section 5, a fact not popular with local officials. On July 23, however, Campbell had broken with his long-time friend and mentor, Senator Thur-

¹³² *Id.* See *supra* text accompanying notes 72-105.

¹³³ *House Report, supra* note 2, at 52.

¹³⁴ See *Pinderhughes Paper, supra* note 22, at 16.

¹³⁵ *Id.*

¹³⁶ H. R. Res. 222, 97th Cong., 1st Sess. (1981).

¹³⁷ 127 CONG. REC. H4820 (daily ed. July 23, 1981).

mond, lending his public support to the Act.¹³⁷ Present in the House balcony that day had been Armand Derfner, himself a South Carolinian, and Althea Simmons, legislative coordinator for the NAACP. Both had been surprised and pleased by Campbell's new position, and quickly had gone to his office to obtain a copy of his statement. Each member of this group wished to avoid a possible filibuster in the Senate and further argument over the proposed amendments. Their best hope was to continue a search for mutually acceptable language.

On September 17, Congressman Railsback introduced Campbell to representatives of the Leadership Conference gathered in his office. That afternoon, principals and staff huddled around a conference table in the Rayburn House Office Building and pored over the issues once again. During the two-week period that followed before consideration on the House floor, numerous private meetings took place, both in the office of Minority Whip Trent Lott of Mississippi, in the Capitol, and in the Speaker's Lobby just outside the doors to the floor. On September 30, however, any possibility for a last-minute settlement disappeared when a letter signed by Chairman Edwards was circulated to the 435 members of the House. In its final paragraph, Edwards warned against floor amendments to H.R. 3112 as reported by the Judiciary Committee. "Each amendment to be offered by Republicans," Edwards wrote, "would do serious damage to the bill. Please vote them all down."¹³⁸

General debate commenced on October 2, a day after Attorney General Smith privately forwarded his recommendations on the Act to the President. Each member of the Subcommittee and several from outside the Judiciary Committee took the well¹³⁹ and spoke of the genesis of the Act,¹⁴⁰ its accomplishments,¹⁴¹ and the need for the specific changes that H.R. 3112 made to the existing Act.¹⁴² Congressman McClory offered correspondence that he had solicited from state and local jurisdictions regarding the expense resulting from the bilingual ballot provisions of Title II.¹⁴³ Congressman Campbell, despite his support for the Act, indicated that he planned an amendment that would allow bailout for state legislatures if two-thirds of the jurisdictions within a covered state had successfully pursued bailout.¹⁴⁴ When the Committee finally rose¹⁴⁵ concluding general

¹³⁸ Letter from Congressman Don Edwards to "Dear Colleague" (Sept. 30, 1981).

¹³⁹ The term "well" refers to a podium, facing the House Membership, and located on the House floor below the Speaker's Chair.

¹⁴⁰ 127 CONG. REC. H6850-51 (daily ed. Oct. 2, 1981) (remarks of Rep. Fish). *See id.* at H6863-66 (remarks of Rep. Collins).

¹⁴¹ *Id.* at H6849 (remarks of Rep. Washington).

¹⁴² *Id.* at H6841-42 (remarks of Rep. Rodino).

¹⁴³ *Id.* at H6852-61.

¹⁴⁴ *Id.* at H6819.

¹⁴⁵ *Id.* at H6878. The technical motion concluding consideration under the rule allowing two hours of general debate was "that the Committee [of the Whole House on the State of the Union] do now rise." *Id.* (remarks of Rep. Edwards). When considering the text of

debate, the amendment process was set to begin the following Monday, October 5.

Over the weekend, the civil rights leadership engaged in vigorous efforts to eliminate language that could spell trouble for H.R. 3112 in the forthcoming Senate debate or in the courts. Accordingly, on Monday morning when the House resolved itself into committee, a new amendment offered by Chairman Edwards lay at the Clerk's desk. By permitting bailout notwithstanding the pendency of a complaint, this new amendment dealt with the problem of pending cases that was first raised by Congressmen Hyde and Lungren at full Committee. The new proposal allowed the reviewing court to re-open the case if the outcome of the pending case ultimately went against the jurisdiction.¹⁴⁶ The approach of the Edwards amendment was praised by Hyde as an improvement over its predecessor,¹⁴⁷ but still unresponsive to the fact that consent decrees, which remained a bar to eligibility for bailout even though they contained no finding of liability, were often entered into "to buy peace."¹⁴⁸ However, Hyde did not object to Edwards' amendment and it was agreed to by voice vote.¹⁴⁹

Several additional attempts to amend H.R. 3112 followed. Congressman Hyde offered an amendment aimed at encouraging settlements and consent decrees. He argued, as he had earlier, that consent decrees should be subject to review, but should not constitute an absolute bar to bailout.¹⁵⁰ Congressman Sensenbrenner, taking the floor in opposition to Hyde's amendment, argued that half of all voting rights cases are resolved through consent decrees, settlements or agreements. Sensenbrenner suggested that if a jurisdiction "really feels that it is not guilty of discriminatory voting practices, then [it] ought to try the suit in court."¹⁵¹ When a recorded vote was taken, the Hyde amendment failed by ninety-two to 285, with fifty-six members not voting.¹⁵²

Next, Congressman Butler offered an amendment that would have permitted bailout cases to be reviewed in local federal courts, not simply in federal courts within the District of Columbia. Butler's amendment also

a bill, the House once again becomes a Committee of the Whole House for purposes of debating and amending the legislation. The actual motion, made by the Majority Floor Leader, in this instance, Chairman Edwards, was that the "House resolve itself into the Committee of the Whole House on the State of the Union for the further consideration of the bill (H. R. 3112) . . ." *Id.* at H6937.

¹⁴⁶ *Id.* at H6939 (remarks of Rep. Edwards).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* "[I]t seems to me," Hyde commented, "that the court hearing the bailout ought to have discretion to look at the consent decree to see what led to it," but not be automatically bound by it. *Id.* What Hyde wanted was tantamount to a "rule of reason," in contrast to a "per se" standard. *Id.*

¹⁴⁹ *Id.* at H6945.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at H6946.

¹⁵² *Id.* at H6948.

failed, though by a closer margin than did Hyde's amendment.¹⁵³ The promised Campbell amendment seeking to create a two-thirds threshold for state bailout eligibility similarly failed, ninety-five to 313, with twenty-five members not voting.¹⁵⁴

Six more amendments were offered, including three by Congressman Butler.¹⁵⁵ Congressman Thomas Bliley of Virginia then offered a proposal to strike the Committee amendment to section 2. Congressman Barney Frank of Massachusetts instantly charged that adoption of the Bliley amendment would "gut the bill fairly effectively."¹⁵⁶ Congressman Sensenbrenner opposed the Bliley amendment on similar grounds, arguing that the Rodino amendment to section 2 was necessary in order to clarify the standard of proof required in order to establish violations of the Act.¹⁵⁷ Chairman Edwards also opposed the amendment, claiming that the intent standard represented an "impossible" burden.¹⁵⁸ In the end, the Bliley amendment, like the rest, was overwhelmingly rejected.¹⁵⁹ The issue raised by his proposal, however, became the central question raised in the Senate debate.

Congressman McClory subsequently attempted to alter the bilingual ballot requirements of Title II, citing the costs reflected by correspondence he had received from state and local officials. McClory stated that in California, officials reported that \$645,754.23 was spent in thirty-eight counties for this purpose, and a similar amount in the primaries, for a total of more than \$1.2 million in 1980. In San Francisco alone, McClory claimed, the cost for printing Chinese ballots was \$40,542.¹⁶⁰ In Wyoming, the bilingual ballot provisions of the Act allegedly doubled the printing costs to the State.¹⁶¹ Scotts Bluff County, Nebraska, allegedly spent \$17,673.26 in the 1980 primary and \$16,044.68 in the general election to print ballots

¹⁵³ See generally *id.* at H6948-66. The vote on the Butler amendment was 132-277, with 24 members not voting.

¹⁵⁴ See generally *id.* at H6966-73.

¹⁵⁵ *Id.* at H6973. See generally *id.* at 6974 (amendment offered by Congressman Lungren to remove two-year delay in effective date of Act); *id.* at H6975-78 (amendment offered by Congressman Hartnett(South Carolina) to extend preclearance provisions of § 5 nationwide); *id.* at 6979-81 (two amendments offered by Congressman Butler, one of which would have eliminated from definition of "objection" under bailout criterion those objections withdrawn by Attorney General; other would have allowed all objections to be cured); *id.* at H6981-82 (amendment offered by Congressman Collins (Texas) to shift burden of proof on bailout petitions from states to federal government); *id.* at H6982 (third amendment offered by Congressman Butler, which would require that "voting procedures which inhibit or dilute . . . equal access" must first be identified by federal government before being corrected).

¹⁵⁶ *Id.* at H6983.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at H6985.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at H6986.

¹⁶¹ *Id.*

which no one ever requested.¹⁶² Congresswoman Schroeder referred to McClory's argument as a "myth" designed to hobble the minority language provisions,¹⁶³ even though McClory was supported by Congressman Paul 'Pete' McCloskey, a liberal Republican from California who hoped to become a United States Senator in November of 1982. McCloskey's position was that dependence on a language other than English constituted a "trap and a delusion" that inevitably would bar minorities from cultural integration.¹⁶⁴ McCloskey's charge was rebuffed by Congressmen Garcia and Leland, who represented large Hispanic constituencies. Garcia created a light moment by delivering his opposition in Spanish.¹⁶⁵ The final vote, however, was 128 to 284 against the McClory amendment, with twenty-one members not voting.¹⁶⁶

The size of the vote against the McClory amendment discouraged any further amendments, some members fearing that their probable defeat would create negative legislative history. A short while later, Congressman Butler's motion to recommit the bill to the Judiciary Committee was defeated by voice vote. H.R. 3112 then was passed by the House of Representatives by the one-sided vote of 389 to twenty-four, with thirty members not voting.¹⁶⁷

The extraordinary efforts of the civil rights lobby had achieved its purpose. The long hours of planning and congressional contact had borne fruit. As one NAACP representative said:

Whatever I asked for that I needed I got: money, executive director's and staff time We normally have a variety of issues we work on, but in this case I had all my staff working on it.¹⁶⁸

Said another:

[A]s long as I have been in Washington, this [has been] one of the most amazing, most historical events of my career It was beautiful, I'm happy I had the chance to participate and be instrumental in this; I'll never forget this in my life, never¹⁶⁹

IV. THE SENATE

A. *Pre-Committee*

Following final House approval of H.R. 3112, the Senate was faced with an amended Voting Rights Act proposal that, from the perspective

¹⁶² *Id.* See *House Hearings*, *supra* note 61, at 1957-66.

¹⁶³ 127 CONG. REC. H6986-87 (daily ed. Oct. 2, 1981).

¹⁶⁴ *Id.* at H6991.

¹⁶⁵ *Id.* at H6995. Congresswoman Millicent Fenwick of New Jersey complimented Garcia on his speech, responding first in Spanish, then in Italian.

¹⁶⁶ *Id.* at H6998.

¹⁶⁷ *Id.* at H7011.

¹⁶⁸ See *Pinderhughes Paper*, *supra* note 22, at 16.

¹⁶⁹ *Id.* at 25.

of the conservative leadership of the Senate Judiciary Committee, was far worse than anything anticipated.¹⁷⁰ In addition, the House had adopted the measure and rejected alternative amendments by an overwhelming margin, providing H.R. 3112 with a substantial amount of momentum. The Senate strategy had been to let the House act first, a decision some conservatives would later question.

The Senate bill (S. 895) was introduced by Senator Edward M. Kennedy of Massachusetts and Senator Charles McC. Mathias, Jr. of Maryland. S. 895, introduced on April 7, 1982, had six original co-sponsors¹⁷¹ and eventually attracted nineteen additional co-sponsors by the time of final House action.¹⁷² The Senate bill was identical to the House bill as it had been originally introduced on April 7, 1982 by Representative Rodino.¹⁷³ S. 895 proposed to extend the preclearance requirement for covered jurisdictions an additional ten years, conform the expiration date of the bilingual provisions to the preclearance requirements, and establish a results test in section 2 of the Voting Rights Act.¹⁷⁴

On October 7, only two days after the House had completed action on H.R. 3112, the sponsors of S. 895 initiated a rarely-used parliamentary procedure to place the House bill directly on the Senate legislative calendar.¹⁷⁵ This procedure, authorized by rule XIV of the Senate rules, permits House-passed bills to be held at the Senate desk, rather than being referred to the appropriate standing committee. A member of the Senate must object to referral to committee prior to the official adjournment of the legislative day in which the bill has been communicated to the Senate.¹⁷⁶ The bill that is the object of the objection is then formally added to the Senate Calendar. As a result, rule XIV circumvents the normal legislative sequence and runs the risk of antagonizing Senators whose committees are denied jurisdiction over bills. Rule XIV is exercised

¹⁷⁰ *House Hearings*, *supra* note 61, at 60. Originally the civil rights leadership repeatedly had spoken in terms of maintaining the Act intact. *Id.* Now it was the critics of H.R. 3112 who favored this approach.

¹⁷¹ 127 CONG. REC. S3539 (daily ed. Apr. 7, 1981). In addition to the principle sponsors, supporting members of the Senate included Joseph Biden (D-Del.), John Chaffee (R-R.I.), Alan Cranston (D-Cal.), Howard Metzenbaum (D-Ohio), Daniel Moynihan (D-N.Y.), and Lowell Weicker (R-Conn.). *Id.*

¹⁷² S.895 was ultimately to attract a total of 32 sponsoring Senators, prior to the introduction of S.1992. *See infra* note 190.

¹⁷³ 127 CONG. REC. H1382 (daily ed. Apr. 7, 1981).

¹⁷⁴ *See supra* text accompanying notes 57-58.

¹⁷⁵ 127 CONG. REC. S11,334 (daily ed. Oct. 7, 1981).

¹⁷⁶ Standing Rules of the United States Senate, rule XIV(4). Senate rule XIV(4) states in relevant part that:

[E]very bill and joint resolution of the House of Representatives which shall have received a first and second reading without being referred to a committee shall, if objection be made to further proceeding thereon, be placed on the Calendar.

Id. *See Riddick, Senate Procedure: Precedents and Practices*, S. Doc. No. 2, 97th Cong., 1st Sess. 204-205, 930-5, 936-7 (1981) (discussion of history of rule XIV); 126 CONG. REC. S7435-37 (daily ed. June 19, 1980) (remarks of Sen. Hatch).

primarily in cases of non-controversial legislation, or, when both the sponsors of highly controversial legislation and the Majority Leader of the Senate wish to bypass the normal committee process.¹⁷⁷ Once a bill is placed on the legislative calendar by this method, the Majority Leader must consent before consideration on the Senate floor.

While Senator Howard Baker, the recently elevated Majority Leader, did not actively lend encouragement to circumventing the Judiciary Committee, the supporters of H.R. 3112 were concerned about possible delaying tactics in committee and wished to initiate an alternative legislative process that would be available if necessary.¹⁷⁸ Throughout Senate consideration, the House bill remained a major factor to be considered by the Senate Judiciary Committee leadership. Although Baker appeared willing to rely on normal committee procedures, those who expressed doubt about H.R. 3112 nevertheless were made aware that an alternative was available. Even in the event that legislation moved expeditiously through the committee, proponents of H.R. 3112 were assured by the fact that the undiluted House bill was available for consideration on the Senate floor in the event of significant changes in committee.¹⁷⁹

Senator Baker wished to avoid prolonged and bitter debate on extension. He proposed to key members that a simple ten-year extension of the existing Act be approved.¹⁸⁰ Baker's suggestion was quickly rejected, principally by supporters of H.R. 3112 who remained dissatisfied with the Supreme Court's decision in *Mobile*.¹⁸¹ They were joined in an unusual alliance by critics of H.R. 3112 who wished to see a more effective bailout mechanism established for covered jurisdictions.¹⁸² In early December of 1981, it had become clear that a significant portion of the ninety-seventh Congress would be devoted to consideration of the Voting Rights Act extension.

¹⁷⁷ See, e.g., 103 CONG. REC. 9257-93 (1957) (debate over use of rule XIV in context of Civil Rights Act of 1957, June 17, 1957); 110 CONG. REC. 3693-3719 (1964) (debate over use of rule XIV in context of Civil Rights Act of 1964, February 26, 1964). See also CONG. REC. (daily ed. Jan. 25, 1979) (use of rule XIV to expedite consideration of proposed constitutional amendment relating to direct election of President and Vice-President); CONG. REC. S1654 (daily ed. Feb. 22, 1979) (same).

¹⁷⁸ 39 CONG. Q. 2028, 2028 (1981).

¹⁷⁹ 127 CONG. REC. S11,344 (daily ed. Oct. 14, 1981) (H. R. 3112 ordered on Senate calendar).

¹⁸⁰ N. Y. Times, Dec. 3, 1981, § A, at 18. Senator Baker stated, "I would like to see us simply extend the existing language for ten years and do it this year." *Id.*

¹⁸¹ Washington Post, Dec. 4, 1981, § A, at 4. "Kennedy and civil rights groups wanted the law clarified to assure that the government doesn't have to prove discriminatory intent, as well as discriminatory effects, in voting rights cases." *Id.*

¹⁸² *Id.* The *Post* reported that:

Senator Thurmond reportedly wanted to make it easier for States and localities to get out from under enforcement provision of the law.

Id.

Senator Baker, in response to Thurmond's objections to simple extension, as well as those put forth by Senator Kennedy (*supra* note 181), remarked that his proposal represented "one of the shortest trial balloons in history." *Id.*

Apart from the principal sponsors of S. 895, Senator Kennedy and Mathias, the key participants in the extension debate were conservative Senators, Strom Thurmond of South Carolina and Orrin Hatch of Utah. Both occupied leadership positions on the Judiciary Committee, with Thurmond serving as Chairman of the Committee and Hatch serving as Chairman of the Judiciary Subcommittee on the Constitution. S. 895 and related voting rights legislation had been referred to this Committee.¹⁸³

The civil rights records of Thurmond and Hatch differed considerably from those of Kennedy and Mathias. Senator Thurmond had only ascended to the chairmanship of the Judiciary Committee at the beginning of the year when the Republicans won control of the Senate. However, he had been in the Senate for nearly three decades and had developed a reputation in some quarters as an opponent of most federal civil rights legislation, although more recently he had cast a critical vote in support of a constitutional amendment providing for voting representation in Congress for the predominantly minority population of the District of Columbia.¹⁸⁴ As one of the most dedicated advocates of the doctrine of state's rights, the South Carolinian had voted against the passage of the original Voting Rights Act in 1965, as well as the 1970 and 1975 amendments.¹⁸⁵ Senator Hatch, in his first term of office, had never before cast a vote on the Voting Rights Act but already had acquired a reputation as an articulate critic of many of the initiatives of the civil rights leadership.¹⁸⁶ He had been the leading congressional critic of "affirmative action" and racial quota programs on constitutional grounds, and had led a successful filibuster during the ninety-sixth Congress, that blocked efforts to expand Title VIII of the Fair Housing Act of 1968. His objection had been to efforts to establish a standard of defining housing discrimination that focused upon the statistical "effects" of an allegedly discriminatory action rather than

¹⁸³ 127 CONG. REC. S100 (daily ed. Jan. 6, 1981); 127 CONG. REC. S11,850 (daily ed. Oct. 22, 1981). Other bills on the subject of voting rights that had been referred to the Subcommittee on the Constitution by the time that H.R. 3112 secured final approval were S.53, sponsored by Senator S. I. Hayakawa (R-Cal.), which proposed to repeal the bilingual election requirements of §§ 4 and 203 of the Voting Rights Act (127 CONG. REC. S100 (daily ed. Jan. 6, 1981), and S.1761, sponsored by Senator Thad Cochran (R-Miss.), which proposed to establish a procedure by which the Justice Department would be empowered to administratively review changes in election laws and procedures on a national basis. 127 CONG. REC. S11,850 (daily ed. Oct. 22, 1981). In large part, S.1761 was based upon recommendations made by Judge William Keady and Professor George Cochran. See *supra* note 92; see also *Senate Hearings*, *supra* note 92, at 342-66. (testimony of Professor Cochran).

¹⁸⁴ See THE NEW REPUBLIC, Dec. 6, 1980, at 11; TIME MAG., May 11, 1981, at 24. Thurmond's reputation was sharply at odds with the attitude toward him by many minority-group members in his home state where he had often secured significant support from the black community in his election efforts.

¹⁸⁵ 111 CONG. REC. S11,466 (daily ed. May 25, 1965) (cloture); 111 CONG. REC. S11,752 (daily ed. May 26, 1965) (Senate passage); 111 CONG. REC. S19,378 (daily ed. Aug. 4, 1965) (conference); 116 CONG. REC. S7336 (daily ed. Mar. 13, 1970); 121 CONG. REC. S24,211 (daily ed. July 23, 1975)(cloture); 121 CONG. REC. S24,780 (daily ed. July 24, 1975) (Senate passage).

¹⁸⁶ See 39 CONG. Q. 1953, 1953 (1981).

upon the motivation of the alleged discriminator.¹⁸⁷ Kennedy and Mathias, on the other hand, had each been in Congress for approximately twenty years and had cast "aye" votes on the original Voting Rights Act and both extensions.¹⁸⁸ Both consistently endorsed the legislative objectives of the civil rights leadership and often had led fights on their behalf.¹⁸⁹

Following final House action on H.R. 3112, the strategies of both sides began to emerge. The supporters' principle objective was the perpetuation of the momentum that had been built up in the House. They attempted to sustain the momentum by pressing the Senate Judiciary Committee to hold expedited hearings.¹⁹⁰ By resorting to rule XIV and to public pressure for hearings prior to the end of the first session, supporters of H.R. 3112 hoped to continue to ride the crest of their first impressive, bipartisan victory on the other side of Capitol Hill.

On December 16, proponents re-introduced extension legislation in the Senate, identical to the version of H.R. 3112 that had been adopted by the House.¹⁹¹ Replacing S.895 as the focus of Senate efforts, S. 1992, again introduced by Senators Kennedy and Mathias, permanently extended the preclearance obligations of covered jurisdictions, established a complex bailout formula for such jurisdictions, and sought to overturn the Supreme Court's *Mobile* decision by establishing a new test in section 2 of the Act.¹⁹² The most significant fact about S. 1992, however, was that it was co-sponsored by sixty-one Senators.¹⁹³

¹⁸⁷ See, e.g., *Hearings on Affirmative Action and Equal Protection Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 97th Cong., 1st Sess. (May 4, June 11, June 18, July 16, 1981) Hatch's objections to the Fair Housing Act (S.506, 96th Cong.) were largely predicated upon his objections to an "effects" standard of discrimination which had been incorporated into the Act by a number of lower Federal Courts. 127 CONG. REC. S15,191-200 (daily ed. Dec. 1, 1980). See 126 CONG. REC. S 11,807-919 (daily ed. Sept. 3, 1980).

¹⁸⁸ See *supra* note 185.

¹⁸⁹ In addition to their efforts on the Voting Rights Act during the 98th Congress, Mathias and Kennedy were also among the legislative floor leaders on such issues as the Fair Housing Act Amendments during the 97th Congress (S.506 *supra* note 187) and a proposed constitutional amendment during the 96th Congress to provide the District of Columbia with voting representation in Congress, the latter perceived as a "civil rights" issue by some because of the large black population in the District of Columbia. H. J. Res. 554, 96th Cong. (1980).

¹⁹⁰ See 39 CONG. Q. 2028, 2028 (1981); see *infra* note 211.

¹⁹¹ 127 CONG. REC. S15,694 (daily ed. Dec. 16, 1981).

¹⁹² Washington Post, Dec. 17, 1981, § A, at 4. In announcing the bill's introduction, Kennedy observed that "the impressive rise in voter registration [that has occurred since the original Voting Rights Act] is threatened in some States by highly questionable re-registration techniques." *Id.*

¹⁹³ In addition to the nine co-sponsors of S. 895, (see *supra* note 171), the members of the Senate co-sponsoring S.1992 included Mark Andrews (R-N.D.), Max Baucus (D-Mont.), Lloyd Bentsen (D-Tex.), David Boren (D-Okla.), Rudy Boschwitz (R-Minn.), Bill Bradley (D-N.J.), Dale Bumpers (D-Ark.), Quentin Burdick (D-N.D.), Robert Byrd (D-W.Va.), Howard Cannon (D-Nev.), Lawton Chiles (D-Fla.), William Cohen (R-Me.), John Danforth (R-Mo.), Dennis DeConcini (D-Ariz.), Alan Dixon (D-Ill.), Christopher Dodd (D-Conn.), Pete Domenici (R-N.M.),

Among the co-sponsors were twenty-one Republican Senators, including conservatives Dan Quayle of Indiana, Paula Hawkins of Florida, and William Roth of Delaware, as well as eight Southern Democrats. The sixty-one co-sponsors not only represented a number well in excess of a majority of the Senate, but more importantly, one more than the number necessary to invoke cloture or terminate debate in case of a filibuster.¹⁹⁴ The coalition was the product of a week-long grass roots campaign, combined with personal lobbying by Senators such as Kennedy, Mathias, and Howard Metzenbaum of Ohio, to secure the co-sponsorship of Senators for the House bill. Supporters of S. 1992 hoped to demonstrate, not only that ultimate passage of an extension measure was a foregone conclusion, but that, in all likelihood, the Senate-passed bill would closely resemble H.R. 3112.

In the meantime, the strategy of those who had misgivings about H.R. 3112 included the enlistment of active participation by the Administration in the form of support for an alternative. They attempted to slow down the legislative process so that they could inform their colleagues about what they perceived as difficulties with the House version. To a far greater extent than is normally the case with congressional hearings, the Senate hearings on S. 1992 seemed designed to highlight defects in the legislation through debate between some of the most articulate civil rights academics and lawyers in the country.

Critics of H.R. 3112 were nearly as successful in achieving their short-term objectives prior to the outset of Senate hearings as were proponents. They could not match the stunning political achievement reflected by the support behind S. 1992, but they did succeed in postponing the start of Subcommittee hearings to the early days of the second session when a minimum of conflicting legislative hearings would be occurring before the Congress. Most important, critics succeeded in involving the Administration.

The Administration had played virtually no role in House deliberations on the extension of the Voting Rights Act, to the consternation of a number of House members engaged in the difficult task of attempting to formulate a "reasonable alternative" to section 5.¹⁹⁵ The President had

David Durenburger, (R-Minn.), Thomas Eagleton (D-Mo.), Wendell Ford (D-Ky.), John Glenn (D-Ohio), Gary Hart (D-Col.), Mark Hatfield (R-Ore.), Paula Hawkins, (R-Fla.), John Heinz (R-Pa.), Ernest Hollings (D-S.C.), Walter Huddleston (D-Ky.), Daniel Inouye (D-Haw.), Henry Jackson (D-Wash.), Nancy Kassebaum (R-Kan.), Patrick Leahy (D-Vt.), Carl Levin (D-Mich.), Russell Long (D-La.), Spark Matsunaga (D-Haw.), George Mitchell (D-Me.), Robert Packwood (R-Ore.), Claiborne Pell (D-R.I.), Charles Percy (R-Ill.), Larry Pressler (R-S.D.), William Proxmire (D-Wis.), David Pryor (D-Ark.), Dan Quayle (R-Ind.), Donald Riegle (D-Mich.), William Roth (R-Del.), Paul Sarbanes (D-Md.), James Sasser (D-Tenn.), Arlen Specter (R-Pa.), Robert Stafford (R-Vt.), Paul (D-Mass.), Harrison Williams (D-N.J.), Bennett Johnston (D-La.), Ted Stevens (R-Alas.), and John Melcher (D-Mont.).

¹⁹⁴ Standing Rules of the United States Senate, rule XXII(2). An absolute number of 60 Senators is necessary to invoke cloture on a filibuster. *Id.*

¹⁹⁵ See *supra* text accompanying note 106.

indicated originally that he was sympathetic to the nationwide extension of section 5,¹⁹⁶ an approach favored by Senator Thurmond.¹⁹⁷ Later statements made as H.R. 3112 wended its way through the House Judiciary Committee tended to indicate that Reagan was more flexible on the subject of extension.¹⁹⁸ On June 16, prior to final Subcommittee action in the House, the President announced that he had commissioned the Justice Department to prepare an analysis of possible options on extension and to report back to him by October 1.¹⁹⁹

On October 2, three days before the House vote, Attorney General William French Smith forwarded a private report to the President summarizing the development of the Voting Rights Act and setting forth five alternatives for consideration.²⁰⁰ In retrospect, the most striking aspect

¹⁹⁶ Washington Post, Dec. 12, 1980, § A, at 1 (entitled, *Reagan Assures Blacks He'll Defend Civil Rights*); Washington Post, May 9, 1981, § A, at 8 (entitled, *Administration is Undecided on Voting Rights Act Provision*).

¹⁹⁷ 127 CONG. REC. S6903 (daily ed. June 24, 1981); U.S. NEWS AND WORLD REP., Mar. 23, 1981, at 42; THE NEW REPUBLIC, Dec. 6, 1980, at 11.

¹⁹⁸ See, e.g., Washington Post, July 25, 1981, § A, at 6; Washington Post, July 11, 1981, § A, at 6; N. Y. Times, June 4, 1981, § A, at 15; Washington Post, May 9, 1981, § A, at 8.

¹⁹⁹ Washington Post, June 16, 1981, § A, at 1.

²⁰⁰ *Report to the President from the Attorney General of the United States Concerning Amending the Voting Rights Act* (Oct. 2, 1981) [hereinafter cited as *Report to President*].

The first alternative proposed a substantial modification of the Act to permit covered jurisdictions with a record of compliance with the Act (for a period of between five and seven years) to bailout. Following bailout, such jurisdictions could again be placed under the preclearance obligation following a showing of a subsequent violation within a specified period of time. An optional adjunct of this alternative was the termination of the preclearance mechanism for all jurisdictions at some designated date. *Id.* at 7.

By "compliance with the Act," the report stated that a covered jurisdiction would have to demonstrate (a) the absence of § 5 objections during the specified period of time by the Attorney General, except for those which were subsequently withdrawn, those which subsequently received judicial preclearance, and those relating to redistricting that were not submitted with an intent to discriminate and that were capable of being cured, (b) the absence of "unjustified" implementation of voting changes that had not been precleared, (c) the absence of constitutional or § 2 violations, (d) the absence of the use of a prohibited "test or device," and (e) the absence of violations of registration practices or conduct of elections covered by § 2 or the Constitution. *Id.* at 10.

Under this alternative, as under each of the other proposed alternatives, jurisdictions would also be permitted to bailout from § 5 preclearance in the event of minority populations of less than 3000, or 5% of the total population. Special election districts, such as utility districts, would also be permitted to bailout automatically. *Id.* at 9-10. In addition, under this alternative, covered counties would be able to bail out independently of their states. *Cf. City of Rome v. United States*, 446 U.S. 156, (1980). All bailout applicants would be able to petition their local federal district court, rather than only being able to bring such petitions before the District Court for the District of Columbia, § 4(a). *Report to President, supra*, at 7.

The second alternative was similar to the first except that the bailout criteria would be made more stringent. Covered jurisdictions would be required not only to comply with the provisions of existing law, but would be required to have made no changes in voting laws or procedures that violated the Constitution or that evidenced some discriminatory intent or purpose. *Id.* at 12. This alternative would not treat as fatal for purposes of bailout

of the recommendations, which were prepared in close collaboration with the office of Assistant Attorney General for Civil Rights, William Bradford Reynolds, was its cursory reference to the issue of section 2. Under the heading "Other Considerations", a single paragraph in the twenty-one page report addressed the section 2 controversy. Most significantly, it concluded "we are opposed to including in the Administration proposal any amendment of § 2 that suggests the incorporation of an 'effects' test."²⁰¹ The report focused almost exclusively on the issue of bailout.

On November 6, following more than a month of debate within the White House, President Reagan issued a highly ambiguous statement. The statement expressed support for a ten-year extension, "either through a direct extension of the Act or through a modified version of the new bill recently passed by the House of Representatives."²⁰² Without detailing the extent to which the House bill satisfied this criteria, Reagan also endorsed amendments "which incorporate reasonable bailout provisions for States and other political subdivisions."²⁰³ In addition, the President preferred the extension of the bilingual coverage provisions in section 203, making them concurrent with the expiration date of the special provisions of sections 4 and 5.²⁰⁴ Finally, Reagan stated that the Act should

lack of full compliance with the procedural requirements of § 5, or objections to § 5 submissions by the Attorney General, so long as the jurisdiction could overcome the burden of demonstrating that no purposeful discrimination had been at work in this process. *Id.* at 12-13.

The third alternative would have provided for an additional extension of the existing provisions of §§ 4 and 5, perhaps for five years, with jurisdictions possessing low minority population or high minority voter registration automatically allowed to bailout. *Id.* at 14. Those jurisdictions in which the minority population below 3000 or 5% of the population, and those in which the voter registration rate among minorities was in excess of 65% and equal to or greater than the white voter registration rate, would be automatically eligible for bailout. Since voter registration normally is conducted only at the county or city level, no state would be likely to avail itself of this bailout procedure. *Id.*

The fourth alternative, described by Smith as an "unattractive one", proposed another simple, straight extension of the current Act for a period of 3 to 5 years. *Id.* at 16. "Covered jurisdictions with a commendable voting record in recent years . . . have ample reason to complain about a proposed flat extension of the Act's present provisions." *Id.*

The final alternative, described as having serious legal and practical questions proposed to extend the Act nationwide as favored by Senator Thurmond and, at one time, by the President. *Id.* at 18. The Report described this alternative as likely to place a "tremendous administrative burden" upon the Department of Justice. *Id.*

²⁰¹ *Report to President, supra* note 200, at 19.

²⁰² Statement by the President, 17 Weekly Comp. Pres. Doc. 1223-24. See Washington Post, Nov. 6, 1981, § A, at 1. See N.Y. Times, Nov. 8, 1981, § A, at 22 (entitled, *Voting Rights Backers Assail Reagan's Stand*); Los Angeles Times, Nov. 8, 1981, § A, at 1 (entitled, *Rights Groups Say Voting Act Shift Makes Extension Meaningless*); Los Angeles Times, Nov. 8, 1981, § A, at 1 (record of some of political maneuvering within White House prior to President Reagan's announcement, entitled, *An Angry Smith Won Voting Act Concession*). According to the Los Angeles Times, President Reagan had concluded that he would support the House-approved measure until being persuaded at the last minute by Attorney General Smith to reverse his decision. *Id.*

²⁰³ Statement by the President, 17 Weekly Comp. Pres. Doc. 1223-24.

²⁰⁴ *Id.* Despite early indications to the contrary, such as the introduction of S.53 (127 CONG. REC. S.100-101 (daily ed. Jan. 6, 1981)), the issue of bilingualism received little serious

retain the intent test rather than incorporating a "new and untested" effects or results standard.²⁰⁵

The President's announcement served as a beacon for Senate skeptics of the House legislation, most of whom had been urging opposition to H.R. 3112, in its various forms, for many months. Critics quickly accelerated efforts to build a case in favor of alternatives to the House measure and to communicate them to their colleagues. Well before hearings even had been scheduled, large amounts of literature were distributed to Senate offices by both sides.

An imbalance in lobbying resources characterized the entire Senate debate on the Voting Rights Act much as it had in the House. On the proponents' side, an impressive array of organizations such as MALDEF, the NAACP, and the ACLU, coordinated efforts to secure Senate adoption of the House bill. Spearheaded by the Leadership Conference on Civil Rights, supporters of the House bill included virtually all significant civil rights, labor, civil liberties, public interest, and religious organizations.²⁰⁶ These organizations were effective in lobbying Senators, just as they had been in the House, communicating to them strong civil rights support for adoption of a mirror image of H.R. 3112.

On the other side, the effectiveness of arguments against the House bill suffered from a nearly total absence of outside allies. Since the early Sixties, civil rights organizations had learned the value of being well organized and intense in their support of legislation. In contrast, opponents tended to be dispersed and far less effective. Organizations of officials from covered jurisdictions, who would have had an interest in the question of bailout, were nowhere to be seen during debate in either House.²⁰⁷ In addition, the level of concern about the Voting Rights Act within covered jurisdictions had sharply subsided over the years. Most, including Southerners, had learned to tolerate the Act and applied virtually no pressure upon their elected officials to repeal or seriously weaken it. The only persons who still seemed to maintain an intense concern about the Act were black Southerners who continued to view it as the foundation for their progress over the past generation. Because of the success of the Act, southern politicians found themselves confronted with a political equation similar to that of their colleagues outside the South. The only constituents who expressed an interest in the fate of the Act were those strongly

legislative attention in either house of Congress. The only witness in the Senate to testify in opposition to extension of § 203(b) of the Act, relating to the provision of bilingual registration and election materials, was the author of S.53, Senator Hayakawa. *See Senate Hearings, supra* note 92, at 848-53. Among witnesses urging retention of the provision were Vilma Martinez, Executive Director, MALDEF (*see Senate Hearings, supra* note 92, at 289-92), and William Clements, Governor, State of Texas (*see Senate Hearings, supra* note 92, at 870).

²⁰⁵ Statement by the President, 17 Weekly Comp. Pres. Doc. 1223-24.

²⁰⁶ *See generally* Gellman, *The New Old Movement*, THE NEW REPUBLIC, Sept. 6, 1982, at 10.

²⁰⁷ *See infra* note 332 and accompanying text. One lobbyist, supporting H.R.3112, observed that the Act "is not the target of any well-organized, well-financed lobby." 39 CONG. Q. 1111 (1981).

supportive of the House measure. In a sense, the success of H.R. 3112 seemed to be directly related to the achievements of the Voting Rights Act itself over the past seventeen years in sharply altering the nature of the southern electorate.²⁰⁸ The imbalance in lobbying resources was more apparent in the context of these amendments than in any major civil rights legislation to come before the Congress in recent years. The Administration proved not only to be the most valuable ally of those with apprehensions about the House bill, but virtually their only ally.

On December 15, shortly before the end of the first session, Senator Charles Grassley of Iowa, a member of the Subcommittee on the Constitution, introduced a bill (S. 1975) designed to provide an alternative to the House measure.²⁰⁹ While disclaiming that S. 1975 was an "Administration bill," Grassley conceded that he viewed it as a measure that "squares in most respects" with President Reagan's November 6 announcement.²¹⁰ S. 1975 proposed to extend the special provisions of the Voting Rights Act for an additional five years and to establish a bailout mechanism significantly less stringent than that contained in H.R. 3112. Under the Grassley proposal, covered jurisdictions would become eligible for bailout if, during the preceding five years (1) no discriminatory test or device had been used; (2) all "substantial" submissions for section 5 preclearance had been made; (3) no "unremedied" objections by the Attorney General under section 5 had occurred; and (4) no court decrees were issued finding that the jurisdiction had purposely denied or abridged the right of any individual to vote. In addition, S. 1975 retained the existing language of section 2 as defined by the Supreme Court in *Mobile*. While the Grassley proposal was not the only alternative to the House measure, sponsorship by such a key member of the Subcommittee with jurisdiction over the Voting Rights Amendments lent S. 1975 special credibility.

B. *The Subcommittee*

On January 27, 1982, shortly after the start of the second session of Congress, and after several initial delays,²¹¹ the Subcommittee on the Con-

²⁰⁸ See Atlanta Constitution, Oct. 11, 1981, § J, at 1. (entitled, *Opposing Voting Rights for Political Dividends Appears to be as out of Date as Poll Taxes*); Washington Post, June 13, 1981, § A, at 8 (entitled, *Southern Republicans Back Voting Rights Act*).

²⁰⁹ 127 CONG. REC. S15,372 (daily ed. Dec. 15, 1981).

²¹⁰ *Id.*

²¹¹ Washington Post, Jan. 20, 1982, § A, at 14 (entitled, *Voting Rights Hearings Postponed*). After the second of two brief delays, the Leadership Conference in a January 19, 1982 telegram to Senator Hatch stated:

[We] are outraged by your announced plan to delay once again the start of hearings on legislation to extend the Voting Rights Act . . . [T]he Reagan Administration's plea for additional time in which to submit legislation is no excuse for delaying hearings which are starting a bare seven months before the scheduled expiration of the Act . . . [A]ny delay can only be seen as an effort to undermine

stitution began the first of eight scheduled days of hearings; a ninth was later added. The opening statement of Chairman Hatch made clear that the focal point of Senate hearings would be the results test contained in the amended section 2. In a lengthy statement, Hatch sought to dispel what he referred to as "myths" surrounding the extension of the Act. He observed, "The debate beginning in the Senate today will focus upon a proposed change in the Act that involves one of the most important constitutional issues ever to come before this body. Involved in this debate will be the most fundamental issues involving the nature of American representative democracy, federalism, civil rights, and the separation of powers."²¹² Hatch went on to argue that the proposed change in section 2, from an intent test to a results test, would redefine the concept of "discrimination" and would "transform the Fifteenth Amendment and the Voting Rights Act from provisions designed to ensure equal access and equal opportunity in the electoral process to those designed to ensure equal outcome and equal success."²¹³

For the first time during congressional consideration of the Voting Rights Act extension, the issue of the proposed change to section 2 was moved to the forefront of debate. In this regard, Senators Thurmond and Hatch differed in their emphases during committee consideration. Thurmond, since he represented a state that had been covered since the inception of the Act in 1965, was now principally concerned with what he perceived as a need for a more effective bailout procedure for covered jurisdictions of the South.²¹⁴ As a result, Senator Thurmond directed his primary attention toward a reform of section 5. During the opening day of hearings, he stated that nationwide application of the Act would create a fairer and more effective Act, and that "a statute must be applied equally to all citizens of this nation in order to ensure true equal protection under the law."²¹⁵ Thurmond would often articulate this theme during the balance of the Subcommittee hearings.

Senator Hatch, though, was preoccupied with section 2. Because of his involvement with the amendments to Title VIII of the 1968 Civil Rights Act, he had become sensitive to the abandonment of intent as a basis for identifying racial discrimination. His efforts in re-evaluating affirmative action programs represented similar apprehensions about the recent evolution of national civil rights policy.²¹⁶

The two leading Senatorial proponents of S. 992, Mathias and Kennedy, delivered opening statements after Hatch, with Mathias speaking

the voting protections of citizens. Staff Files, Committee on the Judiciary, United States Senate.

²¹² *Senate Hearings, supra* note 92, at 3.

²¹³ *Id.*

²¹⁴ *See supra* note 185.

²¹⁵ *Senate Hearings, supra* note 92, at 60.

²¹⁶ *See supra* note 187.

from the witness stand rather than from the committee podium. Hatch closely questioned both Senators.

Senator Mathias chose to concentrate his remarks on the question of section 2:

The House amendment is needed to clarify the burden of proof in voting discrimination cases and to remove the uncertainty caused by the failure of the Supreme Court to articulate a clear standard in the *City of Mobile v. Bolden* We are not trying to overrule the Court. The Court seems to be in some error about what the legislative intent was Prior to *Bolden*, a violation in voting discrimination cases [could] be shown by reference to a variety of factors that, when taken together, added up to a finding of illegal discrimination. But in *Bolden*, the plurality appears to have abandoned this totality of circumstances approach and to have replaced it with a requirement of specific evidence of intent . . . this is a requirement of a smoking gun, and I think it becomes a crippling blow to the overall effectiveness of the Act.²¹⁷

Hatch then initiated a line of questioning that was to be repeated on a number of occasions throughout the hearings. He requested that Mathias be more specific concerning the overall objectives of the new section 2 test:

SENATOR MATHIAS: The purpose of the bill is to provide for fair and just access to the electoral process.

SENATOR HATCH: Is [it] the most fair and just access—if 55% of Baltimore is black that 55% ought to be represented as sole black districts or at least majority black districts.

SENATOR MATHIAS: A fair and just operation of the electoral process is to give all citizens equal access to vote, run, or otherwise participate in the process.

SENATOR HATCH: What does “equal access” mean?

SENATOR MATHIAS: You are well aware of what it means.

SENATOR HATCH: I want to know what you think it means, because I know what it means under the effects test. I think it means, as the Attorney General of the United States does, proportional representation.

SENATOR MATHIAS: You look at the totality of circumstances; that is what we have been doing.

SENATOR HATCH: That is what we do under the intent standard. I am quite confused as to relevance of these circumstances that you are considering in their totality I do not understand what the question is that the court asks itself in evaluating the totality of circumstances under the results test? What precisely does the court ask itself after it has looked to the totality of cir-

²¹⁷ *Senate Hearings, supra* note 92, at 199.

cumstances and what is the standard for evaluation under the results test?

SENATOR MATHIAS: Look at the results.

SENATOR HATCH: That is all? And if there was absolutely no intent to discrimination, as they found in the *Mobile* case, if the results looked like discrimination, then would the court be able to come down on that jurisdiction—on Baltimore, for example?²¹⁸

Senator Hatch inquired throughout the hearings about the significance of the "totality of circumstances" description of the proposed results test. Hatch's chief goal seemed to create a distinction between the *scope* of permissible evidence under a test for discrimination and the *standard* for evaluating such evidence. The distinction normally was couched in terms of what threshold question should judges ask in attempting to evaluate evidence before them in a section 2 proceeding.²¹⁹ It was not until much later in the hearing process that proponents of the House bill seemed prepared to respond to this query.²²⁰ In Hatch's view, however, a reasonable and comprehensible response was never forthcoming.²²¹

The intensity of Hatch's position on section 2 became particularly apparent with his subsequent questioning of Senator Kennedy. Hatch raised questions which related to Kennedy's homestate even more directly than he had with Mathias. He framed the issue in the form of a hypothetical situation that might confront a Mayor of Boston. The Senator began:

SENATOR HATCH: [Let us understnad the] specific application of the proposed new "results" standard in section 2—suppose, for example, that we are considering a "hypothetical" new mayor of Boston. Suppose that Boston has a minority population of approximately 22.4% And suppose that Boston has a city council of approximately 11% minorities. This is slightly less than one-half

²¹⁸ *Senate Hearings, supra* note 92, at 200-201.

²¹⁹ *See, e.g., Senate Hearings, supra* note 92, at 599-600 (questioning by Hatch of Steve Suits, Executive Director, Southern Regional Council). *See* *Washington v. Davis* 426 U.S. 229, 242 (1976). The *Washington* Court held that invidious discriminatory purpose may often be inferred from the totality of the relevant facts just as it had been in successful *de jure* and *de facto* busing cases under the Fourteenth Amendment, *Keyes v. School District #1*, 413 U.S. 189, 205 (1973).

²²⁰ *See, e.g., Senate Hearings, supra* note 92, at 959. (testimony of Professor Norman Dorsen, President, American Civil Liberties Union). Admitting that it was "inadequate" for proponents of S.1992 and H.R. 3112 to define the new "results" test in § 2 in terms of the "totality of circumstances," Dorsen quoted Justice White in *White v. Regester*, that the plaintiff's burden in "results" cases "is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the [minority] group in question." 412 U.S. 755, 766 (1973). White further described the type of factors considered by the 6th Circuit in *Zimmer v. McKeithen*, 485 F.2d. 1297 (5th Cir. 1973), as establishing even "more specific" direction as to the proper understanding of the "results" test. 412 U.S. at 766.

²²¹ *Executive Session of the Senate Committee on the Judiciary* (April 28, 1982), contained in *Senate Hearings, supra* note 92, at Vol. II, 21-2.

of the minorities' representation in the population. Suppose further that the city of Boston elected its city council on an at-large basis Can you offer assurances—what assurances specifically—that this new mayor will not have the Justice Department or the Lawyers Committee for Civil Rights or the NAACP Legal Defense Fund suing the city of Boston upon passage of the new “results” test? It is a purely hypothetical thing, of course, but I would like to have your response.

SENATOR KENNEDY (visibly angry): Supposing you write it out for me and I will give you a written answer.²²²

Senator Hatch's questioning of Kennedy reflected an alternative approach which he pursued during the Subcommittee hearings. Setting forth a hypothetical “totality of circumstances,” Hatch frequently inquired about the decision-making processes that a court would have to undergo in order to determine whether such facts constituted a section 2 violation.²²³ If the response was that the hypothetical situation represented a section 2 violation, he attempted to establish some guidelines on those jurisdictions likely to be vulnerable to legal challenge under the new standard. If the response was that no violation existed, his goals were nevertheless achieved by establishing some rough parameter of what the new test covered. A response, however, that a court would have to evaluate the totality of circumstances on a case-by-case basis, suggested to Hatch the fundamental difficulty that any community would have in knowing whether its own electoral procedures were in compliance with the new law.

In other words, Hatch sought to clarify his own position that the results test was intelligible only to the extent that it approximated a standard of proportional representation by race.²²⁴ Hatch interpreted proportional representation as minority membership on legislative bodies in numbers approximately reflecting its population within the relevant jurisdiction. The remedy for discrimination, defined as lack of proportional representation, would be the establishment of single-member districts. To the extent that proponents of the results standard rejected identification of the standard with proportional representation, Hatch feared that the only alternative was that the judicial branch would have unconstrained discretion in the resolution of section 2 cases. As he later observed dur-

²²² *Senate Hearings, supra* note 92, at 217.

²²³ *See, e.g., Senate Hearings, supra* note 92, at 960-61.

²²⁴ *Senate Hearings, supra* note 92, at 3-5. Sen. Hatch accorded little merit to the “disclaimer” of proportional representation contained in S.1992 and H.R. 3112, arguing that it was merely a “smokescreen” which would achieve nothing more than require plaintiffs to identify within a community any one of a multitude of “objective factors” of discrimination that could be located in virtually any major community in the country in addition to the absence of proportional representation. *See Mobile v. Bolden*, 446 U.S. 55, 75 n. 22 (1980) (plurality opinion rejected similar disclaimer proposed by Justice Marshall in his dissent, 446 U.S. at 111-12 n. 7).

ing a subsequent day of hearings, "Indeed, the more I think about it, the more convinced that I am that the real distinction between the intent standard and the results standard is even greater than the issue of proportional representation. The real issue is whether or not we're going to define civil rights in this country by a clear, determinable standard—through the rule of law, as it were—or by a standard that literally no one can articulate."²²⁵

The harsh exchange between Kennedy and Hatch was not the only friction present in the hearing room. Indeed, it was a foreshadowing of the entire Senate debate on the Voting Rights Act. Attorney General Smith, representing the Administration before the Congress for the first time on this issue, also exchanged discordant words with Senator Kennedy. The Attorney General surveyed the achievements of the 1965 Act and presented the recommendations contained in his October report to the President.²²⁶ Smith felt that the Voting Rights Act had "worked well" and that the need for its special protection continued.²²⁷ The Attorney General then recommended the President's position as originally expressed on November 7, calling for a ten-year extension of the Act which he indicated would be "longer than any previous extension voted by Congress," a "workable and fair" bailout, and deletion of the results test contained in H.R. 3112 and in S. 992.²²⁸ Although Smith avoided recommending a specific set of bailout criteria, he offered to work with the Subcommittee in the development of a mutually satisfactory bailout.²²⁹ Emphasizing the unique nature of the original temporary preclearance mechanism, he emphasized the Administration's strong opposition to the permanent nature of the extension provided for in H.R. 3112.²³⁰

With respect to the proposed change from an intent to a results test in section 2, the Attorney General placed the Administration strongly on the side of Senator Hatch. Smith called the results standard a "dramatic" change from current law and one that Congress should not endorse without "compelling and demonstrable" reasons.²³¹ He echoed the concern about

²²⁵ *Senate Hearings, supra* note 92, at 340.

²²⁶ *See supra* notes 197-98 and accompanying text.

²²⁷ *See Senate Hearings, supra* note 92, at 69.

²²⁸ *Id.* at 70-71.

²²⁹ *Id.*

²³⁰ *Id.* at 69. Attorney General Smith stated that:

[I]n the same breath that we speak of an extension of the [A]ct, we must also underscore its exceptional character. It vests extraordinary powers in the National Government over matters that, consistent with the values of federalism, have traditionally rested within the province of States and local control ... [T]he Supreme Court in sustaining the constitutionality of the act took care to note the temporary nature of the special provisions.

Id.

²³¹ *Id.* at 70-71. Attorney General Smith explained that:

The inclusion in section 2 of [a results] test would call into question the validity

proportional representation by race that had been raised in the context of the proposed change. Smith remarked that "[u]nder the nationwide effects test, any voting law or procedure in the country that failed to mirror the population makeup in a particular community would be vulnerable to legal challenge under [s]ection 2."²³²

Following questioning of the Attorney General by Hatch, Senator Kennedy delivered a lengthy critique of the Administration's overall record on civil rights, concluding that the Attorney General's statement reflected the same "casual" attitude on civil rights matters. He observed further, "How can a significant group of Americans, whose skin is not white, have very much confidence that these alterations and changes that you are suggesting to us here today in terms of voting rights are really going to fulfill our national commitment?"²³³ In addition, Kennedy called into question the accuracy of the Attorney General's statement that the civil rights leadership had earlier endorsed a simple ten-year extension of the Voting Rights Act.²³⁴ Accusing Senator Kennedy of "political rhetoric" and

of State and local election laws and systems that have long been in existence, not just in the South, but in all of America.

Id. at 71. Hatch repeatedly questioned witnesses on the nature of the voting rights problem *outside* the covered jurisdictions that purportedly justified the need for the amended § 2. *See, e.g., Senate Hearings, supra* note 92, at 1174 (exchange between Hatch and Dr. Arthur Fleming, Chairman, United States Civil Rights Commission). Virtually no substantial evidence was introduced during the hearings relating to voting rights problems outside such jurisdictions. *See* 128 CONG. REC. S6642 (daily ed. June 10, 1982).

²³² *Senate Hearings, supra* note 92, at 70-71. The Attorney General continued by stating that:

Historic political systems incorporating at-large elections and multi-member districts, which had never before been questioned under either the Act or the Constitution would suddenly be subject to attack. So too would be many redistricting and reapportionment plans.

Id.

²³³ *Id.* at 76-77. Among the Administration's civil rights policies condemned by Senator Kennedy was its recent decision to argue on behalf of tax exemptions for racially segregated private schools. *See* *Bob Jones University v. United States*, 51 U.S.L.W. 4593 (May 24, 1983). Other criticized policies included the Administration's decision to fire the long-serving Chairman of the United States Commission on Civil Rights, Dr. Arthur Fleming, its critique of affirmative action policies, appointments of allegedly unqualified individuals to the Equal Employment Opportunity Commission (EEOC), and economic policies which have produced what he called the "heaviest burdens" upon minority youths. *Senate Hearings, supra* note 92, at 76-77. There is little question that the growing perception of the Administration as being hostile to civil rights, reflected particularly by the controversy surrounding its handling of the *Bob Jones* case, contributed significantly to its political difficulties on the voting rights issue. *See, e.g.,* 1982 CONG. Q. ALMANAC 397-99; Evans & Novak, *Who Hid Reagan's Memo?*, *Washington Post*, Jan. 22, 1982, § A, at 15; *Washington Post*, Jan. 21, 1982, § A, at 1 (entitled, *Reagan Played Direct Role on Tax Exemptions*). *See generally* CONG. Q. 171 (1982) (summarizing criticisms of Justice Department action on the Voting Rights Act by the civil rights leadership).

²³⁴ *Senate Hearings, supra* note 92, at 71. The Attorney General testified that civil rights groups with whom he had met during the past year "were unwavering in their praise of the existing legislation" and that their "strongly held view at that time was, 'If it isn't

"misstatements", the Attorney General reiterated the Administration's position and labelled as "major distortions", much of Senator Kennedy's criticism.²³⁵

The interchange between Kennedy and the Attorney General reflected another recurrent theme raised by critics of S. 1992. Although they were aware that a ten-year extension of the existing statute did not now represent an ideal outcome for the civil rights leadership after their impressive House victory, the critics of S. 1992 were still surprised at the intensity of the opposition to a straight extension of the law. After all, Hatch and the others believed that the Voting Rights Act had consistently been described as "the most successful civil rights act in the history of the Nation" by those in the civil rights leadership.²³⁶ They did not yet fully realize the extent to which the civil rights leadership's expectations had been raised by the final House action.

In addition to the Attorney General and the Senate sponsors of S. 1992, other witnesses testifying at the opening day of hearings were individuals representing the major outside support organizations for the Voting Rights Act extension. They included Benjamin Hooks, President of the Leadership Conference on Civil Rights, Vilma Martinez, Executive

broke, don't fix it.'" *Id.* Smith also remarked that, "every civil rights group representative that I talked to in the spring, summer, and fall subscribed to exactly the position that the President is [now] taking." *Id.* at 79-80. Cf. Correspondence of Benjamin Hooks, Chairman, Leadership Conference on Civil Rights, to the Attorney General of the United States, William French Smith (February 9, 1982), reprinted in *Senate Hearings, supra* note 92, at 1089-90. While no witnesses from the organized civil rights community rejected the proposed change in § 2 effected by H.R. 3112, several seemed to confuse the House measure with a simple extension of existing law. See, e.g., *House Hearings, supra* note 61, at 60. Benjamin Hooks stated that:

The Voting Rights Act is the single most effective legislation drafted in the last two decades . . . I have not seen any changes that were anything but changes for changes sake. I do not understand it. It is our position that since it is working well those of us who proposed it and were the sufferers and forebearers are not coming in at this time suggesting that there be changes. It would be best to extend it is its present form.

Id. Ralph Abernathy, former Executive Director, Southern Christian Leadership Conference (SCLC), similarly stated, "We need to continue the bill in its present form for the next ten years." *House Hearings, supra* note 61, at 101.

²³⁵ *Senate Hearings, supra* note 92, at 78.

²³⁶ See Executive Session of the Subcommittee on the Constitution (March 24, 1982), contained in *Senate Hearings, supra* note 92, at Vol. II, 9. Further confusion was evidenced in the events surrounding the testimony of Texas Governor, William Clements, who referred to the "unprecedented" coalition within Texas by civil rights groups—including the League of United Latin-American Citizens, the Texas NAACP, and the Texas League of Women Voters—in support of a "10-year extension of the act as presently constituted." *Id.* at 869, 874-75. This claim was subsequently rejected by each of these organizations. See *Senate Hearings, supra* note 92, at 1611, 1615-17. (testimony of Arnaldo Torres, Executive Director, League of United Latin-American Citizens (LULAC)). Telegram from Texas League of Women Voters to Senator Orrin Hatch (February 4, 1982); Telegram from Texas League of Woman Voters to Texas NAACP (February 5, 1982).

Director of MALDEF, and Ruth Hinerfeld, President of the League of Women Voters. Dr. Walter Berns of the American Enterprise Institute also testified as an academic critic of the proportional representation which he felt was the necessary outcome of an amended section 2.²³⁷

The themes highlighted by Hatch, as well as by proponents of the House measure, were restated frequently during the remaining eight days of hearings. Although occasional discussion of the merits of the new bail-out standard relating to section 5 occurred,²³⁸ the consistent focus of the hearings remained upon the meaning and wisdom of the proposed results test in section 2. The principle elements of controversy regarding section 2 were as follows:

(1) *Whether the results standard was reflective of the law existing prior to the Mobile decision.* This question was important in determining whether Hatch's predictions of proportional representation were credible.²³⁹ If the results standard merely reflected the understanding of the law prior to *Mobile*, Hatch would have difficulty demonstrating that an explicit re-statement of the results standard in section 2 to overturn *Mobile* would lead to proportional representation. While Hatch occasionally argued that some of the decisions interpreting the effects standard of section 5 established a remedy of proportional representation,²⁴⁰ his principal argument was that the law on section 2, prior to *Mobile*, had never been anything other than an intent standard.²⁴¹ Thus, the absence of proportional representation requirements in the past was largely irrelevant. In this regard, Hatch frequently quoted Justice Stewart's comments in *Mobile*.

²³⁷ *Senate Hearings, supra* note 92, at 231. See Berns, *Voting Rights and Wrongs*, COMMENTARY, March 1982, at 31.

²³⁸ See, e.g., *Senate Hearings, supra* note 92, at 394-99 (testimony of Rep. Henry Hyde); *id.* at 605-608 (Steve Suits, Executive Director, Southern Regional Council); *id.* at 749-53 (Abigail Turner, Attorney, Mobile, Alabama); *id.* at 1368-72 (Drew Days, Professor, Yale Law School).

²³⁹ *Id.* at 4-5, 516, 644, 1645. Hatch generally was careful to state that, in his view, proportional representation would likely serve as a limit, or as a standard by which the achievements of a particular community in electing minority representatives would be judged, and that whether or not such a community had accorded minorities a truly "effective" or "undiluted" vote would ultimately depend upon its movement in the direction of proportional representation. *Id.* His position was not that the new test would suddenly impose proportional representation throughout the country.

²⁴⁰ Hatch often cited *City of Richmond v. United States*, 422 U.S. 358 (1970); *Kirksey v. Board of Supervisors of Hinds County*, 528 F.2d 536 (5th Cir. 1976); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973); *City of Port Arthur v. United States*, 517 F.Supp. 987 (D.D.C. 1981); *City of Petersburg v. U.S.*, 354 F.Supp. 1021 (D.D.C. 1973), *aff'd per curiam*, 410 U.S. 962 (1973).

²⁴¹ *Senate Hearings, supra* note 92, at 515. Sen. Hatch stated:

I do not believe that the *Mobile v. Bolden* case represents a departure from the law existing prior to the case. I do not believe that there is any section 2 case or any [Fifteenth] Amendment case where the Supreme Court did not require a finding of purposeful discrimination.

Id. See *id.* at 914-18 (testimony of E. Freeman Leverett, Attorney, Elberton, Georgia).

[I]t is apparent that the language of section 2 no more than elaborates upon that of the Fifteenth Amendment, and the sparse legislative history of section 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself While other of the Court's Fifteenth Amendment decisions have dealt with different issues, none has questioned the necessity of showing purposeful discrimination in order to show a Fifteenth Amendment violation.²⁴²

To the extent that Hatch was successful in demonstrating that the results test represented a new test, one that had not existed prior to the *Mobile* decision, he was far more likely to be credible in suggesting that the impact of this test would be unwise public policy or, at best, uncertain.

In contrast, supporters of H.R. 3112 took issue with both Hatch and Justice Stewart. Laughlin McDonald, the Director of the Southern Regional Office of the American Civil Liberties Union, argued that *Mobile* required proof of intent and, therefore, was a "change in the law." McDonald continued, "Prior to *Mobile*, it was understood by lawyers trying these cases and by the judges who were hearing them that a violation of voting rights could be made out upon proof of a bad purpose or effect. . . . *Mobile* had a dramatic effect on our cases."²⁴³ McDonald, as well as a number of other advocates of H.R. 3112, offered as an illustration the decision of United States District Court Judge Robert Chapman in a case involving Edgefield County, South Carolina. The decision included vacating a judgement for plaintiffs in a vote dilution case several days following the *Mobile* decision.²⁴⁴ Immediately prior to *Mobile*, Judge Chapman had ordered a judgement for the plaintiffs on the basis of an effects or results standard.

(2) *Whether the results standard would inevitably lead to proportional representation.* Although virtually all witnesses on both sides of the debate claimed to reject the notion of proportional representation as desirable public policy,²⁴⁵ the critical issue in the entire debate was whether the

²⁴² *Mobile v. Bolden*, 446 U.S. 55, 60-61, 63 (1980).

²⁴³ *Senate Hearings*, *supra* note 92, at 369. See *Nevett v. Sides*, 571 U.S. 209 (5th Cir. 1978).

²⁴⁴ *Senate Hearings*, *supra* note 92, at 369-70. See *id.* at 1130 (testimony of Thomas C. McCain, Chairman, Democratic Party, Edgefield County, S.C.); *id.* at 1622 (testimony of Charles W. Coleman, City Attorney, Edgefield County, S.C.). Senator Thurmond also spoke passionately on the Edgefield situation. *Id.* at 1135-38. See also Bruck, *Strom Thurmond's Roots*, THE NEW REPUBLIC, March 3, 1982, at 15.

²⁴⁵ Not only did critics of H.R. 3112 and S. 1992 condemn "proportional representation" as public policy (see, e.g., *Senate Hearings*, *supra* note 92, at 717-21 (testimony of Michael Levin, Professor, City College of New York)), but so did every proponent of these measures. See, e.g., *Senate Hearings*, *supra* note 92, at 956 (testimony of Norman Dorsen, President, American Civil Liberties Union). The difference between the two sides, however, was primarily a matter of definition. See *Senate Hearings*, *supra* note 92, at 252-54 (exchange between Hatch and Benjamin Hooks, and exchange between Chief Counsel of Subcommittee and Professor Drew Days); *id.* at 1375-76.

results test would lead to a political regime in which proportional representation of racial and ethnic groups became the standard on which voting rights violations would be predicated.²⁴⁶ Critics of H.R. 3112 repeatedly attacked the results test as one which could lead to such a situation.²⁴⁷ Assistant Attorney General for Civil Rights Reynolds remarked that the proposed amendment to section 2 might lead to the use of "quotas" in the election process, and that local units of government would be required to "present compelling justification for any voting system which does not lead to proportional representation."²⁴⁸ Dr. Berns similarly concluded that the amendment would reverse *Mobile* and authorize "[f]ederal courts to require States to change their laws to ensure that minorities will be elected in proportion to their numbers."²⁴⁹

Defenders of the amendment assumed that the results test represented a restatement of the law prior to *Mobile*. They argued that proportional representation had not resulted from federal court decisions during this period. As McDonald observed,

I cannot . . . think of a single case in which we have won, in which we have settled, in which the courts have ruled for us under the Constitution or under section 2 . . . which have resulted in proportional representation As an actual matter, we have never gotten proportional representation.²⁵⁰

To a large extent, the common rejection of proportional representation by proponents and critics of H.R. 3112 masked more fundamental problems of definition.²⁵¹

(3) *What was meant by the results test if not proportional representation.* Hatch argued that the test either would lead to proportional representation or that the test had no comprehensible meaning.²⁵² If the test had

²⁴⁶ See Appendix to *Additional Views*, by Senator Hatch, S. REP. NO. 417, 97th Cong., 2d Sess. 186-87 (1982) [hereinafter cited as *Senate Report*] (summary of remarks by various witnesses on the theme of "proportional representation").

²⁴⁷ See, e.g., *Senate Hearings*, *supra* note 92, at 71. The Attorney General stated:

Under [the new test], any voting law or procedure in the country which produces election results that fail to mirror the population's make-up in a particular community would be vulnerable to legal challenge . . . if carried to its logical conclusion, proportional representation or quotas would be the end result.

Id.

²⁴⁸ *Id.* at 1660-61.

²⁴⁹ *Id.* at 229. See *id.* at 905-40 (statement of E. Freeman Leverett, Attorney, Elberton, Georgia).

²⁵⁰ *Id.* at 372. See *id.* at 1216-26 (summary of § 2 cases placed in hearing record by Frank Parker, Director, Voting Rights Project, Lawyers' Committee for Civil Rights). This list of cases was designed to demonstrate that the results test, allegedly extant in the law prior to *Mobile*, had not led to any requirements of proportional representation. *Id.*

²⁵¹ See *supra* note 239; see also *Senate Hearings*, *supra* note 92, at 991 (testimony of Rolando Rios, Legal Director, Southwest Voter Registration Education Project). Rios distinguished between proportional representation as a substantive *right* and as a *remedy*. *Id.*

²⁵² *Senate Hearings*, *supra* note 92, at 339-41.

no such meaning, he felt it was likely to invest the federal courts with sharply enhanced authority to substitute their own policy preferences on voting practices and electoral structures for the policies of state legislatures and local elected bodies.²⁵³

Hatch asked of witnesses what the "core value" was of the results test.²⁵⁴ In the absence of any clearly defined value, Hatch argued that the totality of circumstances response, relied on by proponents of the House measure, was "unsatisfactory." To speak of the scope of permissible evidence in the context of the totality of circumstances missed the point, in his judgement. Any test, including the intent test, encouraged consideration of the totality of circumstances. The crucial inquiry involved determining the threshold question asked by a court in evaluating evidence; in other words, the standard by which the totality of circumstances would be judged. As the Subcommittee report later concluded:

[T]here is no core value under the results test except for the value of equal electoral results for defined minority groups, or proportional representation. There is no other ultimate or threshold criterion by which a fact-finder can evaluate the evidence before it.²⁵⁵

²⁵³ See *Senate Report, supra* note 246, at 136-39 (*Additional Views* of Senator Hatch). "In the absence of such standards, the 'results' test affords virtually no guidance whatsoever to communities in evaluating the legality and constitutionality of their governmental arrangements (if they lack proportional representation) and it affords no guidance to courts in deciding suits (if there is lack of proportional representation)." *Id.* See also *Mobile v. Bolden*, 446 U.S. 55, 76 (1980). "Mr. Justice Marshall's dissenting opinion would discard these fixed principles [of law] in favor of a judicial inventiveness that would go far toward making this Court a super-legislature . . . We are not free to do so." *Id.*

²⁵⁴ *Senate Hearings, supra* note 92, at 1340.

²⁵⁵ *Report of the Subcommittee on the Constitution to the Committee on the Judiciary on the Voting Rights Act*, 97th Cong., 2d Sess. (Committee Print, April 1982) [hereinafter cited as *Subcommittee Report*]. The Subcommittee Report is contained in large part in the *Senate Report, supra* note 246, at 137. Critics of the results test in § 2 compared it unfavorably to the effects test in § 5 in this regard. In the context of § 5 where only *changes* in voting law or procedure are scrutinized, a standard of "non-retrogression" (see *Beer v. United States*, 425 U.S. 130 (1976)), affords some guidance to jurisdictions seeking preclearance of their submissions. In the context of § 2, however, where not only changes in law would be evaluated, but also existing electoral arrangements, the 'non-retrogression' principle is inapplicable. *Senate Report, supra* note 246, at 137. In the view of most critics of the proposed "results" test, no alternative standard—except for proportional representation—made sense in the context of § 2. *Id.* In their view, no alternative standard exists short of comparing actual representation of minorities to the representation that they would be ideally "entitled" under a structure of proportional representation. *Id.* See, e.g., *Senate Hearings, supra* note 92, at Vol. II, 131-32 (letter from Timothy G. O'Rourke, Assistant Professor, University of Virginia, to the Subcommittee on the Constitution). O'Rourke stated that:

A challenge to an at-large system of necessity must be predicated on a comparison between electoral opportunity under the existing plan and the opportunity which would or might prevail under one or more alternatives. If the alternatives need not be limited to those that fit within the existing structure of government or the current size of the local governing body, then there is little to pre-

The report further complained that efforts to elicit greater guidance on the meaning of the test had degenerated into "wholly uninformative statements of the sort that 'you know discrimination when you see it,' " or else "increasingly explicit references to the numerical and statistical comparisons that are tools of proportional representation."²⁵⁶

Initial difficulties on the part of supporters in either understanding or responding to inquiries about the "core value" of the results test soon changed. Supporters responded to such inquiries by referring either to the specific factors outlined by the Court in *White v. Regester* or by the lower federal courts in *Zimmer v. McKeithen*.²⁵⁷ Professor Norman Dorsen, of the New York University School of Law and President of the American Civil Liberties Union, was among the first to concede that the totality of circumstances description of the results test was inadequate.²⁵⁸ He relied on Justice White's remarks in *White* to provide a more useful description of the new test. In *White*, Justice White stated that "[t]he plaintiffs burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question."²⁵⁹ Justice White's language eventually was debated in the context of the compromise offered as an alternative to the House language after the completion of Senate hearings.²⁶⁰

(4) *Whether the disclaimer of proportional representation contained in the House proposal was effective.* Supporters of H.R. 3112 constantly argued that the amendment would not result in proportional representation because of the "disclaimer" in the new section 2.²⁶¹ The relevant language, appended at the end of the proposed results test, read:

vent the consideration of proportional representation as the model against which the current system could be evaluated.

Id.

²⁵⁶ See *Senate Hearings*, *supra* note 92, at 253. (statement of Benjamin Hooks, Executive Director, NAACP)

²⁵⁷ See, e.g., *Senate Hearings*, *supra* note 92, at 564 (testimony of Joaquin Avila, Associate Counsel, MALDEF); *id.* at 959 (testimony of Professor Norman Dorsen, President, American Civil Liberties Union).

²⁵⁸ *Id.* at 959.

²⁵⁹ See *supra* note 104.

²⁶⁰ See *Senate Report*, *supra* note 246, at 194-95. (*Additional Views* of Senator Robert Dole). Senator Dole observed that language eventually adopted as part of S. 1992: codifies the legal standard articulated in *White v. Regester* . . . the standard is whether the political processes are equally "open" in that members of a protected class have the same opportunity as others to participate in the political processes and to elect candidates of their choice.

Id. at 194. See also *supra* note 105.

²⁶¹ See *House Report*, *supra* note 2, at 30. Several illustrations of reliance upon the disclaimer as effectively precluding policies of proportional representation can be identified. *Senate Hearings*, *supra* note 92, at 1418 (testimony of Professor Archibald Cox, Harvard Law School, representing Common Cause); *id.* at 1599 (testimony of David Brink, President, American Bar Association); *id.* at 878 (Congressman James Sensenbrenner).

The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section.²⁶²

Critics of the test were concerned that the disclaimer posed no serious barrier to a mandate of proportional representation. They, however, also recognized the internal political difficulties that the disclaimer posed. A casual observer of these amendments, several Senators noted, could not help but assume that the disclaimer language established at least some significant obstacle to the judicial transformation of the results test into a test of proportional representation.²⁶³

There were at least five separate interpretations of the disclaimer which critics of H.R. 3112 believed rendered it no more than a "smokescreen", as a serious impediment to the establishment of a proportional representation principle, however faithfully the provision was to be enforced. (1) The first interpretation accorded the disclaimer related to the "objective factors" argument of proponents. Critics pointed to the House Report as outlining a theory by which certain voting and electoral practices were characterized as "objective factors of discrimination."²⁶⁴

²⁶² Section 3, H.R. 1992 as passed by the House of Representatives, October 7, 1981; S. 1992, as introduced. The disclaimer would have immediately followed the proposed results test, which read:

No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be im- or applied by any State or political subdivision in a manner which results in the denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2).

See *supra* text accompanying note 52.

²⁶³ See, e.g., 128 CONG. REC. S6964-65 (daily ed. June 17, 1982) (remarks of Senator Howell Heflin); 128 CONG. REC. S7107-109 (daily ed. June 18, 1982) (remarks of Senator Paul Tsongas); 128 CONG. REC. S7115 (daily ed. June 18, 1982); (remarks of Senator Joseph Biden); 128 CONG. REC. S7115-16 (daily ed. June 18, 1982) (remarks of Senator George Mitchell).

²⁶⁴ *House Report, supra* note 2, at 30. Among the aggregate of "objective factors" to be considered in conjunction with the results test, according to the House report, were: [A] history of discrimination affecting the right to vote, racially polarity voting (sic) which impedes the election opportunities of minority group members, discriminatory elements of the electoral system such as at-large elections, a majority vote requirement, a prohibition on single shot voting, and numbered posts which enhance the opportunity for discrimination, and discriminatory slating of the failure of minorities to win party nomination.

Id. In addition to these factors, the Subcommittee Report (*supra* note 255) suggested the following additional "objective factors": a history of "dual" school systems, cancellation of registration for failure to vote, residency requirements for voters, special election requirements for third-party or independent candidates, off-year elections, substantial candidate cost requirements, staggered terms of office, high economic costs associated with registration, disparity in voter registration by race, history of lack of proportional representation, disparity in literacy rates by race, evidence of racial bloc voting, history of English-only ballots, history of poll taxes, disparity in distribution of public services by race, and numbered electoral posts. *House Report, supra* note 2, at 143-44.

These practices included at-large voting systems, registration purging requirements for failure to vote, and anti-single shot balloting requirements. The proponents of H.R.3112 believed that such enumerated practices commonly characterized political jurisdictions that were not "equally open" to minority group members. The existence of an at-large voting systems, for example, was considered to be an "objective factor of discrimination" because it tended to result in the establishment of larger voting districts and hence fewer districts with majorities of minority group members.²⁶⁵ Critics of H.R. 3112, focusing upon the "in and of itself" language in the disclaimer, argued that the disclaimer could lead to a situation in which an absence of proportional representation, although insufficient to trigger a violation of section 2 by itself, would be sufficient if accompanied by the existence of one or more objective factors of discrimination.²⁶⁶ The broad scope of "objective factors,"²⁶⁷ combined with what critics believed would be the ease of identifying one or more such factors within a given jurisdiction, seemed to make a proportional representation standard inevitable. As the Subcommittee Report was later to conclude, "The courts and the Justice Department . . . have already identified so many such factors that one or more would be available to fully establish a § 2 claim in virtually any political subdivision having an identifiable minority group."²⁶⁸ Critics, therefore, argued that the disclaimer could be fully satisfied where a section 2 violation was identified, not on the basis of lack of proportional representation "in and of itself," but on the basis of such a finding combined with one or more objective factors purporting to explain the absence of proportional representation.²⁶⁹ Identification of

²⁶⁵ See generally O'Rourke, *The Legal Status of Local At-Large Elections: Racial Discrimination and the Remedy of "Affirmative Representation"*, Speech prepared for delivery at the 1979 Annual Meeting of the American Political Science Association, reprinted in *Senate Hearings, supra* note 92, at Vol. II, 464-94; Davidson and Korbel, *At-Large Elections and Minority Group Representation*, 43 J. POLITICS 982 (1981); E. BANFIELD AND J. WILSON, *CITY POLITICS* 151 (1963); Jewell, *Local Systems of Representation: Political Consequences and Judicial Choices*, 36 GEO. WASH. L. REV. 790 (1968); M. SEASONGOOD, *LOCAL GOVERNMENT IN THE UNITED STATES* (1933); *Senate Hearings, supra* note 92, at 802-803 (testimony of Armand Derfner, Joint Center for Political Studies). An alleged distinction has been suggested between minority "representation" and minority "influence". See *id.* at 542-46 (testimony of Prof. Susan McManus, University of Houston); Executive Session, Senate Committee on the Judiciary, *id.* at Vol. II, 26-27 (remarks of Sen. Hatch).

²⁶⁶ *Senate Hearings, supra* note 92, at 516. The somewhat mechanistic understanding of the operation of the results test was given at least some impetus by the explicit rejection in the House Report of consideration of "highly subjective factors such as responsiveness of elected officials to the minority community." *House Report, supra* note 2, at 30. Cf. *Zimmer v. McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1978) (lack of responsiveness was listed as one of several factors to be considered by courts under *White v. Regester* standard).

²⁶⁷ See *supra* note 264. Neither the listing in the House report nor the Senate Subcommittee report purported to be comprehensive.

²⁶⁸ *Senate Report, supra* note 246, at 143; *Subcommittee Report, supra* note 255, at 36.

²⁶⁹ *Senate Report, supra* note 246, at 144-45; *Subcommittee Report, supra* note 255, at 38. The Subcommittee report states, "such 'objective factors of discrimination' largely consist of electoral procedures or mechanisms that purportedly pose barriers to full participation by minorities in the electoral process. Given the existence of one or more of these

an objective factor would then become a largely mechanical and perfunctory process.

(2) The second interpretation accorded the disclaimer was the "remedial" argument. Critics of the disclaimer suggested that even if a lack of proportional representation would not suffice to establish a substantive violation of section 2, the disclaimer did not rule out proportional representation as a remedy for the violation.²⁷⁰

(3) The third interpretation accorded the disclaimer was the "minority advantage" argument. Critics suggested that the effect of the disclaimer might be to impose upon jurisdictions an absolute obligation to dismantle "objective factors of discrimination", such as at-large systems, which were inconsistent with the pursuit of proportional representation. They claimed that the disclaimer would protect communities lacking proportional representation only to the extent minorities clearly had failed to take advantage of existing electoral arrangements compatible with the concept of proportional representation.²⁷¹ In other words, although proportional representation "in and of itself" would not be required, an affirmative obligation would exist to eliminate any electoral or structural barriers to the achievement of proportional representation.²⁷²

(4) The final interpretation accorded the disclaimer was the "textual" argument. Critics argued that even if the disclaimer was interpreted in good faith by the courts, it would not serve as a bulwark against proportional representation because it was syntactically confused and meaningless.²⁷³ Only voting "practices or procedures" could, by definition, constitute violations of section 2, not the racial composition of a representative body as suggested by the disclaimer.²⁷⁴

factors with the lack of proportional representation, the new test in § 2 operates on the premise that the existence of the 'objective factor' *explains* the lack of proportional representation. Thus, in a technical sense, the disclaimer would be satisfied. It would not be the absence of proportional representation *in and of itself* that would constitute the dispositive element of the violation but rather the objective factor." *Id.*

²⁷⁰ *Senate Report, supra* note 246, at 97; *Subcommittee Report, supra* note 255, at 36. The Subcommittee report states, "there is little doubt that many proponents of the results test, in fact, are adamantly determined not to preclude the use of proportional representation as a basis for fashioning remedies for violations of section 2." *Id. See Senate Hearings, supra* note 92, at 991 (testimony of Rolando Rios, Legal Director, Southwest Voter Education Project). *See also infra* text accompanying note 355.

²⁷¹ *Senate Hearings, supra* note 92, at 1660-61. The principle proponent of this theory was Assistant Attorney General for Civil Rights Reynolds. He described a number of municipalities throughout the country that would be vulnerable under the new results standard despite the language of the disclaimer. *Id.* at 1661-63. *See Memorandum from Robert A. McConnell, Assistant Attorney General for Legislative Affairs, to Senator Strom Thurmond (February 25, 1982), reprinted in Senate Hearings, supra* note 92, at Vol. II, 406, 414.

²⁷² *Senate Hearings, supra* note 92, at 1660-61.

²⁷³ *See id.* at 1409. Former Professor Irving Younger, a national authority on evidence and a Washington attorney, articulated this view: "the purported saving sentence of proposed section 2 in fact saves nothing . . . [I]t is simply incoherent." *Id.*

²⁷⁴ *Id.* Professor Younger stated, "If the draftsmen of proposed section 2 wished to see to it that the racial makeup of an elected body would not be taken as evidence of a violation, they have failed to say so in their moving sentence. If enacted, that saving sentence

(5) *The meaning of the intent test.* Just as critics and proponents differed on the proper meaning of the proposed results test, the two sides in the Voting Rights Amendments debate repeatedly disagreed about the meaning of the intent test, which Hatch, Thurmond and the Reagan Administration wished to preserve. Proponents of the results test repeatedly characterized the intent standard as requiring direct evidence of discriminatory purpose or intent,²⁷⁵ such as overt statements of bigotry²⁷⁶ or evidence of a "smoking gun."²⁷⁷ Proponents also felt that the intent test required courts to "mind read"²⁷⁸ in order to discern the intentions of "long-dead" legislators.²⁷⁹ Dr. Arthur Fleming, Chairman of the United States Commission on Civil Rights, and an outspoken opponent of the intent test, contended that "inquiries [into intent] can only be divisive, threatening to destroy any existing racial progress in a community. It is the intent test, not the results test, that would make it necessary to brand individuals as racist in order to obtain judicial relief."²⁸⁰

Advocates of the intent test responded that opponents' opinions belied a misunderstanding of the standard. They claimed that the intent standard permitted consideration of evidence concerning the totality of the circumstances,²⁸¹ including any direct or indirect evidence.²⁸² Both the results and intent tests, they felt, permitted evidence of disparate impact upon minority groups. The latter, however, accorded such evidence the weight that the fact-finder believed it merited, rather than raising a presumption of a section 2 violation.²⁸³ Professor Irving Younger outlined the burden of proof that the intent test placed on the plaintiff:

will either be rewritten by the courts or ignored, in either event debasing Congress' responsibility to write the Nation's laws." See *Senate Hearings*, *supra* note 92, at 230-31 (testimony of Professor Walter Berns, American Enterprise Institute, on matter of courts ignoring altogether intent of drafters of disclaimer). Professor Berns compared the disclaimer to the disclaimer of racial preferences in Title VII of the Civil Rights Act of 1964. 42 U.S.C. 2000e-2(j)); *Senate Hearings*, *supra* note 92, at 230-31; see *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

²⁷⁵ See, e.g., *Senate Hearings*, *supra* note 92, at 304 (testimony of Vilma Martinez).

²⁷⁶ *Id.* at 249. (testimony of Mayor Henry Marsh, Richmond, Virginia).

²⁷⁷ See Memorandum from Ralph Neas, Executive Director, Leadership Conference on Civil Rights, on Amending Section 2 of the Voting Rights Act (January 26, 1982), reprinted in *Senate Hearings*, *supra* note 92, at 282, 286 [hereinafter cited as *Leadership Memorandum*].

²⁷⁸ See *supra* note 275; Parker, *Saving Voting Rights*, N.Y. Times, Feb. 5, 1982, § 3, at 1.

²⁷⁹ See *Leadership Memorandum*, *supra* note 277, at 462. The Birmingham (Ala.) *Post-Herald* noted in an editorial supporting the House-passed § 2 provision, "It would quite a trick for anyone to subpoena [legislators] from their graves for testimony about their racial motivations." Cf. *Senate Hearings*, *supra* note 92 at 1413-14 (testimony of Younger).

²⁸⁰ *Senate Hearings*, *supra* note 92, at 1181 (testimony of Dr. Arthur Fleming, Chairman, U.S. Commission On Civil Rights). Dr. Fleming spoke at least partially in response to Senator Hatch's criticism of "branding" someone a "racist" pursuant to a "results" test. *Id.* See *Senate Hearings*, *supra* note 92, at 974-75 (colloquy between Hatch and Joseph Rauh, Leadership Conference on Civil Rights).

²⁸¹ See *Senate Hearings*, *supra* note 92, at 516 (statement of Sen. Orrin Hatch); *Senate Hearings*, *supra* note 92, at 1414 (colloquy between Hatch and Professor Younger).

²⁸² See *supra* note 281 (testimony cited).

Opposition to the intent test has been practical. To enact it, the argument goes, is to make it more difficult or even impossible to prove a violation. A practical objection to be sure but one which suggests to me that its makers lack practical experience in the conduct of litigation. Spend a few hours in any criminal court in the land. What is the stuff on trial? Almost always a question of intent In nearly all criminal litigation and in much civil litigation, a party must prove the other's intent. So far as I know, except for the matter before this Subcommittee there has been no serious contention that it is an unduly difficult or impossible thing to do Lawyers and judges are familiar with the intent test and juries have no particular trouble in applying it.²⁸⁴

An even more fundamental difference, however, than whether the intent standard was an "inordinately difficult burden" for plaintiffs,²⁸⁵ related to the propriety of the standard. Senator Mathias was subsequently to observe about the intent standard, ". . . simply put, [it] asks the wrong question If [minorities] are denied a fair opportunity to participate . . . the system should be changed, regardless of what may or may not be proveable about events which took place decades ago."²⁸⁶ To Hatch, as with Mathias, the fundamental question involved more than simply the degree of difficulty in satisfying the standard: "Most importantly, it is the right standard in the sense that neither an individual nor a community . . . ought to be considered guilty of discrimination in the absence of intent or purpose to discriminate. To speak of 'discrimination' in any other terms—to treat it as equivalent to a showing of disparate impact—is to transform the meaning of the concept beyond all recognition . . ."²⁸⁷

(6) *What was Congress' original intent in passing section 2 of the Voting Rights Act.* The final major issue related to whether Congress' intent in 1965 was compatible with the newly proposed results test. Critics of the test argued that even if the lower federal courts had adopted a results test in their pre-*Mobile* interpretation of section 2 (which they declined to concede), the original intent of Congress had been the establishment of a test in section 2 premised upon the traditional standard of intent or purpose.²⁸⁸ The Subcommittee Report found it particularly persuasive that Congress chose not to utilize the effects language in section 2 that Congress had expressly incorporated into sections 4 and 5.²⁸⁹ Congress

²⁸³ *Senate Hearings, supra* note 92, at 1414.

²⁸⁴ *Id.* at 1409.

²⁸⁵ *Senate Report, supra* note 246, at 36.

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 135. "An appropriate standard should [not] be fashioned on the basis of what best facilitates successful legal actions against States and municipalities." *Id.*

²⁸⁸ *Id.* at 128-29 (Subcommittee Report at 22-23).

²⁸⁹ *Id.* at 128 (Subcommittee Report at 22). The Subcommittee Report stated, "In sections 4 and 5 of the Act, Congress established an explicit, although highly limited use of [the results or effects] test. The fact that such language was omitted from section 2 is conspicuous and telling." *Id.*

also had exhaustively debated the concept of an effects standard in the context of sections 4 and 5, but had not in the context of section 2.²⁹⁰

Proponents of the results test responded by pointing to the sparse legislative history existing on the meaning of section 2. Relying upon statements by former Attorney General Nicholas Katzenbach, they concluded that Congress was aware of the competing definitions of "discrimination" and intended that section 2 cover voting rights violations established under either.²⁹¹ Ironically, critics of the results test also relied upon the former Attorney General's remarks in 1965 to establish their case as to the original legislative intent.²⁹²

The Senate and House hearings were primarily distinguished, apart from their substantive focus, by the extent to which the Senate debates involved a greater diversity of expert witnesses. Senate critics of H.R. 3112 complained that the hearings conducted by the House were imbalanced and one-sided. In an unusual display of criticism directed at another congressional subcommittee, the Senate Subcommittee Report discussed the "total lack of opportunity for individuals opposed to these changes in the law to testify before the House Judiciary Committee."²⁹³ In contrast, the Senate hearings involved a roughly equal balance between supporters and critics of the House measure, including academicians, litigators, and political figures on both sides. Only in the area of organizational representatives did the House imbalance carry over into the Senate panel. Virtually no group or organization could be found to testify in opposition to the House-proposed changes.

²⁹⁰ *Id.* at 129 (Subcommittee Report at 23).

²⁹¹ *See, e.g., Senate Hearings, supra* note 92, at 1372-73 (colloquy between Sen. Mathias and Professor Days); *Senate Report, supra* note 246, at 17 n. 50-51. Attorney General Katzenbach responded to a question from Senator Fong relating to the meaning of the term "procedure" in § 2 of the original Act, and whether the term was broad enough to encompass restrictive registration hours by a jurisdiction. Katzenbach replied, ". . . I had thought of the word 'procedure' as including any kind of practice of that kind if its *purpose or effect* was to deny or abridge the right to vote on account of race or color." *Hearings Before the Senate Committee on the Judiciary on the Voting Rights Act, 89th Cong., 1st Sess.* 191 (1965). *Cf. Senate Hearings, supra* note 92, at 129 n. 70.

²⁹² *Senate Report, supra* note 246, at 129. Critics of the results test focused upon the immediately preceding remarks of Attorney General Katzenbach in which he suggested that the hypothetical situation described by Senator Fong would be within the scope of § 2 "if it had that purpose," i.e. to discriminate. *See supra Hearing before the Senate Committee on the Judiciary on the Voting Rights Act, 89th Cong., 1st Sess.* 191 (1965). In response to a later question from Senator Fong, the Attorney General responded that the element of intent required was "the same intent that is normally required in a criminal statute." *Id.* at 192-93.

²⁹³ *See Senate Report, supra* note 246, at 125 (Subcommittee Report at 18). "During the eighteen days of hearings that took place in the House, on the extension of the Voting Rights Act, the Judiciary Committee heard 156 witnesses testify on this issue. Of these, only thirteen expressed any reservations about the House measure and some of these were of a relatively trivial nature." *Id. See also Senate Hearings, supra* note 92, at 403-404 (testimony of Congressman Henry Hyde).

While the section 2 issue dominated the Senate hearings, much as the discussion on bailout had dominated the House, at least one full day (February 11) was devoted to the issue of the proposed reforms to the section 4 bailout criteria. Hatch introduced the hearings by describing five "misconceptions" about the bailout procedures that, in his view, previously had characterized the debate on the Voting Rights Act Amendments.²⁹⁴ (1) The first "misconception" involved the expiration date of August 6, 1982. He emphasized that the Voting Rights Act was a permanent piece of legislation. The significance of the August date was simply that a large number of covered jurisdictions would have satisfied their obligations under the existing Act and would have been authorized to petition for bailout.²⁹⁵

(2) The second "misconception" related to whether the House bill represented a "relaxation" of existing criteria. Hatch pointed out that existing bailout criteria consisted of nothing more than demonstrating to a district court that a jurisdiction had not employed a discriminatory test or device for the requisite period of time.²⁹⁶ The proposed criteria in H.R. 3112 and S. 1992 maintained the original requirement and added an additional obligation. Nevertheless, Hatch recognized that the new bailout criteria represented a relaxation, if the assumption was that the requisite time period would again be extended beyond the possible reach of covered jurisdictions. He emphasized, however, that in the absence of such the assumption, the new criteria did not represent a relaxation or liberalization of existing criteria.

(3) The third "misconception" questioned whether the House bailout simply represented a third extension of the time period during which a covered jurisdiction must maintain "clean hands" in order to be eligible for bailout. He emphasized that the extension approved by the House was permanent, not a mere five or seven year extension as it had been

²⁹⁴ *Senate Hearings, supra* note 92, at 1083-87. The misconceptions were frequently reiterated by critics of H.R. 3112 and S.1992. Allegations of "misconceptions" were frequently made during the Voting Rights Act debate. *See* 128 CONG. REC. S66501-50 (daily ed. June 9, 1982) (Senator Jesse Helms).

²⁹⁵ *Senate Hearings, supra* note 92, at 1083. Proponents of the House version of the Voting Rights Act extension were sometimes casual in their description of the significance of the August 6 deadline. Nothing in the Act was scheduled to "expire" on that date. What was important about the date was that a number of jurisdictions "covered" under the original Voting Rights Act would finally have satisfied the requirements of the Act (as well as of its subsequent amendments) and have been eligible for bailout from the preclearance requirements. *See, e.g., id.* at Vol. II, 206 (statement of Council on Church and Race, United Presbyterian Church in U.S.A.: "The Voting Rights Act will expire in August 1982 unless extended by Congress."); *id.* at 225 (statement of Douglas Fraser, President, United Automobile Workers: ". . . [T]he preclearance provisions of section 5 of the Act are scheduled to expire after August 6, 1982"); *id.* at 294 (colloquy between Senator Orrin Hatch and Vilma Martinez).

²⁹⁶ *Id.* at 1084. *See* 128 Cong. Rec. S6649-52 (daily ed. June 10, 1982) (colloquy between Senator Hatch and Senator Mathias).

in the case of the 1970 or 1975 Amendments.²⁹⁷ He observed that jurisdictions could be required to preclear changes in voting laws and procedures in perpetuity under the House bill.

(4) The fourth "misconception" suggested that the term of the extension was not one of substantial significance in view of the establishment of relaxed bailout provisions. He stressed that the Supreme Court had upheld the fundamental constitutionality of the Voting Rights Act in *South Carolina v. Katzenbach* and *City of Rome v. United States*,²⁹⁸ recognizing what the Court called the "exceptional" conditions existing in the South at the time and the "temporary" nature of the preclearance provisions.²⁹⁹ A permanent extension, then, could call into question the constitutionality of the Amendments.³⁰⁰

(5) The final "misconception" involved whether the House bailout represented the sort of "reasonable" bailout that might suffice to preserve the constitutionality of the Act despite the permanent nature of the extension. After briefly discussing the individual criteria for bailout contained in the House bill, Hatch concluded that the bailout provisions as adopted in H.R. 3112 and S. 1992 were not reasonable.³⁰¹ Faced with the permanent extension of preclearance, Hatch felt that the bailout criteria increased the probability that covered jurisdictions would become subject to indefinite coverage.³⁰²

Supporters of the new bailout made little effort to address Hatch's points. They seemed to believe that the misconceptions had been addressed thoroughly during the House hearings. Also, proponents principally were concerned with establishing a thorough record on the controversy surrounding section 2 .

²⁹⁷ *Senate Hearings*, *supra* note 92, at 1084-85.

²⁹⁸ *Id.*

²⁹⁹ *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966); *City of Rome v. United States*, 446 U.S. 156, 182 (1980).

³⁰⁰ *Senate Hearings*, *supra* note 92, at 1085. The question of the constitutionality of the proposed amendments was raised repeatedly by Hatch, both in the context of §§ 5 and 2. *Subcommittee Report*, *supra* note 255, at 59-67, contained in *Senate Report*, *supra* note 246, at 165-73. In the Subcommittee Report, Hatch and the other Subcommittee Republicans argued that the in perpetuity extension of H.R. 3112 was inconsistent with the emphasis in *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966), upon the "temporary" nature of the extraordinary preclearance remedy. *See also Senate Hearings*, *supra* note 92, at 69 (testimony of Attorney General William French Smith); *Senate Hearings*, *supra* note 92, at 946-48 (testimony of E. Freeman Leverett). Even a leading proponent of the House measure conceded that the "extraordinary conditions that existed at the time of *Katzenbach* are, of course, not the conditions that exist today. . .". *Senate Hearings*, *supra* note 92, at 319 (testimony of Ruth Hinerfeld). The subsequent change in the proposed extension from in perpetuity to twenty-five years did not significantly alter the constitutional argument in Hatch's view. *See Senate Report*, *supra* note 246, at 102; *contra id.* at 61-62 (defense of constitutionality of section 5 as proposed either by House bill or Senate bill as introduced). *See also supra* note 117.

³⁰¹ *Senate Hearings*, *supra* note 92, at 1085-87.

³⁰² *Id.* at 1087. *See id.* at 1704-705 (exchange between Senator Hatch and Assistant Attorney General Reynolds).

Apart from the Attorney General who had testified on the opening day of hearings, perhaps the most politically significant witness to appear before the Subcommittee was Assistant Attorney General Reynolds. He appeared on March 1 as the only non-congressional witness during the final of nine days of hearings. In response to a question concerning whether the bailout criteria were "reasonable," Reynolds replied that he did "not see much prospect in the near future for many jurisdictions to bail out under the standards that the House proposed."³⁰³ The principle focus of Reynolds' testimony, however, was section 2.³⁰⁴ He reiterated the observations made by the Attorney General during his earlier appearance that the proposed change would be a "dramatic" one that likely could lead to proportional representation by race.³⁰⁵ Reynolds specifically identified several major cities that could be vulnerable under the new standard. Among these were Pittsburgh, Hartford, Wilmington, and Kansas City (Kansas).³⁰⁶ Not coincidentally, three of the four cities were represented by members on the Judiciary Committee who possibly were perceived at the time as members who could be persuaded to support retention of the intent standard in section 2.³⁰⁷

When the Subcommittee Report was subsequently published, it went well beyond Reynolds' testimony in describing several additional communities as possible objects of section 2 litigation under a results standard. In addition to the communities mentioned by Reynolds, the Report added Anchorage, Baltimore, Birmingham, Boston, Cincinnati, Dover, Fort Lauderdale, New York, Norfolk, San Diego, Savannah, and Waterbury.³⁰⁸

Although critics of the House proposals engaged in extensive efforts

³⁰³ *Id.* at 1707. Cf. Letter from Armand Derfner to Senator Orrin Hatch (March 8, 1982), reprinted in *Senate Hearings*, *supra* note 92, at 830-31.

³⁰⁴ *Senate Hearings*, *supra* note 92, at 1659-63.

³⁰⁵ *Id.* at 1664.

³⁰⁶ *Id.* at 1661-62. *Contra Senate Report*, *supra* note 246, at 34-35.

³⁰⁷ Senator Arlen Specter represented Pittsburgh, Pennsylvania, Senator Joseph Biden represented Wilmington, Delaware, and Senator Robert Dole represented Kansas City, Kansas.

³⁰⁸ *Senate Report*, *supra* note 246, at 154-57 (Subcommittee Report at 48-52). A typical description would read as follows:

Cincinnati, Ohio

The Cincinnati City Council is composed of nine members elected at-large. One member of the council is a member of a minority group (11.1%). The minority population of Cincinnati is at least 33 percent. This lack of proportionality and the at-large electoral practices, when weighed in light of the history of segregated schools in Cincinnati (according to the U.S. Commission on Civil Rights), will likely result in restructuring of the system for electing members of the City Council.

Id. at 155. *Contra Senate Report*, *supra* note 246, at 34-35. In addition to listing municipalities that it believed to be vulnerable under the proposed § 2 results test, the Subcommittee Report also listed entire states that it believed could be subject to litigation. *Id.* at 152-54 (Subcommittee Report at 46-48). This latter analysis was predicated upon the absence of proportional representation in one or both houses of the state legislature, and the concurrent existence of one or more of four listed "objective factors" of discrimination. *Id.* at 153-54 (Subcommittee Report at 48).

to make the section 2 changes more concrete for the average Senator by attempting to predict the impact upon particular communities, Senators from the affected jurisdictions expressed little concern.³⁰⁹ Most members of the full committee felt that Reynolds' allegations, as well as those of the Subcommittee Report, "were inconsistent with how the results test operates, and ignored the track record of cases decided under the results test."³¹⁰ Implicit in these views was the fundamental disagreement as to whether the new test represented a restatement of the law reversed by *Mobile* or an entirely new standard.³¹¹

The Assistant Attorney General's appearance, as well as that of Attorney General Smith, was marked by discord between the Administration and members of the Committee. Reynolds was involved in a dispute with a member of the Subcommittee, Senator Patrick Leahy of Vermont, about whether his testimony on the meaning of the intent test was consistent with a brief recently filed by the Department of Justice in a related civil rights matter.³¹² Shortly thereafter, Reynolds also tangled with Senator Arlen Specter of Pennsylvania on the significance of the *Edgefield County* case in relation to his proposition that *Mobile* had not altered longstanding interpretations of the law with respect to section 2.³¹³

Concluding the March 1 hearing, as well as the entire sequence of hearings on Voting Rights Act Amendments, Senator Hatch reaffirmed his commitment to the idea of nondiscrimination and perhaps in anticipation of forthcoming legislative events, remarked that:

Whatever the outcome of this debate, I personally hope that we will be able to say a decade from now that we did what was right; I personally hope that we will not have to say a decade from now that no one really appreciated at the time what section 2 was all about.³¹⁴

With the completion of hearings, the three Republican members of the Subcommittee were confronted with the decision of what measure

³⁰⁹ The three Senators, for example, toward whom Assistant Attorney General Reynolds had targeted his testimony, (*supra* note 307) all ultimately were supporters of the results test, although Senator Dole eventually proposed an alteration of the House language. See *infra* text accompanying notes 334-40.

³¹⁰ *Senate Report*, *supra* note 246, at 34. "Specifically, the Committee finds that the analysis used by the Assistant Attorney General and the Subcommittee were inconsistent with how the results test operates, and ignored the track record of cases decided under the results test discussed above." *Id.*

³¹¹ See *supra* text accompanying notes 239-44.

³¹² *Senate Hearings*, *supra* note 92, at 1677-79. The dispute related to briefs filed by the Department of Justice in the context of school desegregation suits in *State of Washington v. Seattle School District No. 1*, 50 U.S.L.W. 4998 (1982), and *Crawford v. Board of Education of City of Los Angeles*, 50 U.S.L.W. 5016 (March 22, 1982), concerning what constituted relevant evidence in proving *de jure* discrimination in these communities.

³¹³ *Senate Hearings*, *supra* note 92, at 1683-86.

³¹⁴ *Id.* at 1850.

they should report to the full Committee. While general agreement seemed to exist on the defects in the House bill, a keen awareness also was present of the political difficulties that awaited any attempt they made to deviate from the House bill. The legislative vehicle approved by the Subcommittee inevitably would serve as the principle alternative at full Committee. This reality served to shape the final Subcommittee product.

On March 24, Senator Hatch convened the Subcommittee for the purpose of reporting a bill. With Hatch, Thurmond, and Grassley comprising a majority of the Subcommittee, there was little doubt that critics of the House bill would prevail. Any suspense stemmed from uncertainty over which alternative the Subcommittee would propose.

Opening the session, Senator Hatch proceeded once again to detail his concerns over the results test in S. 1992. A listing of statements by academics and others on the dangers of the new test followed.³¹⁵ He then warned that:

[T]he results test is going to effect a transformation in civil rights policy in this country that few, if any, of us can predict if it is enacted. It will be a country in which considerations of race and ethnicity intrude into each and every public policy decision. Rather than continuing to move toward a constitutional color-blind society, we will be moving toward a totally color-conscious society.³¹⁶

The ranking Democrat, Senator Dennis DeConcini of Arizona, then expressed his support for S. 1992, while commending Senator Hatch.³¹⁷ At the same time, DeConcini commended Senator Hatch for offering all viewpoints a "full and fair opportunity to be heard."³¹⁸ Suggesting the extent to which the hearings had focused the debate on the section 2 issue, he further noted that:

Many questions have been raised regarding the propriety of portions of this bill, especially section 2. Proponents of the bill, however, have answered each of these questions to my satisfaction. I am confident as I prepare to vote for S. 1992 that the results test embodied therein will not lead to a requirement of proportional representation by race in State and local governments not to any of the other dire consequences suggested by the bill's opponents.³¹⁹

Finally, addressing something that had generally been obscured in the public debate, Senator DeConcini observed that "perhaps the most important observation regarding these hearings . . . is the uniform expres-

³¹⁵ See *Senate Hearings*, *supra* note 92, at Vol. II, 1-12 (Subcommittee executive session); *id.* at Vol. II, 2-4 (listing of statements on alleged dangers of new test).

³¹⁶ *Id.* at Vol. II, 4.

³¹⁷ *Id.* at Vol. II, 4-5.

³¹⁸ *Id.* at Vol. II, 5.

³¹⁹ *Id.*

sion of support by virtually every witness and by every Senator for the idea of equality in voting rights."³²⁰ This point was one that critics of H.R. 3112 had been making since the outset of the Senate debate, though without visible success. The central issue was not whether to extend the Act, or whether to provide equal access for all persons to the voting process, but related to the merit of the specific provisions of S. 1992 and H.R. 3112.

Following a decision to mark-up S. 1992,³²¹ the Subcommittee voted along party lines to approve a bloc of amendments offered by Senator Grassley. These amendments struck the text of S. 1992 in its entirety and substituted instead a straight ten-year extension of existing law, including the retention of the seventeen-year old language of section 2.³²² The Grassley preclearance extension, although not permanent, represented the longest extension of the Act in its history. Without debate, the Subcommittee unanimously voted to report S. 1992, as amended, to the full Committee.³²³ The decision was immediately described by civil rights leaders as one that would "severely jeopardize the voting rights of millions" of blacks and other minorities.³²⁴

Chairman Hatch then did something unusual. He indicated that he intended to issue a formal Subcommittee report to accompany the bill to full Committee. This was an extremely rare action since formal bill reports normally were prepared only subsequent to final full committee consideration. In an apparent attempt to consolidate his position and plead his case prior to full Committee action, Hatch promised the report, allowing the Democrats time to prepare and submit "additional views." On April 2, the Subcommittee report was printed and immediately distributed.³²⁵

C. *The Full Committee*

During a thirty day hiatus between Subcommittee and full Committee action, intensive lobbying and negotiations took place within the

³²⁰ *Id.*

³²¹ *Id.* at 7-8. The decision to mark-up S.1992 rather than Senator Grassley's S.1975 was largely influenced by a desire to make it easier for some of the 63 co-sponsors of S. 1992 to respond favorably to the Subcommittee substitute. *Id.* at 10-11. Substantial consideration was given, as well, to the parliamentary implications of anticipated full committee efforts to reverse any Subcommittee action and restore the original text of S. 1992. *Id.* at 10-12.

³²² *Id.* at 6, 8. The subcommittee-adopted amendments also proposed to conform the bilingual ballot provisions of § 203 with the preclearance provisions of §§ 4 and 5. *Id.* At the same time that he offered his substitute, Grassley made clear his continued interest in attempting to find some further middle ground on the § 2 issue. *Id.* at 7. His substitute was being proffered with "the understanding that I will continue to seek the reconciliation which I have mentioned and reserving the right to modify my vote in the future." *Id.* at 7-8.

³²³ *Id.* at 10.

³²⁴ Washington Post, Mar. 24, 1982, § A, at 5 (entitled, *White House Wins Round in Voting Rights Act Fight*).

³²⁵ See *supra* note 255. In addition to the Majority Views of the Subcommittee, short Additional Views were filed by Senator DeConcini and Senator Leahy. *Id.* at 82.

Judiciary Committee, much as it had in the House, between members and staff of the Committee and outside organizations, notably the Leadership Conference on Civil Rights. The Administration and the leadership of the Judiciary Committee had faced an uphill legislative battle ever since the announcement of sixty-one Senate co-sponsors³²⁶ had been made in late December. While they had not obtained a remarkably improved position in the depth of their Senate support, the critics of S. 1992 nevertheless clearly had achieved several objectives.

First, the Subcommittee hearings had succeeded in establishing the section 2 issue as the central element in the Senate debate, a reversal of the priorities in the House.³²⁷ Second, they had succeeded in clarifying that the specific concern over the House amendments to section 2 involved the alleged inevitability of proportional representation.³²⁸ The original tendency on the part of proponents of H.R. 3112 had been to ignore criticism of section 2, as amended. By the time hearings drew to a close, however, the proponents of H.R. 3112 echoed their own opposition to proportional representation.³²⁹ Lastly, the hearings had demonstrated that those who were opposing straight extension of the law were supporters, not critics, of H.R. 3112 and S. 1992.³³⁰

In brief, the Subcommittee hearings had succeeded in slowing down some of the momentum which had been generated by final House approval of H.R. 3112. In addition, another original objective, the enlistment of active Administration support, had also been achieved. Both Attorney General Smith and Assistant Attorney General for Civil Rights Reynolds

³²⁶ See *supra* note 193. The number of Senate co-sponsors stood at 65 following subcommittee mark-up with the addition of Republican Senators Harrison Schmitt (NM); Mack Mattingly (Ga.); Frank Murkowski (Alaska); and Richard Lugar (Ind.). *Id.*

³²⁷ See, e.g., *Advocates of Election Rights Say It's Election Results That Matter*, NATL. J. 592 (Apr. 3, 1982) ("Whether to approve the House passed language on the results test has become the dominant issue in the Senate Judiciary Committee."); *Intent a Key Issue in Voting Rights Debate*, CONG. Q. 42 (1982); N. Y. Times, Mar. 20, 1982, §A, at 10 (entitled, *Top Justice Officials Join Battle on Voting Rights*, "Senator Orrin Hatch, Republican of Utah and Justice Department officials have succeeded in their effort to focus the Senate hearings on the question of whether blacks and Hispanic Americans must prove intentional discrimination . . ."). Also active in legislative efforts by the Justice Department was Robert A. McConnell Assistant Attorney General for Congressional Affairs.

³²⁸ See, e.g., Wall St. J., May 5, 1982, at 30 (entitled, *Voting Rights Imbroglío*); NATL. J., 592-94 (Apr. 3, 1982).

³²⁹ See, e.g., *Senate Hearings*, *supra* note 92, at 5 (statement of Senator DeConcini at Subcommittee executive session on March 24, "I am confident . . . that the results test embodied [in S.1992] will not lead to proportional representation by race in State and local governments . . ."); Washington Post, Mar. 20, 1982, § A, at 16, (entitled, *Who Wants Quotas*, "No one—not even the most ardent of the bill's supporters—wants [quotas in electoral politics] . . . Supporters of the bill should take whatever steps are necessary to reassure undecided Senators that they could not occur.").

³³⁰ The opposition by the civil rights community and their supporters in the Senate to the simple ten-year extension of the existing Act approved by the Subcommittee clarified this issue somewhat. See Smith, *Voting Rights Act: Extend It as It Is*, Washington Post, Mar. 29, 1982, § A, at 11. *Contra* Letter from Congressman Peter Rodino, Chairman, House Committee on the Judiciary to the Editor, Washington Post, Apr. 5, 1982, § A, at 14.

had undertaken extensive efforts to educate members and journalists to their view that the results test was flawed and should be rejected.³³¹

Several areas, however, existed in which the critics had not been successful. They had been unable to generate any significant outside organizational support for their position. Groups that might have been otherwise expected to be receptive to their arguments, such as the National Conference of State Legislatures, the National Association of Counties, or the United States Conference of Mayors, actually endorsed H.R. 3112.³³² As final Committee action approached, a general feeling seemed to exist among members of the Committee that they wished to remain supportive of the mass of outside organizations lobbying for the House version, while at the same time responding to the potentially explosive issue of proportional representation and electoral quotas.³³³

On April 24, Senator Robert Dole of Kansas, one of the few remaining undecided members of the Committee, accorded them this opportunity by proposing a compromise on both sections 2 and 5 that was designed to reconcile the two competing viewpoints on the Committee. Formulated in coordination with representatives of the Leadership Conference, the new language on section 2 proposed to retain the results language

³³¹ Immediately following Subcommittee action, the Attorney General wrote in the *New York Times* that:

Unfortunately, there have been disturbing efforts to derail the dispassionate consideration by branding anyone who does not support a bill recently passed by the House of Representatives as opposed to the Voting Rights Act itself. The House bill, however, is *not* the Voting Rights Act but something very different . . . The Administration wholeheartedly supports a ten-year extension of the Voting Rights Act in its present form . . . It should be extended as is.

Smith, *The Voting Rights Act*, N.Y. Times, Mar. 27, 1982, §A, at 23. See *supra* note 330.

³³² See *Senate Hearings*, *supra* note 92, at Vol. II, 217 (National League of Cities); *id.* at 380 (National Conference of State Legislatures). Unpublished letter from John J. Gunther, Executive Director, United States Conference of Mayors, to Members of the Senate (March 24, 1982) (urging approval of S. 1992 as introduced "without change"); see also *Voting Right*, NAT'L J. 77 (Jan. 9, 1982) (lack of outside group opposition to House bill). Despite the efforts of the Subcommittee on the Constitution, debate over the House version of the Voting Rights Act increasingly had taken on the tone of a "good government" issue on which a wide variety of organizations with little direct interest in civil rights announced their formal positions. In addition to the 165 organizations belonging to the Leadership Conference on Civil Rights (including the National Association of Market Developers, the National Association of Real Estate Brokers, and the National Funeral Directors Association), conspicuous support was lent to the House version by such organizations as the Health Insurance Association of America (Letter to Senators, May 21, 1982), and such corporate enterprises as Aetna Life & Casualty, Atlantic Richfield Co., Exxon Corporation, and RCA Corp. Washington Post, May 20, 1982, § A, at 28 (advertisement) See 128 CONG. REC. S7123-28 (daily ed. June 18, 1982).

³³³ See N.Y. Times, Apr. 28, 1982. Senator Robert Dole, for example, one of the critical undecided members of the Judiciary Committee indicated his opposition to the Subcommittee bill as "too restrictive." *Id.* "I share the view of the civil rights community that in some voting cases, it is hard to prove intent." *Id.* Dole also observed, however, that the House measure and its results test could be made "a little more precise" and that he would like to state more directly that "it does not condone proportional representation by race." *Id.*

of H.R. 3112, but to append a new subsection attempting to describe its parameters in greater detail:

A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the state or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity to participate in the electoral process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one "circumstance" which may be considered provided that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.³³⁴

The new language in section 5 established a twenty-five year extension period for the preclearance requirement of covered jurisdictions rather than the permanent extension provided for by the House.³³⁵

Since Senator Dole was in a politically critical position in the center of the Committee, the proposed compromise effectively resolved any remaining doubts about the fate of the Voting Rights Act in the Senate and in the entire Congress. With eighteen members of the Judiciary Committee, ten Republicans and eight Democrats, the support of nine members was necessary to retain the Subcommittee amendments to S. 1992. The support of ten members was necessary to restore the original language of S. 1992 or undertake other changes. Nine Committee members, two Republicans and seven Democrats, were already listed as co-sponsors of S. 1992 as introduced, with seven inclined to support the Subcommittee version.³³⁶ Publically, only Senator Dole and Senator Howell Heflin of Alabama had remained uncommitted.³³⁷

Since the Dole compromise had been coordinated with leaders of the civil rights community, it carried with it the support of the original sponsors of S. 1992, Senators Kennedy and Mathias. In addition, the Dole compromise attracted the support of each of the other Committee co-sponsors as well as Senator Heflin.³³⁸ Faced with this show of bipartisan support,

³³⁴ 42 U.S.C. § 1973b(b) (1976). The compromise was ultimately reflected in § 3(b) of the Voting Rights Act Amendments. *Id.*

³³⁵ 42 U.S.C. 1973c(8). In addition, Congress was charged with "reconsidering" the provisions of the new bailout at the end of fifteen years (in August, 1997). 42 U.S.C. 1973c(7) (1976).

³³⁶ N.Y. Times, Apr. 28, 1982, § A, at 25 (entitled, *Panel Delays Action on Voting Rights as Compromise is Sought*); CONG. Q. 1017 (1982).

³³⁷ *Id.*; see CONG. Q. 1503 (1982).

³³⁸ The hopes of critics of the results test that Senator Heflin might support their position had been heightened shortly prior to the full Committee vote when an Alabama District Court on remand from the Supreme Court had identified Fifteenth Amendment and § 2 violations in Mobile, Alabama under the intent test articulated by the Court in *City of Mobile v. Bolden*, 446 U.S. 55 (1980). See *Bolden v. City of Mobile*, Civ. Action No. 75-297-P (S.D.

several Republican conservatives who had been leaning toward the Subcommittee version rather than the original also opted for the compromise.³³⁹

On May 3, one day before the Judiciary Committee was finally to consider S. 1992, the Administration, unsuccessful in brokering alternative compromises, also joined in support of the compromise.³⁴⁰ President Reagan announced then that "the compromise would greatly strengthen the safeguards against proportional representation while also protecting the basic right to vote."³⁴¹ Attorney General Smith and Assistant Attorney General Reynolds followed with similar statements.

The Dole proposal effectively supplied a political resolution to misgivings about section 2. It did not, however, put to rest the considerable confusion over what the compromise ultimately was intended to mean. During most of the remaining debate in the Senate, each side attempted to explain the reach of the Dole provision. When the full Committee commenced debate on the extension on April 28, Senator Dole explained the purpose of his language in the following manner:

Ala. 1982); *Brown v. Board of Commissioners*, Civ. Action No. 75-298-P (S.D. Ala. 1982). An Eighth Circuit decision was handed down several days later also identifying a violation of the Fifteenth Amendment under the intent standard. *Perkins v. City of West Helena*, 81-1516 (8th Cir. 1982). Senator Hatch observed that opponents of the intent standard were more likely to characterize the standard as "unacceptably difficult" following these cases rather than "impossible" as they earlier had. *See Senate Report*, *supra* note 246, at 98 n. 10.

³³⁹ The conservatives included most prominently Senator Grassley, the formal sponsor of the Subcommittee version of S. 1992, as well as Senator Alan Simpson (R-Wy.). Although Senator Paul Laxalt (R-Nev.) subsequently joined in support of the compromise at full Committee, he never joined as a co-sponsor and indeed authored *Additional Views* in the final Committee report that were sharply at variance with the Majority Views. *Senate Report*, *supra* note 246, at 188-92.

³⁴⁰ N.Y. Times, May 4, 1982, § A, at 1 (entitled, *President Backs Bipartisan Plan on Voting Law*); Washington Post, May 6, 1982, § A, at 3 (entitled, *Administration in Mighty Effort to Avoid Offense on Civil Rights*.) During the period between the Subcommittee and full Committee mark-ups, a large number of proposed compromises either had been circulated or discussed seriously by the members and staff of the Judiciary Committee. Among the alternative compromise solutions circulated were those (a) establishing bifurcated standards of identifying violations of the Act depending upon whether an alleged violation related to "access" to the electoral process (i.e. registration and voting), or to the "structure" of the process (e.g. "at-large" systems and redistricting), the former would have been judged by a results standard and the latter by an intent standard; (b) stating explicitly that courts, utilizing an intent standard, were empowered to consider the "totality of circumstances" available in evidence and listing illustrative factors; and (c) establishing as an "affirmative defense" that an action giving rise to a presumptive violation under a results standard was not undertaken with any discriminatory purpose or objective. With virtually all of the Committee sponsors of S. 1992 apparently disinclined to support anything other than the original unamended version, Senators Dole and Heflin were the principal objects of negotiating efforts to fashion a § 2 compromise. *See* CONG. Q. 1042 (1982) (Senator Dole's role in achieving his compromise). Dole was particularly influenced, as were White House officials, by his wife, Elizabeth, then White House Special Assistant for Public Liason and currently Secretary of Transportation. *See Pinderhughes Paper*, *supra* note 22, at 15.

³⁴¹ Washington Post, May 4, 1982, at § A at 1 (entitled, *Senators Agree on Voting Act*).

Proponents of the results standard in the Mathias/Kennedy bill persuasively argue that intentional discrimination is too difficult to prove to make enforcement of the law effective. Perhaps, more importantly, they have asked if the right to exercise a franchise has been denied or abridged, why should plaintiffs have to prove that the deprivation of this fundamental right was intentional. On the other hand, many on the Committee have expressed legitimate concerns that a results standard could be interpreted by the courts to mandate proportional representation The supporters of this compromise believe that a voting practice or procedure which is discriminatory in result should not be allowed to stand regardless of whether there exists a discriminatory purpose or intent However, we also feel that the legislation should be strengthened with additional language delineating what legal standard should apply under the results test and clarifying that it is not a mandate for proportional representation. Thus, our compromise adds a new subsection to section 2 which codifies language from the 1973 Supreme Court decision of *White v. Regester*.³⁴²

The compromise was met with sharp criticism from Senator Hatch, who recognized that the Dole provision inevitably would replace the Subcommittee language. He raised a number of points designed to demonstrate that the Dole compromise was largely an "illusory" one, and that the impact of the provision was not likely to be different from the unamended House provision.³⁴³ Hatch made the following points with regard to the compromise: (1) the emphasis upon the totality of circumstances perpetuated the confusion that proponents of the results test had generated between the scope of the permissible evidence and the standard by which such evidence would be evaluated in a court;³⁴⁴ (2) in Hatch's view, no "core value" existed by which a results test could judge discriminatory conduct other than by a proportional representation analysis, and nothing in the compromise language established any alternative;³⁴⁵ (3) the compromise also perpetuated confusion between proportional representation as a right and proportional representation as a remedy;³⁴⁶ (4) as with the original results language, the flaw was not with an inadequately strong disclaimer of proportional representation, but with the central notion itself of a results test;³⁴⁷ (5) the concept of an "equally open" system did nothing to address the problem of legislative guidance to the courts;³⁴⁸ and (6) the concept of "protected groups" within the

³⁴² *Senate Hearings, supra* note 92, at Vol. II, 59-60.

³⁴³ *Senate Hearings, supra* note 92, at Vol. II, 70.

³⁴⁴ *Id.* at 71.

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ *Id.* at 71-72.

³⁴⁸ *Id.* at 72-73.

language of the compromise was inconsistent with the Act's original intent to protect the right of individuals, not groups, to cast their votes.³⁴⁹

Immediately prior to final Judiciary Committee consideration of amendments to the Subcommittee bill, Hatch engaged Dole in a series of questions designed further to draw out Dole's intent in developing the compromise language.³⁵⁰ (1) In response to a question inquiring whether he agreed with the House sponsors of H.R.3112 on the identity of the effects test in section 5 and the results test in section 2, Senator Dole stated that the test in section 5 was "different" from the results test of section 2.³⁵¹ Senator Dole emphasized that "access" and "whether or not the system is open" were at the heart of his change to section 2.³⁵² (2) In response to a question inquiring whether Senator Dole agreed with former Assistant Attorney General Drew Days that predominantly black neighborhoods would be immune from partisan gerrymandering under the new section, Dole replied that he did not agree.³⁵³ (3) When Hatch asked about the relationship between Dole's compromise and the *White v. Regester* test, Senator Dole said that the compromise carried forth the *White v. Regester* test. He argued that the *White v. Regester* test did not require proportional representation nor did it invalidate at-large election systems. Dole subsequently reiterated that the existence of an at-large system would not, in and of itself, give rise to a violation in circumstances where there would not otherwise have been a violation.³⁵⁴ (4) Finally, in probably the most ambiguous exchange between the two, Senator Dole was asked whether the compromise was designed to preclude courts from imposing proportional representation as a remedy for a section 2 violation. After first responding that the compromise did not so prohibit a

³⁴⁹ *Id.* at 73. Hatch also felt that the Dole proposal perpetuated the constitutional defects of both §§ 2 and 5. *Senate Report, supra* note 246, at 101-102; *contra id.* at 39-43.

³⁵⁰ *Senate Hearings, supra* note 92, at Vol. II, 79-82.

³⁵¹ *Id.* at 80. Considerable confusion on this point is evidenced by the fact that most witnesses who addressed this issue during the House hearings argued that the results test of § 2 and the effects test of § 5 were similar or identical, while the opposite tact was taken during Senate Hearings. There are illustrations of posture taken by proponents of the revised § 2 in the House. *See House Hearings, supra* note 61, at 229 (testimony of State Senator Julian Bond of Georgia, "I urge you to make your intentions that relate to that provision perfectly clear by adopting the effects standard in section 2 . . ."); *id.* at 369 (testimony of Mayor Henry Marsh, Richmond, Virginia); *id.* at 1772 (testimony of Dr. Arthur Fleming, Chairman, U.S. Commission on Civil Rights). There are several illustrations of the new posture of the civil rights leadership at Senate hearings. *See Senate Hearings, supra* note 92, at 1254 (testimony of Julius Chambers, Executive Director, NAACP Legal Defense Fund). Counsel: "What is the relationship between the results test in section 2 and the effects test in section 5?" Chambers: "They are not the same test . . ." *Id.* at 1443 (testimony of Professor Archibald Cox, Harvard Law School).

³⁵² *Senate Hearings, supra* note 92, at Vol. II, 80.

³⁵³ *Id.* Cf. *Senate Hearings, supra* note 92, at 1376-77 (Professor Days); *id.* at 1255-56 (Julius Chambers). The Days-Chambers interpretation of § 2 would seem to impose a direct legal obligation upon redistricting authorities to *maximize* the influence of minority vote.

³⁵⁴ *Senate Hearings, supra* note 92, at Vol. II, 81.

court,³⁵⁵ Dole stated that such concerns were unwarranted because "[i]t is a well established legal principle that remedies must be commensurate with the violation established."³⁵⁶

On May 4, following three days of debate interspersed with statements of support and criticism for the proposed compromise, the Judiciary Committee finally prepared to consider amendments. The first of the amendments, the Dole compromise, was approved by a vote of fourteen to four. All four negative votes were cast by the Committee's conservative faction.³⁵⁷ A series of amendments were then offered by Senator John East of North Carolina, one of the four opponents of the Dole compromise.³⁵⁸

³⁵⁵ *Id.*

³⁵⁶ *Id.* See 128 CONG. REC. S6962 (daily ed. June 17, 1982) (exchange between Senator Dole and Senator Thurmond on Senate floor on meaning of the compromise); 128 CONG. REC. S7119-20 (daily ed. June 18, 1982) (exchange between Dole and Senator Slade Gorton of Washington).

³⁵⁷ Voting in opposition to the compromise (and effectively in support of the Subcommittee proposal) were Senators Thurmond, Hatch, John East of North Carolina, and Jeremiah Denton of Alabama. Shortly prior to offering his compromise, Senator Dole agreed to incorporate language proposed by Senator Metzenbaum that added a new § 208 to the Voting Rights Act: "Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer." This amendment was prompted by concerns raised by the National Federation of the Blind. *Senate Hearings, supra* note 92, at Vol. II, 64-66. The language was subsequently modified by an amendment from Senator East. See *infra* note 358, 42 U.S.C. §1973aa-6 (1982).

³⁵⁸ *Senate Hearings, supra* note 92, at 86. The following amendments were offered by Senator East and rejected by the Judiciary Committee: (1) An amendment to eliminate illiteracy as a basis for allowing polling booth assistance to be given a voter (defeated 5-13). *Id.* (2) An amendment to substitute a new bailout provision in § 5 which would permit bailout in the event that a jurisdiction had not, for the previous five years, been in violation of the Constitution or the laws of the United States involving voting rights, except for violations which were "trivial, promptly corrected, and not repeated" (defeated 6-12). *Id.* at 94. (3) An amendment stating that at-large elections do not violate the results standard in the new § 2 (defeated 5-13). *Id.* at 97. (4) An amendment adding "sex" as a suspect factor under the Voting Rights Act (defeated 2-16). *Id.* at 105. (5) An amendment to shift the burden of proof to the Attorney General, not the covered jurisdiction, in establishing that a § 5 submission is in violation of the Act (defeated 6-12). *Id.* at 106. (6) An amendment to eliminate the exclusivity of venue for preclearance cases in the District Court for the District of Columbia (defeated 6-12). *Id.* at 109. The issue of venue was one that was subject to relatively little discussion during the Senate hearings. *But see id.* at 1173-74 (testimony of Dr. Arthur Fleming, Chairman, U.S. Commission of Civil Rights); *id.* at 125 (statement of the Former Attorney General of the United States, Griffin Bell, "It is a departure from the equal protection of the law and a disparagement which stigmatized judges in the regions covered by the Act to require that relief be sought only from judges in the District of Columbia."). (7) An amendment to concentrate the venue in all § 2 cases, as well as § 5 cases, in the District Court for the District of Columbia (defeated 4-14). *Id.* at 111. (8) An amendment to extend the preclearance requirement of the Voting Rights Act on a nationwide basis (defeated 5-13). *Id.* at 115. The only amendment offered successfully by Senator East clarified that the polling assistance to be offered handicapped or illiterate individuals was not to be provided by "an officer or agent of the voter's union," in addition to the voter's employer. This amendment was approved 9-7. *Id.* at 92; see Section 5 of the Voting Rights Act Amendments, 42 U.S.C. 1973aa-6 (1982); *supra* note 357.

By this time, both of the major critics of the House measure, as well as of the Dole language measure, Senators Hatch and Thurmond, conceded that, with an excess of seventy co-sponsors, there was no longer any question that the compromise would be approved overwhelmingly by bipartisan majorities on the Senate Floor.

Finally, in mid-afternoon on May 4, the Committee voted seventeen to one to report S. 1992, as amended by Senator Dole, to the full Senate. Only Senator East, calling it a "slap in the face to the South," voted against the bill.³⁵⁹ Both Hatch and Thurmond reiterated their fears about the language of the Dole compromise, but nevertheless indicated that they supported the overall objectives of the Act and did not wish to cast a vote which could be misinterpreted as opposition to the Act itself. Hatch predicted the measure would pass overwhelmingly on the floor and indicated his unwillingness to join in any proposed filibuster.³⁶⁰

On May 25, a final report was issued on the Committee version of S. 1992.³⁶¹ The Committee views filed by Senator Mathias described the measure as "one of the most significant issues to come before this Congress"³⁶² and detailed at considerable length the arguments in behalf of the changes to sections 2 and 5 of the Voting Rights Act. An unusually large number of "Additional Views" followed from Senators who were formally part of the Committee majority: Thurmond, Hatch, Laxalt, Dole, Grassley, and Denton.³⁶³ Senator East filed "Minority Views." While the full range of views about S. 1992 was expressed by one or more Senators in this Report, most noteworthy was its length³⁶⁴ and the extent to which the Report seemed to be directed, not toward Senators, but toward federal judges who almost certainly would be called upon in the future to interpret the language of the new proposal.³⁶⁵

³⁵⁹ CONG. Q. 1043 (1982)

³⁶⁰ N.Y. Times, May 5, 1982, § A, at 5 (entitled, *Voting Law Compromise Clears Senate Panel*).

³⁶¹ See *supra* note 246.

³⁶² *Senate Report*, *supra* note 246, at 1.

³⁶³ *Id.* at 88, *et. seq.* Probably the most novel of these Additional Views came from Senator Laxalt, *id.* at 188-92, and posited what he called an "objective design" standard. According to Laxalt, this standard "looks to the 'totality of circumstances' surrounding a voting practice, including the impact of that practice, to determine if a reasonable observer could conclude that the practice results in the denial or abridgement of the right to vote on account of race." *Id.* at 190. The "objective design" standard, which Laxalt likened in some respects to the standard set forth by Justice Stevens in *City of Mobile v. Bolden*, 446 U.S. 55, 83 (1980) was explicitly rejected in the Majority Views of the Senate Report. *Senate Report*, *supra* note 246, at 28 n. 11.

³⁶⁴ While the 239 page length of the Senate Report was far longer than the average Senate report, on even highly controversial legislation, it was by no means an unprecedently long report. Most remarkable about its length, however, was that it related entirely to a legislative measure of less than ten pages. Most Senate reports that have been lengthier than S. Rep. 97-417 have related to far lengthier legislative proposals. For sheer volume of legislative analysis, as opposed to simple legislative description, probably few Senate reports have been as detailed than this one.

³⁶⁵ See, e.g., *Senate Report*, *supra* note 246, at 104 n.24 (*Additional Views* of Senator Hatch); *id.* at 193-96 (*Additional Views* of Senator Dole); *id.* at 12 n. 31 (*Majority Views* sub-

D. *The Floor*

Two weeks after S. 1992, as amended, was reported by the Judiciary Committee and placed on the Senate Calendar, debate began on the floor of the Senate. By June 9, the number of Senate co-sponsors had swelled to seventy-seven. Despite a half-hearted filibuster led by North Carolina Senators East and Helms, action on the Senate floor was largely anticlimactic. Both Thurmond and Hatch had supported final Committee passage of S. 1992 and now largely occupied themselves reiterating their concerns as part of the legislative and historical records.³⁶⁶ Despite his apprehensions, Hatch served as the floor manager for the Voting Rights Amendments on the Republican side of the debate while Senator Kennedy served as the Democratic floor manager.³⁶⁷

Senator Helms, who had indicated several days earlier his intention to filibuster the amendments "until the cows come home,"³⁶⁸ led off the debate by suggesting that he saw "no urgency to move" to consider the legislation.³⁶⁹ Emphasizing what he viewed as a misunderstanding that the Voting Rights Act was due to expire on August 6, Helms suggested that there were "priority" legislative issues that first ought to be considered by the Senate.³⁷⁰ Helms focused on the fact that portions of his State of North Carolina would continue to be subject to the preclearance requirements of the Act despite an absence of a finding of voting rights

mitted by Senator Mathias). Senator Mathias stated that "it is intended that a section 5 objection also follow if a new voting procedure itself so discriminates as to violate section 2." *Id.* at 12 n. 31. Nothing is present in the hearings of either the House or Senate that would suggest that changes to § 5 were ever considered by the Judiciary Committees of either body or that this statement reflected the stated position of any member. In fact, the following exchange between Congressmen Edwards and Elliot Levites of Georgia, during final House consideration of the Senate amendments to H.R. 3112, reinforces this view. Levites: [I inquire of] the gentleman from California whether there is any portion of this legislation that changes § 5 of the Act . . . or changes the tests contained therein. Edwards: No change was made. 128 CONG. REC. H 3844 (daily ed. June 23, 1982). *Cf.* *City of Lockhart (Tex.) v. United States*, 51 U.S.L.W. 4189 (Feb. 23, 1983).

³⁶⁶ See 128 CONG. REC. S6502-52 (daily ed. June 9, 1982) (remarks of Senator Orrin Hatch); 128 CONG. REC. S 6944-48 (daily ed. June 17, 1982) (remarks of Senator Strom Thurmond). One of the most dramatic exchanges during the floor debate occurred between Senator Thurmond and his colleague from South Carolina, Senator Ernest Hollings, regarding the recent history of treatment of minorities in the voting process in their state. Much, but not all, of the flavor of this debate is lost to the reader of the record as a result of substantial editing of the floor statements. 128 CONG. REC. S 6861-69 (daily ed. June 16, 1982); *id.* at S 6924-26; 128 CONG. REC. S 6948-56 (daily ed. June 17, 1982).

³⁶⁷ See 128 CONG. REC. S6553 (daily ed. June 9, 1982) (remarks of Senator Robert Dole). Following the adoption of the motion to proceed with S.1992 (*see infra* text accompanying notes 374-75), Senator Mathias was asked by Hatch to take on this responsibility for the remainder of the debate.

³⁶⁸ Washington Post, June 10, 1982, § A, at 12 (entitled, *Helms Threatens to Stall Voting Rights Act*). Helms also threatened to introduce a variety of "non-germane" floor amendments on such issues as abortion, a threat that privately divided even the anti-abortion community.

³⁶⁹ 128 CONG. REC. S6501 (daily ed. June 9, 1982).

³⁷⁰ *Id.*

discrimination for the seventeen years since 1965. In Helms' judgement, continued preclearance would result in the treatment of North Carolinians as "second class" citizens.³⁷¹

Following a lengthy opening statement by Senator Hatch, a "unanimous consent" agreement was reached that a vote would be held on the following Tuesday, June 15, on a cloture motion to terminate debate on the initial procedural motion to consider S. 1992.³⁷² Despite the North Carolina Senators' protests that they did not intend to obstruct or delay consideration of the measure, but simply to engage in "deliberative discussion," the unanimous consent agreement was clearly aimed at ensuring that such discussion did not turn into a filibuster.³⁷³ On June 14, a cloture petition was filed on the motion to consider S. 1992, containing the signatures of the requisite eighteen Senators, including thirteen Republican members.³⁷⁴ By a vote of eighty-six to eight the following day,³⁷⁵ the Senate approved terminating the initial procedural debate and moved toward formal consideration of the amendments.

The three Senators who had played leading roles in Committee, Dole, Hatch, and Kennedy, continued to focus on fine descriptions regarding the meaning of the new section 2 provision, in attempts to influence future judicial interpretations.³⁷⁶ Dole continued to emphasize his understanding that the test incorporated the standard of *White v. Regester*, with particular emphasis on whether the political processes are "equally open," Hatch, meanwhile, continued his argument that the new test did not effectively achieve Dole's desired objectives, but stressed that the compromise was incorporated into the Act in direct response to concerns about proportional representation. Kennedy repeatedly emphasized that the result test had been the traditional test employed by federal courts prior to the Supreme Court's decision in *Mobile*.

On June 17, the Senate considered amendments. With few exceptions, the amendments were offered without serious prospects of success. Individual Senators primarily wished to articulate their concerns about the Judiciary Committee measure.³⁷⁷

³⁷¹ *Id.* North Carolina was not covered as a state, but did have a higher portion of its counties covered than did any "non-covered" state.

³⁷² 128 CONG. REC. S6558 (daily ed. June 9, 1982). Senators Helms and East did not object to the unanimous consent agreement in the apparent realization that an earlier cloture vote could be forced upon them regardless of their own desires. *Id.*

³⁷³ *See, e.g.*, 128 CONG. REC. S6556 (daily ed. June 9, 1982) (remarks of Senator Charles Mathias); 128 CONG. REC. S6557 (daily ed. June 9, 1982) (remarks of Senator Donald Riegle of Michigan).

³⁷⁴ 128 CONG. REC. S6557 (daily ed. June 14, 1982).

³⁷⁵ 128 CONG. REC. S6783 (daily ed. June 15, 1982). Voting against cloture, in addition to Senators Helms and East, were Senators Harry F. Byrd, Jr., and John Warner of Virginia, James McClure and Steve Symms of Idaho, Jeremiah Denton of Alabama, and John Stennis of Mississippi. *Id.*

³⁷⁶ *See infra* text accompanying notes 376-77.

³⁷⁷ *See, e.g.*, Letter from the American Bar Association to U.S. Senators (June 10, 1982) ("[T]he American Bar Association supports passage of this bill and opposes any amend-

A series of amendments were offered in succession and defeated in turn with a minimum of debate. The first amendment, offered by Senator East, would have deleted the new results test from S. 1992 but was defeated sixteen to eighty-one.³⁷⁸ The second amendment, also by East was defeated fourteen to eighty-one and would have restricted the jurisdiction of the federal courts to impose proportional representation or quotas to remedy voting rights violations.³⁷⁹ Senator Helms offered the third, defeated one to ninety-four, which would have authorized the courts to order proportional representation as a remedy for voting rights violations.³⁸⁰ Helms wanted to face the Senate to go on record in opposition to federal court orders for quotas or proportional representation remedies.³⁸¹ The fourth amendment, offered by East and defeated thirty-one to sixty-five, proposed to allow district courts outside the District of Columbia to have jurisdiction over section 5 cases.³⁸² East's final amendment, which was defeated nineteen to seventy-eight, proposed to substitute a new bailout provision similar to the one defeated in Committee.³⁸³

An amendment by Majority Whip Ted Stevens was defeated thirty-eight to fifty-nine. Stevens' amendment placed the burden of proof upon a voter challenging a bailout petition to demonstrate that the standard of section 2 had not been met by the applicant jurisdiction.³⁸⁴ Stevens offered a second amendment, defeated thirty-two to fifty-eight that sought to allow states independently to bailout.³⁸⁵

Senator S.I. Hayakawa of California proposed an amendment, defeated thirty-two to fifty-four, that would have deleted the bilingual election requirements of section 203 of the Act.³⁸⁶ An amendment by Senator Thad Cochran of Mississippi was defeated sixteen to seventy-four, and had sought to incorporate the preclearance provisions of S. 1030, the legislation he had introduced during the previous session of Congress.³⁸⁷ Senator Sam Nunn of Georgia offered an amendment, defeated thirty-eight to fifty-five, that attempted to impose a time limit upon the Attorney General in his objection to a submission for preclearance.³⁸⁸ An amendment by

ments to it . . . It is our view that from a constitutional and legal perspective, as well as from the perspective of sound national policy, there are *no* amendments that could improve upon the 'totality of circumstances' test in section 2, the more generous bailout provision in section 5, or the bilingual voting or national coverage provisions of this legislation."). As on the House side, the civil rights community made clear that the "pro-civil rights" position was opposition to any and all floor amendments. *Id.*

³⁷⁸ 128 CONG. REC. S6956 (daily ed. June 17, 1982).

³⁷⁹ *Id.* at S6966.

³⁸⁰ *Id.* at S6969.

³⁸¹ *Id.* Only Senator Spector of Pennsylvania refused to support the play by Senator Helms. *Id.*

³⁸² *Id.* at S6977.

³⁸³ *Id.* at S6985.

³⁸⁴ *Id.* at S6989.

³⁸⁵ *Id.* at S6998.

³⁸⁶ 128 CONG. REC. S7075 (daily ed. June 18, 1982).

³⁸⁷ *Id.* at S7083. See *supra* notes 92, 180.

³⁸⁸ *Id.* at S7087.

Senator Denton, defeated nineteen to seventy-three, attempted to relax the standard for bailout.³⁸⁹

Senator Stevens offered a third amendment, rejected twenty-eight to sixty-four, that sought to redefine the bailout criteria.³⁹⁰ An amendment by Senators Thurmond and John Warner sought to reduce the limit on the continued preclearance requirement of covered jurisdictions from twenty-five to fifteen years, but was defeated twenty-eight to sixty-six.³⁹¹ Helms then introduced another amendment, defeated twelve to eighty-one, which sought to delete each of the eighty-two counties of North Carolina from the continued preclearance requirements of the Voting Rights Act.³⁹² Helms' final amendment, also defeated twelve to eighty-one, sought to exempt from section 5 coverage those jurisdictions with black voting figures in excess of sixty percent and to extend coverage to those jurisdictions with registration figures below 43.7 percent.³⁹³

The only successful amendments added to S. 1992 were adopted with the approval of the principal sponsors of the measure, without a rollcall vote. These included a series of technical amendments proposed by Senator Mathias,³⁹⁴ a technical amendment proposed by Stevens to conform provisions regarding the exemption from the bilingual ballot requirements of the Act for Alaskan Natives and Indians who possess no historical written language,³⁹⁵ a technical amendment relating to the bailout standard,³⁹⁶ and an amendment by Senator Don Nickles of Oklahoma to limit the triggering formula in section 203 to language minorities who do not speak English "adequately enough to participate in the electoral process."³⁹⁷

In the early afternoon of June 18, the Senate voted eighty-five to eight in behalf of the 1982 amendments to the Voting Rights Act.³⁹⁸ Only four

³⁸⁹ *Id.* at S7092.

³⁹⁰ *Id.* at S7098.

³⁹¹ *Id.* at S7099.

³⁹² *Id.* at S7100.

³⁹³ *Id.* at S7102. It was probably no coincidence that the registration figure for minorities in Massachusetts, the homestate of Senator Kennedy, was 43.6%. See *Senate Report, supra* note 246, at 167 (Chart B). The figure for Kansas, as Senator Helms pointed out, was even lower, at 40.3%. *Id.* In North Carolina, the latest available figures demonstrated a minority registration rate of 49.2%. *Id.*

³⁹⁴ 128 CONG. REC. S6939 (daily ed. June 17, 1982).

³⁹⁵ *Id.* at S6982.

³⁹⁶ *Id.* at S6989.

³⁹⁷ 128 CONG. REC. S7104 (daily ed. June 18, 1982).

³⁹⁸ *Id.* at S7139. Voting against final passage of the amendments were Senators Byrd, Denton, East, Hayakawa, Helms, Humphrey, McClure and Symms. *Id.* Only four Senators from the South were included in this total. Absent Senators (all of whom were on record in support of final passage) were Senators Burdick, Danforth, Exon, Glenn, Goldwater, Lugar, and Wallop. *Id.* Immediately prior to final passage, Senator Mathias moved, by unanimous consent, to the formal consideration of the pending House measure. See *supra* text accompanying notes 175-77. He then moved to substitute the final Senate language of S.1992 to the provisions of that measure (H.R. 3112) so that final House concurrence could parliamtarily be facilitated. *Id.*

Senators from the States of the Old Confederacy voted in opposition to the Act. A brief floor discussion five days later in the House of Representatives was marked by members' efforts to complete the legislative history of the Act. The House then concurred in the Senate amendments by voice vote.³⁹⁹

On June 29, 1982, President Reagan in a signing ceremony at the White House proclaimed the right to vote "the crown jewel of American liberties," saying: "This legislation proves our unbending commitment to voting rights. It also proves that differences can be settled in the spirit of good will and good faith."⁴⁰⁰ Immediately after witnessing the ceremony, Benjamin Hooks, the Executive Director of the NAACP, asserted that minority groups had no confidence that President Reagan's Civil Rights Division of the Justice Department would enforce the new law.⁴⁰¹ He added that he did "want to congratulate the President, however, for belatedly at least coming along with the Civil Rights Act."⁴⁰²

V. CONCLUSION

Three days after the President's signature was affixed to the final version of H.R. 3112, the Supreme Court released its long-awaited opinion in *Rogers v. Lodge*. In a six to three decision, the *Rogers* Court found that discriminatory intent could be identified in jurisdictions with at-large election systems operated along the lines of Burke County, Georgia.⁴⁰³ Justice White, who authored the Court's 1973 opinion in *White v. Regester*⁴⁰⁴ and dissented in *Mobile*, wrote for the majority. He was joined by two members of the *Mobile* plurality, Chief Justice Burger and Justice Blackmun, as well as by Justice Stewart's replacement, Justice O'Connor.⁴⁰⁵

³⁹⁹ 128 CONG. REC. (daily ed. June 23, 1982).

⁴⁰⁰ Washington Post, June 30, 1982, §A, at 1 (entitled, *Reagan Signs Voting Rights Act Extension*).

⁴⁰¹ N.Y. Times, June 30, 1982, §A, at 2 (entitled, *Voting Rights Act Signed by Reagan*). The following day, the Justice Department issued a statement by Assistant Attorney General Reynolds in which he said:

The Civil Rights Division will not rest on past accomplishments. Now that the extension is law, we pledge to maintain our enforcement efforts in this area at the same high level. Our litigation responsibilities under section 2 of the Act and preclearance responsibilities under section 5 of the Act will continue to receive the highest priority so that the Congressional mandate that all be afforded an equal opportunity to participate in the electoral process, without regard to race, color, creed, or membership in a language minority group, will indeed become a reality.

⁴⁰² N.Y. Times, June 30, 1982, §A, at 2 (entitled, *Voting Rights Act Signed by Reagan*).

⁴⁰³ *Rogers v. Lodge*, 458 U.S. 613 (1982), *sub nom.*, *Lodge v. Buxton*.

⁴⁰⁴ See *supra* note 206 and accompanying text.

⁴⁰⁵ 458 U.S. at 614. Justice Stewart announced the Court's opinion in *Mobile*, one in which the Chief Justice, Justice Powell, and Justice Rehnquist joined. *Mobile v. Bolden*, 446 U.S. 55 (1980). While the Chief Justice, as stated, joined the majority in *Lodge*, Justices Powell and Rehnquist, the latter a law school classmate of Justice O'Connor, chose to dissent. 458 U.S. at 614.

In many ways, *Lodge* and *Mobile* evolved from similar facts. Both cases involved at-large election systems that had been created at a time when blacks were effectively disenfranchised by law.⁴⁰⁶ Since the adoption of these at-large procedures, no black candidates in either jurisdiction had ever been elected to office.⁴⁰⁷ *Mobile*, Alabama and Burke County, Georgia, each with substantial black populations,⁴⁰⁸ had histories of racial discrimination⁴⁰⁹ and practiced bloc voting along racial lines.⁴¹⁰

The difference between *Lodge* and *Mobile* was the standard of proof applied by the circuit courts of appeals. In *Mobile*, the Supreme Court struck down the Fifth Circuit's attempt to expand the Fourteenth Amendment to include proof through an effects test.⁴¹¹ Justice White underscored his support for an intent test in his dissent in *Mobile*,⁴¹² a position he reiterated in *Lodge*.⁴¹³ In both instances as well as in his majority opinion in *Washington v. Davis*, he argued that discriminatory intent can be inferred from the totality of the circumstances,⁴¹⁴ a contention made during congressional hearings. White illustrated his point by reviewing the findings of the district court in *Lodge* that blacks in Burke County had historically been denied political access through methods common to the pre-Voting Rights Act South. These methods included literacy tests, poll taxes, and white-only primaries.⁴¹⁵ In doing so, White clearly was attempting to reconcile the circumstances of *Lodge* with those in *Mobile* and *White v. Regester*.⁴¹⁶ In *White v. Regester*, the Justice wrote that the intent standard could be met if the plaintiff could show that the political mechanism under attack operated as a bar to access and that the minority group had less opportunity than others to participate in the political process.⁴¹⁷ In

⁴⁰⁶ Alabama's and Georgia's at-large systems were created in 1911 (*Mobile*, Alabama, and Burke County, Georgia). In many Southern States, such as Alabama, the state constitution limited black suffrage. See *supra* note 38. The District Court in *Lodge* found that the Georgia practice of utilizing at-large election schemes had been developed in a similar "race neutral" environment. 458 U.S. at 614.

⁴⁰⁷ In *Mobile*, it was significant that no black candidate had attempted election until 1973. See *supra* text accompanying note 200. In *Lodge*, however, "there had been black candidates" for the Burke County Commission. Indeed, Justice White wrote that the fact that none of these candidates had ever been elected represented "important evidence of purposeful exclusion." 458 U.S. at 622-23.

⁴⁰⁸ *Mobile v. Bolden*, 466 U.S. 55, 71 (1980); *Rogers v. Lodge*, 458 U.S. 613, 622 (1982).

⁴⁰⁹ *Mobile v. Bolden*, 446 U.S. 55, 74 (1980); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982).

⁴¹⁰ Approximately 35.4% of the residents of *Mobile* had been black. *Mobile v. Bolden*, 446 U.S. 55, 58 n.1 (1980). In Burke County, an area whose size was comparable to the State of Rhode Island, the black population was 53.6%. *Rogers v. Lodge*, 458 U.S. 613, 626 (1982).

⁴¹¹ *Mobile v. Bolden*, 446 U.S. 55, 71 (1980). See *Rogers v. Lodge*, 458 U.S. 613, 619 (1982).

⁴¹² See *supra* note 52.

⁴¹³ *Rogers v. Lodge*, 458 U.S. 613, 618 (1982).

⁴¹⁴ *Id.* at 5.

⁴¹⁵ *Rogers v. Lodge*, 458 U.S. 613, 623 (1982). Many of the same factors were raised in *Mobile*, pursuant to a different equal protection test. *Mobile v. Bolden*, 446 U.S. 55 (1980).

⁴¹⁶ *Rogers v. Lodge*, 458 U.S. 613, 626 (1982).

⁴¹⁷ *White v. Regester*, 412 U.S. 755, 766 (1973).

Mobile, the Court held that blacks registered and voted without hindrance,⁴¹⁸ that they comprised the only active slating organization in the city,⁴¹⁹ and that they generally were not subject to the limitations on access present in *White*. In contrast, the *Lodge* Court confirmed the district court's holding that the sheer size of Burke County lessened black access⁴²⁰ and that past discrimination had "prevented blacks from effectively participating in Democratic Party affairs and in primary elections."⁴²¹

The 1982 Amendments to the Voting Rights Act were significant in what they failed to say, in addition to what the new statute finally contained. The alterations to sections 5 and 2 will be litigated for years to come, with the apparent legislative intent to broaden both sections at the fulcrum of the debate.

The principal focus in the House of Representatives was on the bailout provisions of section 5. The objective of the House was to draft an incentive for recalcitrant communities in the South to incorporate minorities more fully than they had chosen to do in the seventeen years since the adoption of the original Act in 1965. The lure was eventual escape from administrative preclearance, a procedure which, while not always burdensome, nevertheless was viewed by many as an important political symbol by local officials. In this sense, preclearance was a vivid stigma recalling the sins of past generations. Apprehensions over the House amendments to section 5 were fueled by the ambiguous language of its provisions combined with concern about their permanency. In particular, the perceived difficulty in compliance by some raised fears about covered jurisdictions ever shedding their stigma. Others, however, were concerned that amendments to section 5 would not be stringent enough, that once communities were free of preclearance, they could never again be recaptured. The charge that permanent preclearance also carried the potential of jeopardizing the delicate constitutionality of the entire Act compounded Representatives' already conflicting reservations.

The Senate focused its attention principally upon the meaning of the House amendments to section 2. What began the process as an unadorned "results" test for identifying voter discrimination evolved into an increasingly ambiguous test setting forth conflicting factors for judicial consideration and establishing a highly confusing disclaimer of proportional representation.

In the effort to develop an "easier" test for establishing section 2 violations, controversy progressively developed as to whether the entire nature of the Voting Rights Act was being transformed. In the place of an act

⁴¹⁸ *Mobile v. Bolden*, 446 U.S. 55, 73 (1980).

⁴¹⁹ *Id.*

⁴²⁰ *Rogers v. Lodge*, 458 U.S. 613, 626 (1982). See *supra* note 410.

⁴²¹ *Rogers v. Lodge*, 458 U.S. 613, 624 (1982). In fact, the District Court found that "there had never been a black member of the County Executive Committee of the Democratic Party." *Id.*

originally designed to afford equal opportunity for individuals at the ballot box, the debate that emerged during the Ninety-eighth Congress focused upon the use of the Act as a tool for dismantling the structure of self-government erected by communities across the country. In the place of an act whose ultimate objective was to eventually promote colorblind public policies, the debate that emerged focused upon whether the Act would permit color ever to be submerged in the electoral process.

As so often happens in complex legislative matters, particularly where highly charged emotional issues are involved, the federal judiciary will ultimately have to tell Congress what it intended to achieve in its 1982 Amendments to sections 2 and 5. Indeed, the very constitutionality of these provisions will be the subject of considerable debate in the courts in the years ahead. While some compromises promote stability of the law, others merely postpone difficult policy decisions. The undeniably substantial controversies involved in the Voting Rights Act debate must finally be resolved; when they are, they will contribute in great measure toward a definition of the objectives of civil rights policy in the United States for the next generation.

If the new amendments serve to sensitize local and state governments to the need to incorporate minorities into the political mainstream, and that increased sensitivity aids in producing a society which progresses toward politics uncluttered by preoccupation with race, then the Voting Rights Act Amendments of 1982 will have created for themselves a special place in the history of our Nation.

If, instead, the ultimate product of Congress' actions is to encourage greater consciousness of color and ethnicity in the electoral process, the 1982 Amendments will have signaled a major departure in the Nation's understanding of "equality", transforming the focus of analysis for the first time from the individual citizen to the collective racial or ethnic group.