Introduction

Even as late as 1960, voter registration rates among whites in the South were more than twice those of blacks, and in Mississippi it is estimated that less than 5 percent of black adults were registered to vote. In the three decades since then, legal barriers to minority electoral participation have largely fallen, and voting rates of blacks have risen substantially. Yet representation of minorities remains problematic, with black and Hispanic officeholding at all levels of government only a fraction of their percentages in the population.¹

There are two very different explanations for this situation, leading to diametrically opposed policy recommendations. Minorities themselves, and many civil rights attorneys, see the principal barriers to greater representation as electoral arrangements (including at-large elections and gerrymandered districts) and the continued reluctance of white/Anglo voters to vote for minority candidates. They attribute much of the recent success of minorities to voting rights legislation and to ceaseless litigation to protect minority voting rights and end the use of dilutive voting systems (e.g., Parker, 1990). They sometimes call for nongeographically based interpretations of existing election laws (e.g., Karlan, 1989) and a fundamental restructuring of the mechanisms of representation (Guinier, 1991). On the other hand, a number of social scientists, and some white and minority politicians, point to the failure of minorities themselves and of politicians generally to seek aggressively the cross-racial coalitions necessary for minority success. They emphasize socioeconomic differences that might account for disparities in political power as well as the liabilities inherent in “affirmative action in the electoral sphere” (T hernstrom, 1987, p. 242). They also raise the specter of proportional representation and the prospect of an institutionalization of present racial divisiveness (e.g., Butler, 1982; Graham, 1992; O’Rourke, 1992; Thernstrom, 1985, 1987). Accordingly, they advocate a less expansive interpretation of voting rights legislation.

What can be said with certainty is that the subject of minority representation will remain on the forefront of electoral politics for at least the next decade. During the 1990s round of districting, most redistricting litigation will center
on issues of racial fairness, perhaps in combination with new concerns such as the compactness of minority and majority districts. We see no reversal of the pattern of the 1980s, in which there were far more cases involving racial and linguistic minorities than cases dealing with one person, one vote, or other issues. Moreover, as we work our way through the 1990s, an increasing number of cases involving Hispanics, Asian-Americans, and Native Americans will be added to cases concerning the voting rights of African-Americans.

A major concern in this book is the role of social scientists and social science testimony in voting rights cases. As we look to the voting rights litigation of the 1990s, we can anticipate that social science testimony will continue to play a critical role, as it did in the 1980s. Whether establishing the elements of the Gingles test or the various factors of the “totality-of-circumstances” test, the testimony of social scientists will continue to be indispensable. One purpose of this book, therefore, is to explain the methods that have come to be accepted by most courts as the appropriate tool for determining major aspects of minority vote dilution, especially with respect to the determination of racial bloc voting.

Our aim in this book goes beyond explicating the technical issues of social science testimony in voting rights litigation. We describe in considerable detail the evolution of voting rights case law, focusing on the confusion and conflict in the federal district and circuit courts in the years since the Supreme Court’s 1986 decision in Thornburg v. Gingles. We also discuss the issues that are just beginning to confront the courts (and social scientists) as attention turns to alleged vote dilution in the single-member district context. And in our concluding chapter we consider the implications of developments in voting rights case law and the outcomes of voting rights cases for the future of representation in America.

In Chapter 1 we provide an overview of the struggle for minority voting rights and the history of the Voting Rights Act of 1965 and its subsequent amendments and extensions through 1975. We also distinguish between the right to vote and the right to representation and sketch alternative mechanisms and measures of vote dilution.

In Chapter 2 we carry forward the evolution of a vote dilution standard as it developed in the courts in the 1960s and 1970s — in Congress with the adoption of the 1982 amendments to the Voting Rights Act and again in the courts through the Gingles decision. We also discuss the ambiguity surrounding the totality-of-circumstances test in the wake of Gingles.

In Chapter 3 we examine the operationalization of the Gingles three-pronged test that is at the heart of the current Section 2 case law. This requires a review of recent, sometimes contradictory decisions of the federal courts, as well as a discussion of some of the issues addressed in these cases.

Chapter 4 is largely technical, and readers more interested in the law per se
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may wish to skip the most detailed parts. The entire chapter, however, is indispensable reading for social scientists who might consider serving as an expert witness in a voting rights case. The majority of the chapter is devoted to defining and measuring racially polarized voting, but we also discuss other elements of the totality-of-circumstances test.

In Chapter 5 we look at how the concept of vote dilution might be defined and measured in single-member district plans as well as at other issues that are likely to dominate voting rights litigation in the 1990s. This covers such current topics as influence districts, runoffs, and population growth, as well as more “radical” alternatives to the single-member district system.

In the concluding chapter we take a broader look at representation in the United States and suggest that we are dealing with the “politics of the second best.” Nonetheless, in looking at the direction in which the Voting Rights Act is taking us, we conclude on an optimistic note about the future of minority representation and of American politics.
1

The right to vote and the right to representation

Our book is chiefly about the post–1965 era and about representation, as opposed to registration or turnout. However, the rationale for, as well as the nature of, recent and current efforts to protect minority voting rights cannot be understood without an awareness of the history of minority disfranchisement, especially black disfranchisement in the South. The Voting Rights Act of 1965 and the long line of litigation that forms its lineage can be understood only in the context of the failure of the previous hundred years to establish a secure basis for the right to vote. Thus we begin with a brief overview of that troubling history. We then describe the passage of the act itself and its initial extensions and expansion. Finally, we distinguish between voting and representation and raise a number of questions about the current and future operationalization of the concept of nondilution of minority votes. This distinction will serve as a backdrop for the remainder of the book.

The two-hundred-year struggle for minority voting rights

Before the Civil War, black men could vote in only six northern states; black women, of course, were denied the franchise in all states.1 After the war, the right to vote was extended to most adult males in the seceding states. Southern states were required by the Military Reconstruction Act of 1867 to adopt new constitutions granting universal male suffrage, regardless of race, as a condition for readmission to the Union. Congress was to enshrine the promise of the franchise for blacks in a constitutional amendment three years later.

Following the Civil War, three constitutional amendments designed to eradicate the remaining vestiges of slavery in the South were passed, beginning with the Thirteenth Amendment (1865), which guaranteed freedom from slavery. The Fourteenth Amendment, considered by Congress in 1866 and adopted in 1868, granted citizenship to “all persons born or naturalized in the United States” along with its concomitant privileges and immunities, due process of law, and equal protection of the laws. This amendment dealt with the franchise only
Indirectly, by providing in Section 2 that if a state barred any adult males from the vote, the state’s representation in Congress “shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.” This provision was adopted in order to induce states to repeal state laws excluding blacks from the right of suffrage, but it was in fact never utilized.

Enfranchisement of black citizens was granted nationally with the ratification of the Fifteenth Amendment in 1870. This amendment provided that “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 (like Section 2 of the Thirteenth Amendment and Section 5 of the Fourteenth Amendment) gave Congress the right to enforce the amendment through appropriate legislation.

Shortly after the Fifteenth Amendment became effective on March 30, 1870, Congress exercised its authority to pass appropriate legislation by enacting two measures to protect black suffrage: the Enforcement Act in 1870 and the Force Act of 1871. The Enforcement Act of 1870 “provided for criminal sanctions against those who interfered with the constitutionally guaranteed right to vote,” and the Force Act of 1871 “was to supplement the 1870 statute by supplying independent enforcement machinery . . . to be provided by the appointment of federal officials to supervise the election process in each election district” (Schwartz, 1970, p. 547). These two acts prohibited state officials from applying election laws in a racially discriminatory manner, outlawed physical threats and economic intimidation against voters, and made it illegal for individuals to conspire to interfere with a person’s right to cast a ballot. To implement the Force Act, Congress authorized the appointment of supervisors to observe registration and election proceedings in large towns and cities (Kousser, 1984, p. 28).

Before ratification of the Fifteenth Amendment, the military leaders assigned to replace the Confederate governments had already launched a campaign to register blacks to vote. By 1868, more than 700,000 blacks had been registered to vote under the supervision of federal troops (Franklin, 1961, p. 80). Blacks not only participated in politics by voting; they also had a variety of public offices in each of the southern states and even occupied a majority of the seats in the lower house in South Carolina. Although no black ever served as governor of a southern state, three states elected black lieutenant governors (South Carolina, Mississippi, and Louisiana), and blacks were chosen to fill a number of other statewide offices as well. Furthermore, between 1869 and 1901, the South sent twenty blacks to the U.S. House of Representatives and two blacks to the U.S. Senate (Franklin, 1967, pp. 319–320).

In the North, whites came to accept black voting, but in the South, from the outset, whites resisted enforcement of the Fifteenth Amendment. Violence, in
timidation, and fraud were the primary means used initially to discourage blacks from voting. According to information gathered by a House subcommittee in 1868:

Over 2,000 persons were killed, wounded and otherwise injured in [Louisiana] within a few weeks prior to the presidential election; half the State was overrun by violence; midnight raids, secret murders, and open riot kept the people in constant terror until the Republicans surrendered all claims, and then the election was carried by the democracy. (U.S. Commission on Civil Rights, 1968, pp. 3–4)

Blacks who managed to overcome these obstacles and cast a ballot were faced with elections fraught with corruption: Candidates’ names were scratched off the ballots; votes were stolen from the boxes; polls were not open at all in heavily Republican areas; and police were stationed at polling places to allow only those favoring the Democratic party to enter (U.S. Commission on Civil Rights, 1968, p. 4).

By using this array of techniques, whites in the South were able to out radical Republican administrations and replace them with white supremacist Democratic regimes, thus “redeeming” the South. The formal end of Reconstruction, however, was marked by the Compromise of 1877, in which Southern Democrats helped resolve the corruption-plagued presidential election of 1876 by throwing their votes to the Republican candidate Rutherford B. Hayes in return for the removal of the remaining military troops from southern soil and an understanding that white southerners were to manage their affairs without as much supervision as in the past.

Left to its own devices, the South showed no inclination to protect the right of blacks to vote and, in fact, began to institute a series of measures designed to prevent blacks from casting ballots. The prospect of active federal enforcement of the Fifteenth Amendment also ended at approximately this time with two Supreme Court decisions that greatly weakened the effectiveness of the Enforcement and Force acts.

The Court, in two separate cases decided on the same day (March 27, 1876) – United States v. Reese and United States v. Cruikshank – threw out indictments based on various provisions of the Enforcement Act of 1870 and the Force Act of 1871, thereby nullifying critical sections of the two acts. The Court declared that in order to secure convictions under these acts, it must be proved that the accused operated under the authority of state law and intended to discriminate for reasons of race. In Reese, the Court overturned the indictments of two election officials who had refused to receive the vote of a black citizen in Kentucky and were charged with violating two sections of the Enforcement Act. The Court held that the provisions on which the indictment were based (Sections 3 and 4 of the act) were too broad, as they were not confined in their operation to
unlawful discrimination on the basis of race alone and therefore exceeded congressional power under the Fifteenth Amendment.

In *Cruikshank*, eight men who had participated in a mob that had massacred sixty blacks in 1873 in Colfax, Louisiana, appealed convictions under another section of the Enforcement Act (Section 6), which held that conspiring to hinder citizens in the enjoyment of rights or privileges guaranteed by the federal Constitution was illegal. The Supreme Court held that each of the rights at which the conspiracy was aimed was in fact not a federal right but was, rather, a right derived from the states and therefore not subject to federal protection. The Court held that the only voting rights that Congress had the authority to protect were the right to vote in a federal election and the right to vote free of racial discrimination. Because denial of neither of these rights was alleged, the indictment was held not to state an offense. “We may suspect that race was the cause of the hostility; but it is not so averred,” according to Chief Justice Morrison R. Waite (p. 556). Cruikshank was released from prison, and although the Court did not actually strike down Section 6 of the Enforcement Act, it was construed so narrowly that it became virtually useless.

Thus, on the first occasion on which the Supreme Court was asked to consider the acts designed to implement the Fourteenth and Fifteenth amendments, the Court succeeded in crippling the efforts of Congress to protect the right to vote against both official and private interference (Derfner, 1973, p. 529). Reese and Cruikshank paralleled a shift in national attitudes to support noninterference in the South and marked a general retreat from federal enforcement of the Fifteenth Amendment.²

The phase that began in 1877 was inaugurated by the withdrawal of federal troops from the South, the abandonment of the Negro as a ward of the nation, the giving up of the attempt to guarantee the freedman his civil and political equality, and the acquiescence of the rest of the country in the South’s demand that the whole problem be left to the disposition of the dominant Southern white people. (Woodward, 1966, p. 6)

At the same time, events in the South dramatically accelerated this regressive trend toward black disfranchisement. The Compromise of 1877 not only symbolized the end of Reconstruction; it also signaled the beginning of the movement to exclude blacks totally from the southern electorate. The newly redeemed governments of the South managed to reduce by half the number of black voters over the next fifteen years (Lawson, 1976, p. 6).

State statutes passed in an effort to discourage black political participation included such legally sanctioned devices as long residency requirements and very short registration periods. Perhaps the most inventive technique was one adopted by South Carolina in 1882, the “Eight Box Law.” This statute established eight categories of elections with separate ballot boxes for each category. Ballots were not to be counted if placed in the incorrect box, making it impos-
sible for illiterate blacks to cast ballots (election officials were instructed to aid white voters but not black voters in placing their ballots in the correct boxes).

A less well known and more subtle means of minimizing black political participation without actually denying the franchise to blacks was to employ one or a number of “dilutive” techniques; the method(s) chosen depended on the proportion of blacks in the population and their geographic concentration. Such techniques included racial gerrymandering, at-large election systems, annexations or deannexations, or abolishing local elections for certain offices altogether and making such positions appointive. Each of these measures had as its intended purpose minimization of the number of black officeholders or white officeholders supported by blacks (see Kousser, 1984, pp. 31, 36). In addition to all of these measures, local white supremacists used intimidation and violence against blacks wishing to vote and outright fraud at the polls when blacks did manage to cast a ballot.

Despite these efforts, some blacks continued to exercise the franchise and to hold public office, primarily through the operation of the “fusion principle.” Under this practice some whites (usually conservatives) would appoint blacks to a small share of minor public offices in return for black support at the polls. However, even this limited amount of black participation and influence was soon to be eliminated.

Black disfranchisement solidified in southern state conventions

Although most southern states had enacted statutes designed to reduce the number of blacks eligible to vote, it was not until the 1890s that states began to convene constitutional conventions to eliminate what was left of the black vote. Between 1890 and 1910, most southern states rewrote their constitutions in ways that were intended mainly to exclude blacks from the electorate without obviously violating the Fifteenth Amendment.  

Mississippi initiated the movement by convening a state constitutional convention in 1890. Of the franchise qualifications adopted to ensure that blacks would no longer exercise any political power, the “crowning achievement” (Key, 1949, p. 537) of the Mississippi Constitutional Convention was the “understanding” clause, which required a potential elector to read any section of the state constitution or provide a “reasonable” interpretation of any section read to him. Recognizing that a literacy test fairly administered would undoubtedly prevent large numbers of whites as well as blacks from voting, the “reasonable” interpretation clause gave white registrars enough discretion in evaluating applicants’ performance on the test to pass most whites but reject most blacks.

The Mississippi convention marked the beginning of the movement to dis-
franchise blacks in the South by means of a state constitutional convention. South Carolina followed suit with a convention in 1895. Louisiana in 1898, North Carolina in 1900, Alabama in 1901, Virginia in 1902, and Georgia in 1908. These constitutions outlined new qualifications for voting that included not only the “understanding” clause passed by Mississippi and other variants on the literacy test but also such measures as the “good character” test and the payment of a poll tax. Throughout the South, literacy tests were instituted; residency requirements were lengthened; property qualifications for registration were established; and the list of disfranchising crimes was expanded to include offenses believed to be committed more frequently by blacks. Registration and election officials were given broad discretion to determine whether or not a potential voter met the conditions for voting. The appointment of these officials was placed in the hands of state officials rather than local officials in order to ensure white control of the election process even in predominantly black areas.

The Louisiana constitution adopted in 1898 contributed the “grandfather clause” to the list of disfranchising devices. The “grandfather clause” was not actually a disenfranchising technique but, rather, a method of exempting illiterate whites from having to pass the state-imposed literacy test. The Louisiana constitution provided that no male – or son or grandson of such male – who was entitled to vote on January 1, 1867, was to be denied the right to vote.

“But if the Negroes did learn to read, or acquire sufficient property, and remember to pay the poll tax and to keep the receipt on file, they could even then be tripped by the final hurdle devised for them – the white primary” (Woodward, 1966, p. 84). Democratic party leaders across the South declared that only whites were eligible for membership or permitted a voice in the nomination of party candidates. Because the Democratic party was viewed as a private organization, and therefore perceived to be outside the purview of the federal constitution, it was believed that the party could legitimately discriminate if it so chose. As victory in the Democratic primary was tantamount to victory in the general election in the South, being denied access to the Democratic nominating process was the equivalent of disfranchisement. Every state in the South adopted the policy of white primaries, with the exception of Tennessee and selected counties in North Carolina (Lewinson, 1932, p. 153).

The disfranchisement of blacks in the South occurred with the acquiescence, if not the explicit approval, of the federal government. In 1894, for example, Congress – by then under Democratic control – repealed significant portions of the Enforcement Act of 1870 and the Force Act of 1871. Congressional withdrawal from voting rights enforcement was followed four years later by a favorable review from the Supreme Court for the Mississippi state constitution suffrage provisions.

In Williams v. Mississippi (1898), the Court was asked to consider the con-
stitutionality of some of the suffrage provisions of the Mississippi Constitution of 1890. Williams, who had been indicted for murder by an all-white grand jury, challenged his conviction on the grounds that the jury panel had been drawn from the voting rolls, from which blacks had been effectively excluded by the 1890 Mississippi Constitution. Rejecting the assertion that the various requirements (the “understanding” test, poll tax, lengthy residency requirements, etc.) discriminated against black citizens in violation of the due process clause of the Fourteenth Amendment, the Court concluded that “they do not on their face discriminate between the races, and it has not been shown that their actual administration was evil, only that evil was possible under them” (p. 225).

Six years later, the next challenge to the suffrage provisions of a southern disenfranchising constitution met with the same response. In *Giles v. Harris* (1903) and *Giles v. Teasley* (1904), a black citizen attacked several suffrage provisions (such as the “fighting grandfather” clause and the “good character” clause) of the 1901 Alabama Constitution, contending that they violated the Fifteenth Amendment. The Supreme Court disposed of both of these cases on procedural grounds. These two decisions (as well as the earlier decision in 1898) no doubt provided those few southern states that had not yet acted to disfranchise blacks by means of the state constitution the incentive to imitate their fellow southern states.

By the turn of the century, virtually all blacks had been disfranchised in the South. Abandoned by the federal government, thwarted by the Supreme Court, and faced with a multitude of state laws designed expressly for the purpose of disenfranchising them, the majority of blacks in the South would not be permitted to exercise the franchise until 1965.

**A gradual rekindling of the Fifteenth Amendment in the courts**

For an extended period of time, the Supreme Court did very little to alter the level of black disfranchisement. In fact, the white primary was declared legal as late as 1935 in *Grovey v. Townsend*; the poll tax was upheld in 1937 (*Breedlove v. Sutliff*); and the literacy test was declared constitutional as recently as 1959 (*Lassiter v. Northampton County Board of Elections*). But the decades between 1900 and 1960 were not completely void of progress on the suffrage front. For instance, the ratification of the Nineteenth Amendment in 1920 enfranchised women, though black women in the South remained unable, for the most part, to exercise that right. The Supreme Court also began to carve out some exceptions to the doctrine of black disfranchisement that it had sustained in earlier decisions.

In 1915 in *Guinn v. United States*, the Supreme Court declared Oklahoma’s