

The History of Section 5 of the Voting Rights Act from Another Perspective

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I was asked to comment on the article *The Strange, Ironic Career of Section 5 of the Voting Rights Act* by Professor J. Morgan Kousser.¹ The Act is extraordinary legislation. No statutory enactment has been more important to the advancement of minority voting rights in this country, nor has any single provision of that law been as controversial as Section 5. The history of Section 5 has truly been strange and ironic as suggested by the title of the law-review article and deserving of well-written scholarship. Professor Kousser's article, however, presents very little that will be new for attorneys and scholars who have worked extensively with the Voting Rights Act (VRA) in the past. The article provides an interesting and at times insightful retelling of circumstances around the passage and amendment of the Act, but is less effective in its rehash of quarrels over the meaning or correctness of Supreme Court decisions applying Section 5. The article seems driven by an unannounced agenda of the author that slants the discussion and detracts from the credibility of its scholarship.

I. Existing Scholarship

Few, if any, paragraphs² in federal law have had as much written about them as Section 5 of the Voting Rights Act. There are some "oversimplified, partial histories of Section 5" as noted in Professor Kousser's article,³ but there are also many complex and comprehensive ones. Professor Kousser's article sweeps all past scholarship aside by depicting it as inadequate because it has told the Section 5 story only in parts or because other commentators have oversimplified in the service of a political agenda, failed to deal with the VRA's "fits and starts," accepted "misleading shorthand characterizations

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1. J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act*, 86 TEXAS L. REV. 667 (2008).

2. For most of its existence, Section 5 of the Voting Rights Act of 1965 (42 U.S.C. § 1973c (2000) (amended 2006)) has consisted of a single paragraph. The 2006 amendments to the Act added three additional short paragraphs.

3. Kousser, *supra* note 1, at 672.

of crucial cases,” or seen the Act’s history as “linear and deterministic.”⁴ Undoubtedly (given the very substantial amount of scholarship in this area), some writings fit these descriptions, but many knowledgeable scholars and practicing attorneys have also contributed outstanding scholarship that is not subject to these criticisms. By suggesting that all of this scholarship also fails, Professor Kousser’s article is misleading. The representation that the history of Section 5 is “reviewed entirely and in detail for the first time here”⁵ would be commendable if stated as an objective. It is not (in my opinion) accurate, however, as a description of the article both because this statement unfairly denigrates what has gone before and because it overstates the thoroughness and objectivity of this article.

II. Unwarranted Criticism

Professor Kousser is ultimately guilty of what he criticized at the beginning of the article—i.e., oversimplification in the service of a political agenda and “misleading shorthand characterizations of crucial cases.”⁶ Most of the significant cases mentioned by Professor Kousser are worthy (and have been the subject) of individual law-review articles. A fair critical analysis of all of these cases in a single law-review article is impossible, especially, in an article ostensibly offering an objective history of the Act and, as appears to be the case in this instance, in which the author is instead pursuing a particular political slant or agenda.

I offer a few examples of instances where I believe the article is unbalanced. For example, the article portrays two Supreme Court Justices—Potter Stewart and Sandra Day O’Connor—as foes of the Voting Rights Act and as authoring opinions designed to hamper minority political rights and strip the Act of much of its power. The article does so by analyzing cases selectively and without looking meaningfully at the reasoning given by the Justices for their opinions.

The article portrays Justice Potter Stewart through his opinions in *City of Mobile v. Bolden*, *Beer v. United States*, and *United States v. City of Rome* as a Justice who “disregarded the text” of Section 5 and sidestepped Supreme Court precedents to hamper minority political rights.⁷ It accuses Stewart of “implying” in these opinions that Congress had no power to protect anything but “the acts of voting and running for office,”⁸ that at-large election systems were “nondiscriminatory per se,”⁹ and that both Sections 2 and 5 of the

4. All of these descriptions of other scholarship are found in Kousser, *supra* note 1, at 672–74.

5. *Id.* at 674.

6. *Id.* at 673.

7. *Id.* at 695.

8. *Id.* at 703.

9. *Id.* at 714.

Voting Rights Act were unconstitutional.¹⁰ It even suggests that, on a personal level, Stewart obtained “a strong aversion to proportional representation” from his service on the Cincinnati city council and his opposition at the time “as a stalwart Republican” to an election system (single transferable vote) that appeared to make it possible for a black to become mayor.¹¹ Much of this “analysis” fails to adequately explain Justice Stewart’s reasoning in these cases and is purely conjecture about the motives or intentions of Justice Stewart. More importantly, the article makes no mention of Justice Stewart’s role in critical voting rights cases that seem to directly conflict with this conjecture—e.g., *Allen v. State Board of Elections* (Stewart joined the majority in upholding the constitutionality and broad scope of Section 5), *Georgia v. United States* (Stewart wrote the opinion for a 5–4 decision finding the potentially dilutive effects of statewide apportionments subject to Section 5 and recognizing the broad authority of the United States Attorney under the Act), and *White v. Regester* (Stewart joined the rest of the Court in finding two multimember state legislative districts in Texas unconstitutional and imposing single-member districts). By 2006, many minority rights organizations were campaigning to codify the idea (lifted from Stewart’s opinion in *Beer*) that Section 5 of the Voting Rights Act protects the right of minorities to *elect* their preferred candidate of choice, presumably meaning from majority–minority single-member districts.

The article portrays Justice Sandra Day O’Connor in a similar fashion—as a foe of minority political rights. The article selectively reviews her opinions in cases such as *Thornburg v. Gingles*, *Shaw v. Reno*, *Miller v. Johnson*, and *Reno v. Bossier Parish (I and II)*. The article accuses Justice O’Connor of using the Fourteenth and Fifteenth Amendments “to reverse the march toward political equality of [African-Americans],” seeking to “constrain or gut the VRA,”¹² reinterpreting Section 5 through muddled doctrines and strained logic so as to undermine numerous court decisions and to call into question the actions of the Department of Justice (DOJ) and “every southern state legislature in the 1991–1992 redistricting,”¹³ “distorting precedents,”¹⁴ and writing “intellectually indefensible” opinions.¹⁵ The article offers virtually no explanation of Justice O’Connor’s reasoning in these cases and predicts cataclysmic consequences from them even though it was clear by the time that this article was written that the consequences were not

10. *Id.* at 699.

11. *Id.* at 694.

12. *Id.* at 725.

13. *Id.* at 730.

14. *Id.* at 732.

15. *Id.* at 734.

happening.¹⁶ By contrast, Justice O'Connor gets no credit for her concurrence in *Gingles*, a decision that became an effective tool nationwide for attacking discriminatory at-large systems. Even in the opinions that Professor Kousser criticizes, O'Connor assumed that Section 5 and the rest of the Voting Rights Act were constitutional. In fact, she repeatedly suggested that compliance with the Act was a potentially compelling interest justifying the consideration of race in the drawing of district lines necessary to comply with the Voting Rights Act.¹⁷ Some scholars have seen these decisions as essentially corrective in nature, forcing the DOJ to enforce what the Court saw as the correct discrimination model of Section 5, not as attempts to undermine it.¹⁸ Professor Kousser sees these cases as evidence of a Supreme Court engaged in a "New Redemption" that is aimed at "reversing progress toward racial equality and integration."¹⁹ I disagree.

It is possible that both of these Justices are better viewed as stewards of the Voting Rights Act rather than as being out to "strip[] the Act of much of its power."²⁰ They may not have interpreted Section 5 in accordance with Professor Kousser's preferences, but this article is wrong when it suggests that the Supreme Court opinions in question are clearly wrong or motivated by intent to hamper minority voting rights. The Supreme Court's decisions in *Miller* and *Bossier I* and *II* should be seen as efforts by the Court to prevent extremes that could otherwise endanger the constitutionality of the Act.

III. The Effects of Section 5 of the Voting Rights Act

Professor Kousser's article notes the significance and "rewards"²¹ of the Act, but it does not fully explain the magnitude of the changes brought by Section 5, how these changes took place gradually, or the confluence of forces that made these changes happen. I believe it is helpful to go beyond the legal issues to see how and why our society changed.

The most visible evidence of these changes is in the increase of minority elected officials at the federal, state, county, city, school, and other local levels of government. This change has come gradually over time. For example,

16. Few of the redistricting plans of the 1991–1992 period fell victim to a challenge under *Shaw*. It also is generally agreed that *Shaw* played little or no role in post-2000 redistricting. The 1991–1992 redistricting largely remained intact. Although DOJ objections declined after 1995, it is not clear that any of these decisions was actually the cause. See DAVID L. EPSTEIN ET AL., THE FUTURE OF THE VOTING RIGHTS ACT 49 (2006) (indicating that the *Miller* decision might be the most likely suspect among the decisions). The dearth of objections after the 2000 census seems more related to the policies of the current Administration than any decisions by the Supreme Court.

17. See, e.g., *Bush v. Vera*, 517 U.S. 952, 976–81 (1996); *Miller v. Johnson*, 515 U.S. 900, 921–23 (1995); *Shaw v. Reno*, 509 U.S. 630, 653–58 (1973).

18. EPSTEIN ET AL., *supra* note 16, at 50–51.

19. Kousser, *supra* note 1, at 725.

20. *Id.* at 668.

21. *Id.* at 721–22.

the changes in the ethnic makeup of the United States House of Representatives from 1965 through 2007 show the following:

Year	Black Members	Hispanic Members
1965	5	No records available
1969	10	No records available
1971	13	No records available
1973	16	No records available
1981	17	6
1983	21	8
1991	25	11
1993	39	17
2001	36	19
2007	43	23

The reason for the seemingly odd choice of years for this comparison will become evident in the discussion below. Even more substantial changes in the ethnic makeup of state legislatures and local governing boards occurred over this time. The Joint Center for Political and Economic Studies indicates that the number of elected black officials nationwide increased from 1,469 in 1968 to 9,040 in 2000. As would be expected, the largest increase came within those states subject to Section 5 of the Voting Rights Act.²² By 2000, the state legislatures with the greatest number of black members were in states covered by Section 5.²³ The number of elected minority officials for counties, cities, and schools also increased, but at an even faster rate. Section 5 of the Voting Rights Act has directly or indirectly

22. The Joint Center for Political and Economic Studies indicates that the number of black county elected officials nationwide climbed from fewer than 100 in 1970 to more than 950 by 2000. Black municipal elected officials climbed from 623 to almost 4,500 over this period. School-board elected officials climbed from 362 to 1,930. DAVID A. BOSITIS, JOINT CTR. FOR POLITICAL & ECON. STUDIES, BLACK ELECTED OFFICIALS 17 tbl.1 (2000), *available at* http://www.jointcenter.org/publications_recent_publications/black_elected_officials/black_elected_officials_a_statistical_summary_2000 (follow "Download the file" hyperlink).

23. The state legislatures were those in Mississippi (45 black members), Georgia (43), Maryland (38), Alabama (35), and South Carolina (33). BOSITIS, *supra* note 22, at 9. In the Texas Legislature, the number of black legislators went from 0 in 1961 to 14 state representatives by 1981 with the elimination of multimember districts. This number has essentially remained the same while the number of black state senators increased to 2 by 2003, with the number of Hispanic state legislators rising from 6 state representatives and 1 state senator in 1961 to 17 state representatives and 7 state senators by 2003. STEVE BICKERSTAFF, LINES IN THE SAND 40 (2007).

been the cause of most of this increase in the number of minority elected officials.

Section 5 was effective in changing the racial makeup of our governing bodies because of a subtle combination of forces that are not immediately apparent by looking only at the text of the Section or cases interpreting it—i.e., the conscientious and often aggressive efforts of the attorneys in the Voting Section of the Department of Justice, the consistent pressure of civil rights attorneys in court, and the subtle interaction of Section 5 with Section 2 of the Voting Rights Act and the Fourteenth Amendment. For over thirty-two years, I have represented jurisdictions covered by the election-change review process of Section 5.²⁴ I have seen the Voting Rights Act being applied and the changes taking place. Section 5 together with these other laws and forces has been formidable and effective.

Changes in the racial makeup of government through Section 5 came primarily through two mechanisms. The first was through the DOJ's effect on the redrawing of congressional, state, and local single-member-district lines. Such redistricting is an election change subject to review under Section 5 by the Voting Section of the Department of Justice.²⁵ There has been almost no need for litigation to force the triggering change itself (i.e., enactment of a new districting plan) because all of the state and local jurisdictions utilizing single-member (or even multimember) districts have had to redraw all of those districts at least after every decennial census. Each time, they did so under the watching eye of the DOJ Voting Section.

The first decennial census came in 1970, only five years after passage of the Act. Eventually all of the states covered by Section 5 submitted redistricting plans for review. The Attorney General interposed objections to twenty of these statewide redistricting plans (i.e., state house, senate, or congressional plans) in eight of the covered states.²⁶ Some states unsuccessfully challenged these objections by seeking preclearance of their redistricting plan

24. My law firm and I have represented well over 100 different state and local jurisdictions during this period—most of them numerous times on many different Section 5 submissions. Occasionally litigation has occurred. My first dealings with the Department of Justice on voting rights matters was as an assistant state attorney general in *Graves v. Barnes (Graves III)*, 408 F. Supp. 1050 (W.D. Tex. 1976).

25. See *Georgia v. United States*, 411 U.S. 526, 529–30 (1973) (describing a DOJ review of a Georgia redrawing of single-member districts).

26. This computation uses the state-by-state objection information available on the Department of Justice Web site. See U.S. Dept. of Justice, Section 5 Objection Determinations, http://www.usdoj.gov/crt/voting/sec_5/obj_activ.htm. In many instances, a single objection letter from the Attorney General covered more than one of a state's congressional, state house, or state senate plans. For purposes of this computation, therefore, I have counted the plans to which objections were interposed, not the number of objection letters. Counting objection letters is a useful means of analysis, but it is sometimes misleading when neither the subject nor the scope of objections is considered. An objection to a state's statewide redistricting plan or plans in a single letter can be much more significant than an objection to a more limited change in another letter. All objection letters from the Attorney General under Section 5 are simply not of equal significance.

from the District Court of the District of Columbia.²⁷ Eventually redistricting plans redrawn to meet the DOJ objections were adopted by the state legislatures or the federal courts. This pattern reoccurred after the decennial censuses in 1980 and 1990. Each time, the states enacted new redistricting plans and the Department of Justice interposed objections to some of the plans—twenty objections for ten states in the 1980s and nineteen objections for eleven states in the 1990s. Because no new plan could be retrogressive compared with the plan from the prior decade, the search by minority voter organizations was for ways to augment the number of minority-dominated districts. The effect was to ratchet up from decade to decade the number of single-member districts in which minority voters had an opportunity to elect the person of their choice. The chart at the beginning of this Comment shows how the number of minority legislators tended to jump in the first election after each redistricting. Usually this jump is shown by comparing the last year before elections under the new redistricting plan with the first year after the decennial plan became effective (e.g., 1971 with 1973, 1981 with 1983, and 1991 with 1993).

In some instances, however, the effect of a new redistricting is not seen until later in a decade because it is delayed by a continuing legal battle over redistricting or the effect of the incumbency of white elected officials on the initial election outcomes. Some jurisdictions not covered by Section 5 were persuaded to draw districts intentionally with a majority of black or Hispanic voters.²⁸ Local jurisdictions with single-member districts (e.g., counties) also were obligated to redraw districts after each decennial census and were under the eye of the Department of Justice if covered by Section 5.²⁹ They too found their redistricting plans subject to objections.

The second mechanism for change was the substitution of single-member elections for discriminatory multimember or at-large election systems. In 1965, there was no requirement that all members of the House of Representatives must be elected from single-member districts. A few states used multimember districts for the election of members of Congress. Many also used such systems to elect state legislators. At-large election systems were common among local governments. In those jurisdictions with a substantial, but nonmajority black or Hispanic population, these multimember districts or at-large election systems operated to prevent the election of black or Hispanic candidates by allowing a bloc-voting white majority to usually overwhelm minority voters. Beginning in the late 1960s, these election systems began to disappear. In 1967, Congress banned

27. See, e.g., *Georgia*, 411 U.S. at 541 n.13 (noting the option to seek a declaratory judgment from the District Court of the District of Columbia if the DOJ objects to a submission).

28. See *Voinovich v. Quilter*, 507 U.S. 146 (1993).

29. See *Hadley v. Junior Coll. Dist. of Metro. Kan. City*, 397 U.S. 50 (1970); *Avery v. Midland County*, 390 U.S. 474 (1968).

multimember or at-large districts for the election of members of the U.S. House of Representatives.³⁰ In reviewing state redistricting plans after the 1970 census, the DOJ objected under Section 5 to the inclusion of multimember districts in combination with numbered post and majority-vote requirements.³¹ The United States Supreme Court in 1971 told the federal district courts to utilize single-member districts whenever possible in fashioning remedial redistricting plans.³² The elimination of multimember districts from statewide redistricting plans resulted in the drawing of single-member districts in minority-dominated areas that had been submerged by a white majority in the multimember districts and often immediately resulted in the election of minority officials. The DOJ also objected to local government proposals for at-large districts or changes that would enhance the discriminatory effects of existing at-large districts. As might be expected, the number of elected minority members in Congress, state legislatures, and local governments rose as at-large elections were replaced by single-member elections.

In 1973, the United States Supreme Court decided one of the most significant voting rights cases of the twentieth century. I do not feel that Professor Kousser's article gives *White v. Regester* and its related district court decisions appropriate recognition for their important role in establishing the kind of evidentiary record necessary to bring down a discriminatory multimember or at-large election system nationwide. In *Regester*, the Court upheld a challenge to two of the countywide multimember districts adopted by Texas in its statewide legislative redistricting. The Court found that the election systems were "invidiously discriminatory" in violation of the Fourteenth Amendment. Scholars, courts, lawyers, and legislators have disagreed ever since about whether the Court's decision meant that an at-large district could be shown to be unconstitutional based on its discriminatory effects alone, or as purposefully discriminatory based on sufficient circumstantial evidence of its effects and the rationale for its existence. This debate, while intense, is largely academic when considered against the background of what actually happened nationwide after *Regester* was decided. Challenges to multimember and at-large districts, particularly in local governments, proliferated throughout the nation but were particularly plentiful in areas covered by Section 5. Most of these covered areas were within the jurisdiction of the Fifth Circuit Court of Appeals, which *en banc* adopted evidentiary guidelines for a court to use in assessing the

30. See Act of Dec. 14, 1967, Pub. L. No. 90-196, 81 Stat. 581.

31. See, e.g., *Georgia*, 411 U.S. at 529-30 (describing a DOJ objection to a plan that would move residents of single-member districts into "numbered-post" multimember districts).

32. *Connor v. Johnson*, 402 U.S. 690, 692 (1971); see also *Connor v. Finch*, 431 U.S. 407, 415 (1977); *E. Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976); *Chapman v. Meier*, 420 U.S. 1, 18 (1975).

constitutionality of these districts.³³ A showing of purposeful discrimination was not explicitly required. The Supreme Court seemed to shift the ground under civil rights groups when in *City of Mobile v. Bolden* a divided Court found that a showing of unconstitutionality required demonstrating that the election system was adopted or maintained for the purpose of invidious discrimination. Civil rights activists gasped, but the reality for litigators was largely unchanged by the decision. The holding in *City of Mobile* was only by plurality and the Court had left the precedent of *Regester* in place. Moreover, on the same day as it decided *City of Mobile*, the Court had decided in *City of Rome v. United States* (with a majority of six Justices) that the Voting Rights Act does not exceed Congress' power under the Fifteenth Amendment. Two years later in *Rogers v. Lodge*, a six-judge majority of the Court affirmed a ruling of unconstitutionality that relied on the evidentiary factors developed by the Fifth Circuit for judging the constitutionality of an at-large system, even though those factors did not expressly include purposeful discrimination. Even in the *City of Mobile* litigation, the district court on remand found that the city's at-large system was unconstitutional. The decision in *City of Mobile* did little to stop the onslaught against at-large systems.

The 1982 amendment to Section 2 of the Voting Rights Act made clear that an election practice is unlawful if it “*results* in a denial or abridgement of the right of a citizen of the United States to vote on account of race or color” or of language minorities.³⁴ Many supporters of this amendment argued that this “effects” or “results” test was the standard applied in *Regester*. In 1986, the United States Supreme Court in *Thornburg v. Gingles* moved beyond *Regester* to make this “results” test into an even more potent weapon for change. The threshold test established for plaintiffs in *Gingles* became for all practical purposes the point of decision for affected governments. Even though courts thereafter often started their analysis of the legality of an at-large system by indicating that such a system was not “*per se* unconstitutional,” more often than not this statement was immaterial to the outcome of the case. If the first prongs of the *Gingles* threshold existed in a jurisdiction (i.e., black or Hispanic voters within a jurisdiction were sufficiently numerous, voted in a cohesive manner, and were located in a reasonably compact area so that a single-member district could be drawn with a majority of black or Hispanic voters), there were few defenses available for the local government. Unless the jurisdiction had a record of electoral success by minority candidates running at-large (i.e., that there was not a white voting bloc that usually defeated minority candidates), the at-

33. See *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd sub nom. per curiam*, *E. Carroll Parish Sch. Bd.*, 424 U.S. 636.

34. 42 U.S.C. § 1973 (1982) (emphasis added). Applicability of Section 2 to language minorities occurs through its reference to Section 1973b(f)(2).

large system was likely to fail a legal challenge.³⁵ Local governments soon learned from the experience of others that it was expensive for a jurisdiction and divisive for a community to fight to preserve an at-large election system. As a result, many local governments moved to change their systems when threatened with litigation or quickly settled litigation when it was filed if the *Gingles* threshold conditions existed. At-large systems were soon changed to single-member systems nationwide in virtually all jurisdictions with sizeable minority populations. In many instances the change came without any protracted litigation. This was particularly true of cities, school boards, and other forms of local governments in the jurisdictions covered by Section 5 of the Voting Rights Act where even very small jurisdictions often found themselves unwilling targets and moved to change their election systems to avoid expensive litigation.

With each redrawing of single-member districts at the state and local level, and each change from at-large to single-member districts at the local level, the possibility existed to design plans with one or more districts drawn specifically for the purpose of giving minority voters the ability to elect the person of their choice. In such circumstances, minority representatives and lawyers proffered districts that not only created districts where compact minority communities existed but specifically shaped districts to maximize opportunities for minority voters. The tools of redistricting (e.g., racial population data at the block level) often made it possible to add one or more predominantly minority districts by connecting disparate areas of minority population across a jurisdiction while excluding areas of white population. As a result, these proffered districts were frequently elongated and highly irregular in appearance. For jurisdictions covered by Section 5, the argument for adopting these proffered districts was a simple appeal to the survival instincts of the majority of incumbent legislators whose districts were not directly affected by the proffered plan—i.e., adopt the minority group's plan for the minority areas of the jurisdiction and rest easy that the DOJ would approve the final jurisdiction-wide districting plan. This argument was attractive to the incumbent officeholders because any objection by the DOJ to a jurisdiction's districting plan would keep it from taking effect and possibly mean that at least the next election would be held in single-member districts drawn or adopted by a federal court. The vagaries of such an unknown court plan unsettled many incumbents and created a willingness to incorporate

35. See *Overton v. City of Austin*, 871 F.2d 529 (5th Cir. 1989) (challenging the City of Austin's election structure (at-large) under the U.S. Constitution and the Voting Rights Act). Austin remains the largest city in the United States with a purely at-large system. The City of Houston has a mixed (combined single-member and at-large) system. It has successfully defended the at-large component of this system against challenges from Hispanic voters primarily because black candidates have enjoyed significant success in winning election to the at-large seats. See *Campos v. City of Houston*, 113 F.3d 544 (5th Cir. 1997) (challenging the City of Houston's election structure (partially at-large) under the Voting Rights Act).

these proffered district lines (regardless of their appearance) into a jurisdiction-wide plan where the other predominately white districts could be drawn by the incumbents.

The ultimate effect of this ratcheting up of predominantly minority districts from decade to decade under Section 5 has been the increase of minority representation at every level of government. Since most of these minority voters continue to vote for Democratic candidates, the creation of such districts has also meant that these single-member districts are often “safely” Democrat. As some districts have been drawn to contain a greater percentage of minority voters, however, the populations of other districts have necessarily become more “white” and more Republican. As a result, this policy of drawing districts along ethnic lines in furtherance of the Voting Rights Act has reduced the number of competitive districts and, in some instances, promoted political and ethnic divisiveness and extremism, increased partisanship, and created political fiefdoms controlled by a single politician or political power base. In many circumstances, a voter’s ethnicity has become a proxy for the voter’s partisan tendencies. The controversial 2003 redistricting of congressional districts in Texas demonstrated how a partisan fight over district lines could become intertwined with Section 5 and the ethnicity of both the affected incumbent congressmen and the state legislators battling over the redistricting proposal.³⁶ The events in Texas also suggest that Republicans can potentially use the ethnicity of Democratic officeholders to marginalize the Democratic Party by making it appear inhospitable to white voters and candidates.³⁷

For most of the period since the Civil War, the Democratic Party in the South has been a source of suppression of minority voters. Section 5 of the Voting Rights Act has materially changed that situation by increasing minority voting power as measured by the election of minority officeholders, usually as Democrats. This success of blacks and Hispanics within the Democratic Party, however, has coincided with the party’s dramatic loss of power in the jurisdictions covered by Section 5. As a result, these minority voters are left with increasing control of an increasingly weaker political party. This effect posed a dilemma for black and Hispanic elected officials in Texas in 2003. Republicans proposed a redistricting plan that endangered the reelection of all ten white Democratic incumbents in Congress, but also included a congressional district redrawn so it could be controlled by black voters. Scholars have described the dispute as being between “substantive”

36. See generally BICKERSTAFF, *supra* note 23, at 40.

37. *Id.* at 4. Texas State Senator Rodney Ellis suggested that Republicans were trying to “brand” the Democratic Party as only for ethnic minorities by defeating all of the white Democratic congressmen and creating a situation in which “the only elected officials left in [the Democratic Party] would be African-American or Hispanic.” *Id.*

and “descriptive” representation.³⁸ To the minority legislators, the issue was not academic. On one side of this divide among black legislators was Democratic State Senator Rodney Ellis who fought to defeat the Republican redistricting plan. He explained, “I can count. If we do not have a sufficient number of the right people in Congress to vote the right way on issues that are important to us, it makes no difference whether we have another African-American congressman.”³⁹ By contrast, Democratic State Representative Ron Wilson (who had served for twenty-seven years from a predominately black district in Harris County) said he believed that African-Americans are better served by African-American representatives. He openly supported the Republican redistricting plan while blaming the Democrats for not creating the new black-dominated district in the past when they controlled the redistricting process.⁴⁰

IV. Conclusion

Although I am disappointed with some aspects of Professor Kousser’s article, it also offers some valuable insights. The article’s description of the strategies of the various interests during the reauthorization processes in 1982 and 2006 makes for interesting reading. Certainly, Professor Kousser’s discussion of the pending case in the U.S. District Court for the District of Columbia brought by the Northwest Austin Municipal Utility District Number One challenging the bailout provisions of the Voting Rights Act is timely and important.

By suggesting that Section 5 of the Voting Rights Act should be recognized as an extraordinary, but amazingly successful tool for advancing the interests of ethnic minorities in our society, I am not suggesting this success represents “a change in heart, a revolutionary shift in cultural attitudes”⁴¹ within our society that warrants abandonment of the structure of the Act. Rather, as I have urged, based on my study of the 2003 redistricting in Texas, legislative members of a political party could and would (given power to dictate the terms of a redistricting) reduce minority voting strength in the interest of improving the partisan strength of that party. The rationale under such circumstances is that the issue is one of “partisanship,” not racial or ethnic discrimination. Section 5, even if interpreted only as a barrier to retrogression, remains a formidable obstacle to such partisan gerrymandering.⁴²

38. EPSTEIN ET AL., *supra* note 16, at 62.

39. *Id.* at 279–80.

40. *Id.* at 281–84.

41. Kousser, *supra* note 1, at 747.

42. See generally *League of United Latin Am. Citizens v. Perry (LULAC)*, 126 S. Ct. 2594 (2006) (finding that an attempt to redraw a Latino-majority district violated the VRA).

My final observation pertains to the indirect effects of the Voting Rights Act. The race-based single-member districts drawn under the Act have affirmatively created a “seat at the table” for ethnic minorities in federal, state, and local legislative bodies. In turn, the presence of these persons “of color” as elected officials has both created opportunities for familiarity with their white colleagues and for respectful recognition by the general public. As a result, an increasing number of black and Hispanic officials initially elected from purposefully drawn majority–minority districts find themselves as viable candidates in elections that are not necessarily controlled by minority voters. It is not too much of a stretch to suggest that Barack Obama, who initially won election in a heavily minority state senate district in Illinois, is a beneficiary of this effect. This country is better for the effects of the Voting Rights Act and its controversial “radical” Section 5.