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Crashing the Party- The Supreme Court Subjects Political Parties to Preclearance Under Section 5 of the Voting Rights Act of 1965 in Morse v. Republican Party of Virginia

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COMMENT

CRASHING THE PARTY—THE SUPREME COURT SUBJECTS POLITICAL PARTIES TO PRECLEARANCE UNDER SECTION 5 OF THE VOTING RIGHTS ACT OF 1965 IN *MORSE V. REPUBLICAN PARTY OF VIRGINIA*

I. INTRODUCTION

If someone told you that whenever a particular "State or political subdivision" attempts to change its voting laws or regulations, they must first receive approval from the Department of Justice or a federal court in the District of Columbia, would you consider this requirement applicable to political parties? Asked in isolation, the question appears too obvious to warrant serious consideration. An understanding of the history of discrimination denying America's blacks full and complete franchise and an understanding of the adoption and evolution of the Voting Rights Act of 1965, however, may give you pause before answering.

Congress enacted the Voting Rights Act of 1965[1] (Act or the Voting Rights Act) in an attempt to abolish discriminatory voting practices. Section 5 of the Act contains what is commonly referred to as the Act's preclearance requirement, which provides that certain "covered" jurisdictions must preclear changes in a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" with the Attorney

1. 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1994). The Voting Rights Act of 1965 "has been hailed by many to be the most effective civil rights legislation ever passed." S. REP. NO. 94-295, at 11 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 777.

General of the United States or the District Court for the District of Columbia, before implementing the change.[2] The Act has been the subject of much debate, praise, and criticism. It was adopted as a temporary (and somewhat extraordinary) measure and it was given continued life by Congress on three occasions.[3] The Supreme Court of the United States has made many pronouncements on the purpose, effect, and scope of its provisions.[4] Numerous commentators have heralded the Act's requirements. Until recently, however, the judicial gloss given to the Act's preclearance requirement limited its mandates to governmental entities. A divided Supreme Court in *Morse v. Republican Party*,[5] determined that certain changes in a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" effected by non-governmental entities such as state political parties, must also receive the blessing of the Justice Department or the federal District Court for the District of Columbia before being promulgated.[6]

Part I of this Comment discusses the events leading to, and in many respects providing the impetus for, the enactment of the Voting Rights Act of 1965. Part I also outlines the major

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2. 42 U.S.C. § 1973c (1994).

3. Many of the Act's requirements, including the preclearance requirement, are temporary provisions. Congress first extended the temporary provisions of the Voting Rights Act in 1970. *See* Pub. L. No. 91-285, 84 Stat. 314, 315 (1970). Congress again extended the applicability of the Act's temporary provisions in 1975. *See* Pub. L. No. 94-73, 89 Stat. 400-02 (1975). In 1982, Congress extended the preclearance requirement of Section 5 for twenty-five years. *See* Pub. L. No. 97-205, 96 Stat. 131 (1982).

4. For cases discussing the applicability of Section 5 of the Voting Rights Act see: Morse v. Republican Party, 116 S. Ct. 1186 (1996); Presley v. Etowah County Comm'n, 502 U.S. 491 (1992); Clark v. Roemer, 500 U.S. 646 (1991); Pleasant Grove v. United States, 479 U.S. 462 (1987); NAACP v. Hampton County Election Comm'n, 470 U.S. 166 (1985); McCain v. Lybrand, 465 U.S. 236 (1984); City of Lockhart v. United States, 460 U.S. 125 (1983); City of Port Arthur v. United States, 459 U.S. 159 (1982); Hathorn v. Lovorn, 457 U.S. 255 (1982); Blanding v. DuBose, 454 U.S. 393 (1982); McDaniel v. Sanchez, 452 U.S. 130 (1981); City of Rome v. United States, 446 U.S. 156 (1980); Dougherty County, Georgia, Bd. of Educ. v. White, 439 U.S. 32 (1978); Berry v. Doles, 438 U.S. 190 (1978); United States v. Board of Comm'rs, 435 U.S. 110 (1978); Morris v. Gressette, 432 U.S. 491 (1977); United States v. Board of Supervisors, 429 U.S. 642 (1977); Beer v. United States, 425 U.S. 130 (1976); City of Richmond v. United States, 422 U.S. 358 (1975); Connor v. Waller, 421 U.S. 656 (1975); Georgia v. United States, 411 U.S. 526 (1973); Perkins v. Matthews, 400 U.S. 379 (1971); Hadnott v. Amos, 394 U.S. 358 (1969); Allen v. State Bd. of Elections, 393 U.S. 544 (1969).

5. 116 S. Ct. 1186 (1996) (5-4 decision).

6. *Id.* at 1192; *see* discussion *infra* Part V.

provisions of the Voting Rights Act, including the preclearance requirement of Section 5. Part II examines the judicial treatment of certain discriminatory voting practices of political parties prior to the adoption of the Voting Rights Act. In particular, Part II discusses the series of Supreme Court decisions known as the *White Primary Cases* and the application of the state action doctrine to political parties to invalidate discriminatory practices under the Fourteenth and Fifteenth Amendments to the Constitution. Part III analyzes the legislative history of the Voting Rights Act and the three extensions of the Act's temporary provisions, giving particular emphasis to congressional intent, or the lack thereof, to include political parties under Section 5 of the Act. Part IV examines Supreme Court treatment of the Voting Rights Act in general and the preclearance requirement prior to the *Morse* decision. Part IV also discusses the broad interpretation which the Supreme Court has given Section 5 with regard to the types of governmental entities and the types of voting changes subject to preclearance. Part V considers the Supreme Court's most recent Section 5 decision in *Morse* and the reasoning the Court used to find the Republican Party of Virginia subject to the preclearance requirement of Section 5. Finally, Part VI considers the propriety of the *Morse* decision and its impact on future Voting Rights Act litigation.

Perhaps as important as what this Comment discusses is what it does not discuss. There are two facets of the *Morse* decision that are outside the scope of this Comment. The first is the First Amendment freedom of association concerns regarding the Court's decision to include political parties under Section 5 preclearance. While a majority of the Court determined that the First Amendment was not implicated by subjecting the Republican Party of Virginia to Section 5 preclearance, the issue was nevertheless raised and acknowledged by all five opinions in *Morse*.

The second issue that falls outside of the scope of this Comment is the extent to which Section 5 and the constitutional doctrine of state action are co-extensive. While both issues receive a cursory discussion in this Comment, the reader should be aware of the fact that these expansive issues warrant consideration when determining whether political parties come within Section 5's ambit.

A. *Events Leading to the Enactment of the Voting Rights Act*

In March of 1965, when Alabama state troopers attacked 525 voting rights demonstrators on the Edmund Pettus Bridge in Selma, the nation's conscience was raised and the extent to which black Americans had been denied the franchise became painfully apparent.[7] Selma was targeted by the Southern Christian Leadership Conference (SCLC) and its president, Dr. Martin Luther King, Jr., as the place where a growing civil rights movement could create "a rallying point around which we can stir the whole nation."[8]

In addition to anticipating a disproportionate and violent reaction from the white establishment in Selma, the SCLC viewed Selma as a vivid portrait of the disenfranchisement which they sought to reverse. In Dallas County, Alabama, of which Selma is the county seat, a black person seeking to register to vote, a right which ostensibly had been secured by the Fifteenth Amendment,[9] had to overcome ridiculous obstacles: the voter registration office was open only two days of the week; the registration application contained more than fifty blanks requesting different information; and the applicant was required to write part of the U.S. Constitution from dictation, read and answer various questions about the Constitution, answer questions regarding the structure of the government, and swear allegiance to the United States and to the State of Alabama.[10] After the events of Bloody Sunday unfolded in

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7. *See* Laughlin McDonald, *The 1982 Extension of Section 5 of the Voting Rights Act of 1965: The Continued Need for Preclearance*, 51 TENN. L. REV. 1, 25 (1983).

8. Chandler Davidson, *The Voting Rights Act: A Brief History*, *in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 7, 14 (Bernard Grofman & Chandler Davidson eds., 1992).

9. U.S. CONST. amend. XV. ("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. The Congress shall have power to enforce this article by appropriate legislation.").

10. *See* Davidson, *supra* note 8, at 15; *see also* HOWARD BALL ET AL., COMPROMISED COMPLIANCE: IMPLEMENTATION OF THE 1965 VOTING RIGHTS ACT 237-42 app. B (1982). Appendix B of COMPROMISED COMPLIANCE contains a literacy test used in Alabama prior to the enactment of the Voting Rights Act of 1965. Among the sixty-eight questions are: "Of the original 13 states, the one with the largest representation in the first Congress was _____" *Id.* at 239. "What words are required by law to be on all coins and paper currency of the United States?" *Id.* at 238. "The Constitution

Selma, with state troopers attacking the marchers under orders from Governor George Wallace to "use whatever measures are necessary" to prevent the demonstration,[11] the legislative course of securing voting rights was fixed.

In response to the events in Selma, President Lyndon Johnson instructed Attorney General Nicholas deB. Katzenbach to draft the "goddamndest toughest" voting rights legislation possible.[12] Days after the Selma incident, President Johnson addressed a Joint Session of Congress, demanding that the history of discrimination against America's blacks at the polls be remedied once and for all.[13] The debate in Congress was predictable. With the minds of their constituents indelibly marked by the scene of black protesters kneeling in prayer on the Edmund Pettus Bridge, while police armed with billy clubs and tear gas sent them fleeing, most members of Congress focused on the details of what was, to them, inevitable. Southern legislators, however, challenged the constitutionality of the legislation, raising concerns about what they perceived to be encroachments on the Tenth Amendment.[14] Senator Sam Ervin of North Carolina described what would become the preclearance requirement of Section 5 as "an astounding provision. The Tenth Amendment to the Constitution undoubtedly reserves to the States the power to pass laws prescribing qualifications for voters in State elections."[15] The sense of paternalism permeating the legislation raised the ire of many opponents.[16]

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limits the size of the District of Columbia to ____" *Id.* at 240. "After the presidential electors have voted, to whom do they send the count of their votes?" *Id.* at 242.

11. Davidson, *supra* note 8, at 16.

12. *Id.* at 17.

13. In addressing the Joint Session of Congress that was called just days after the incident in Selma, President Johnson declared:

> At times, history and fate meet at a single time in a single place to shape a turning point in man's unending search for freedom . . . . So it was last week in Selma, Alabama. . . . Every device of which human ingenuity is capable has been used to delay this right [of blacks to vote]. . . . This time, on this issue, there must be no delay, or no hesitation, or no compromise with our purpose. . . . We have already waited 100 years and more and the time for waiting is gone.

McDonald, *supra* note 7, at 25 (quoting N.Y. TIMES, Mar. 16, 1965, at 30, col. 1).

14. U.S. CONST. amend. X ("The Powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

15. 111 CONG. REC. 10,106 (1965).

16. During the floor debate on the Voting Rights Act of 1965, Senator Ervin stat-

B. *The Voting Rights Act: Section 5 Preclearance and Other Provisions*

The resulting Voting Rights Act[17] was a comprehensive piece of legislation that combined a permanent prohibition against discriminatory voting practices across the nation, with certain extraordinary, temporary provisions aimed at those southern states where discrimination against blacks was most prevalent.[18] The Senate Judiciary Committee Report on the Voting Rights Act Amendments of 1982[19] (1982 Senate Report) highlighted the dichotomy between the permanent and temporary provisions of the Act. The 1982 Senate Report noted that the

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ed that the legislation was "utterly repugnant to the basic principles upon which our system of justice rests." 111 CONG. REC. 10,102 (1965). In a speech which received much praise from his fellow Southern Senators, Senator Ervin described what he perceived to be the unconstitutionality of the preclearance requirement: "It would certainly be a tragic thing if everyone were going to be condemned if he could not show he was not going to sin in the future. And yet, that is the burden put on a State or political subdivision of a State condemned by the artificial formula [of § 4(b)]." 111 CONG. REC. 10,111 (1965).

17. 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1994).

18. President Johnson referred to the Act as a "triumph for freedom as huge as any ever won on any battlefield." S. REP. NO. 97-417 at 4 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 181. Currently the following States are "covered" under § 4(b) of the Voting Rights Act for preclearance purposes: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. In addition, certain counties or other units of local government are covered in the following States: California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota. 28 C.F.R. pt. 51 app. (1996); *see also* Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249 (1989). In his article, McDonald explains what Congress sought to accomplish through this unusual approach to securing civil rights in a discriminatory society:

> Although the 1965 Act had provisions that applied nationwide, Congress intentionally targeted seven states of the old Confederacy—Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and portions of North Carolina—for the application of unique and stringent measures described by the Supreme Court as the "heart of the Act." [quoting South Carolina v. Katzenbach, 383 U.S. 301, 315 (1965)]. The new measures suspended discriminatory literacy and other tests which had been used to deny blacks the vote. The Act also prohibited the affected jurisdictions from enacting any new discriminatory laws by requiring them for a period of five years to pre-clear all changes in their election practices with federal officials.

Id. at 1250.

19. S. REP. NO. 417, 97-417 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177.

"Voting Rights Act was designed to operate on two levels."[20]

On the first level, Section 4 of the Act targeted certain jurisdictions in which less than half of the electorate was registered to vote or had voted, and which had employed either literacy tests or similar devices to stifle black franchise. Section 5 of the Act operated on this first level to ensure that such "covered" jurisdictions precleared any changes in voting with the Justice Department or the District Court for the District of Columbia. On the second level, the Voting Rights Act prescribed a nationwide prohibition against discriminatory voting practices.[21]

Section 2 of the Act provides that

> [n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied in any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or [membership in a language minority] . . . .[22]

The purpose of Section 2 is to ban any and all voting practices nationwide that result in the denial or abridgement of the right to vote based on the specified discriminatory factors. Section 2 also provides the manner by which a violation of its provisions may be established.[23]

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20. *Id.* at 5, *reprinted in* 1982 U.S.C.C.A.N. 177, 182.

21. *See id.* at 5-6, *reprinted in* 1982 U.S.C.C.A.N. 177, 182-83.

22. 42 U.S.C. § 1973 (1994); *see also* Pub. L. No. 97-205, 96 Stat. 134 (1984) (amending Section 2(a) to include the "results" test with respect to establishing a violation of the prohibition against discriminatory voting practices); McDonald, *supra* note 7, at 28. McDonald explains that after a plurality of the Supreme Court concluded in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), that a plaintiff must prove a racial purpose as a prerequisite to establish a violation of both the Fourteenth and Fifteenth Amendments, and that Section 2 of the Voting Rights Act was "intended to have an effect no different from that of the Fifteenth Amendment itself," *Bolden*, 446 U.S. at 61, Congress amended Section 2 "in order to make clear that whatever the standard of proof in constitutional challenges was, proof of racial purpose was not required for a statutory violation." *Id.* at 28; Mark E. Haddad, Note, *Getting Results Under Section 5 of the Voting Rights Act*, 94 YALE L.J. 139 (1984).

23. Under Section 2(b) of the Voting Rights Act, a violation is established "if, based on the totality of the 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." Subsection (b) of Section 2 further provides that "[t]he extent to which members of a protected class have been

Under Section 4 of the Act, Congress banned the use of tests or devices in determining eligibility to vote.[24] When Congress first adopted the Voting Rights Act, it took the incremental step of banning literacy and other tests under Section 4 only in those jurisdictions which satisfied the Section 5 conditions necessary to be considered a "covered" jurisdiction.[25] When the temporary provisions of the Act first came before Congress for renewal in 1970, Congress banned such tests nationwide and extended the ban for five years.[26] In 1975 Congress made the ban permanent.[27]

Section 4(b) of the Act provides the manner by which a jurisdiction is considered to be "covered" for the purposes of Section 5's preclearance requirement. A "covered" jurisdiction is one that maintained "any test or device"[28] with respect to voting on November 1, 1964, and in which less than fifty percent of the State residents of voting age were registered to vote on November 1, 1964.[29] Congress amended the Voting Rights Act in 1970 and 1975 to include jurisdictions which had in place any test or device regarding voting and in which less than fifty percent of the electorate were registered to vote as of November 1, 1968 or November 1, 1972, respectively.[30]

Other permanent provisions of the Act include the authority of the Attorney General to appoint federal election examiners to covered jurisdictions under specified conditions.[31] Moreover, the Attorney General has the authority to send federal examiners

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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." 42 U.S.C. § 1973 (1994).

24. *See* 42 U.S.C. § 1973b (1994).

25. *See* Pub. L. No. 89-110, 79 Stat. 437, 438 (1965).

26. *See* Pub. L. No. 91-285, 84 Stat. 314, 315 (1970).

27. *See* Pub. L. No. 94-73, 89 Stat. 400-02 (1975). *See* McDonald, *supra* note 7, at 28.

28. *See generally* McDonald, *supra* note 7, at 31 (explaining that "the term 'test or device' includes literacy tests, educational requirements, good character tests, and exclusively English language registration procedures or elections where a single linguistic minority comprises more than 5 percent of the voting age population of the jurisdiction.").

29. *See* 42 U.S.C. § 1973b(b) (1994).

30. *See id. See supra* note 18 for a list of states and jurisdictions meeting the requirements of § 4(b) today.

31. *See* 42 U.S.C. §§ 1973d, 1973f (1994).

to other jurisdictions which are not "covered" under Section 4(b) when certain conditions are met; this is the so-called "pocket trigger" provision of the Voting Rights Act.[32]

Section 5 of the Voting Rights Act, often referred to as the "heart of the Act,"[33] requires "covered" States or political subdivisions to preclear "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" different than that in effect in that State or political subdivision on either November 1 of 1964, 1968, or 1972 with the District Court for the District of Columbia or the Attorney General of the United States.[34] The Supreme Court has consistently given a liberal interpretation to the preclearance requirement. The term political subdivision includes any governmental

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32. *See* 42 U.S.C. §§ 1973a(a), 1973(c) (1994). By providing the Attorney General with the authority to appoint federal election examiners to any jurisdiction in the country "Congress designed [S]ection 3 to reach pockets of discrimination in jurisdictions not otherwise covered by Section 5. Any federal court that has found a violation of voting rights protected by the [F]ourteenth or [F]ifteenth [A]mendments may apply the provisions of Section 5." McDonald, *supra* note 7, at 29-30.

33. *See, e.g.*, South Carolina v. Katzenbach, 383 U.S. 301, 315 (1965).

34. Section 5 of the Voting Rights Act of 1965, as amended, provides that whenever a covered state or political subdivision:

> 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 November 1, 1964 . . . 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 effect of denying or abridging the right to vote on account of race or color or in contravention of the guarantees set forth in section 1973b(f)(2) [membership in a language minority] of this title, and unless and until the court enters such judgement 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, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure 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, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made.

42 U.S.C. § 1973c (1994).

Section 5 is a temporary provision. In 1982, Congress voted to extend the coverage of Section 5 for a period of twenty-five years. Accordingly, Section 5 will expire in the year 2007. *See* Pub. L. No. 97-205(8), 96 Stat. 133(8) (1982).

entity "having power over any aspect of the electoral process within designated jurisdictions . . . ."[35] The Supreme Court has also read the scope of the preclearance requirement to include virtually all changes in election laws or practices that pertain to voting.[36]

Under Section 5, a State or political subdivision, as defined by the Act,[37] may receive preclearance of a change in voting either judicially or administratively. Under the administrative route, the submission must meet certain conditions of specificity as prescribed by Department of Justice regulations.[38] Prior to the adoption of the Attorney General's regulation governing the content of submissions, the Supreme Court determined that the Voting Rights Act required the State or political subdivision to "submit any legislation or regulation" in an "unambiguous and recordable manner."[39] The jurisdiction making the submission has the burden of establishing that the change in voting "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color . . . ."[40] The District Court for the District of Columbia defined the

35. United States v. Board of Comm'r, 435 U.S. 110, 118 (1978); *see also* 42 U.S.C. § 1973*l*(c)(2) (1994) (defining political subdivision as "any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting."). In *Morse v. Republican Party*, 116 S. Ct. 1186 (1996) the Supreme Court held for the first time that a non-governmental entity may be subject to the Act's preclearance requirement. *See* discussion *infra* Part V.

36. *See* Allen v. State Bd. of Elections, 393 U.S. 544, 566-68 (1969) (holding that "Congress intended to reach any state enactment which alters the election law of a covered state in even a minor way.").

37. *See* sources cited *supra* note 35 (defining political subdivision); *see also* 42 U.S.C. §§ 1973aa-1(h), 1973bb-1 (1994) (defining a "State" as each of the several states and the District of Columbia).

38. *See* 28 C.F.R. § 51.27 (1996). When submitting a proposed change under this regulation, the submitting party must explain, among other requirements, the reasons for the change and any potential effect which the change may have on minorities. *Id.*

39. *Allen*, 393 U.S. at 571.

40. 42 U.S.C. § 1973c (1994); *see also* McDonald, *supra* note 7, at 37-38. McDonald explains that this burden shifting is an essential component of Section 5's effectiveness. He notes that the Supreme Court upheld this allocation of the burden of proof in *South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966), and "has consistently applied it ever since." *Id.* at 37 (citing City of Rome v. United States, 446 U.S. 156, 183 n.18 (1980); Georgia v. United States, 411 U.S. 526, 538 n.9 (1973)). McDonald further explains that not "surprisingly many Section 5 submissions turn on the failure of the jurisdiction to carry its burden of proof, rather than on a positive finding of discrimination by the courts or the Attorney General." *Id.* at 37-38.

purpose or effect standard under Section 5 as "the sort of invidious discriminatory purpose that would support a challenge to official action as an unconstitutional denial of equal protection."[41]

II. POLITICAL PARTIES AND JUDICIAL ENFORCEMENT OF THE RIGHT TO VOTE PRIOR TO THE ENACTMENT OF THE VOTING RIGHTS ACT—*THE WHITE PRIMARY CASES*

A. *The Rise and Fall of Black Franchise During Reconstruction*

The Civil War Amendments to the Constitution[42] did little to secure full and complete franchise for America's black citizens. While blacks enjoyed the right to vote at the outset of Reconstruction, southern whites devised new and ingenious schemes to perpetuate the systematic disenfranchisement that had been a part of the nation's early history.[43] At the outset of

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41. Mississippi v. United States, 490 F. Supp. 569, 583 (D.D.C. 1979); *see* McDonald, *supra* note 7, at 39-45, for a good discussion of the purpose or effect standard of Section 5 and the Supreme Court's interpretation of it.

42. The Thirteenth, Fourteenth and Fifteenth Amendments to the United States Constitution are commonly referred to as the Civil War Amendments. These amendments were proposed in the aftermath of the Civil War and were all ratified by 1870. The Civil War Amendments "are closely tied to the earlier abolitionist movement and the post war struggle concerning the rights of freed blacks." JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 14.7, at 642 (5th ed. 1995).

The Thirteenth Amendment provides that: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1. Section one of the Fourteenth Amendment states that: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Under the Fifteenth Amendment the right to vote is guaranteed: "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 the power to enforce this article by appropriate legislation." U.S. CONST. amend. XV.

43. *See* Davidson, *supra* note 8, at 10. In his article, Davidson notes that,

> Among the measures employed by southern white conservatives to undermine the Civil War amendments were violence, voting fraud, white officials' discriminatory use of election structures (such as gerrymandering and the use of at-large elections to prevent black officeholding), statutory

Reconstruction, blacks took advantage of their newly protected constitutional right to vote. "At the high point of southern black voting during Reconstruction, about two-thirds of eligible black males cast ballots in presidential and gubernatorial contests."[44]

Perhaps more troubling to the advocates of continued disenfranchisement was the impact of black suffrage on the outcome of the elections in which blacks exercised their vote. A natural outgrowth of the newly found black suffrage was a dramatic increase in the number of black candidates elected to Congress and the southern state legislatures. In 1870, eleven of the former Confederate states elected 264 blacks to Congress and their various state legislatures.[45] A century later, in 1970, when the Voting Rights Act was being extended for the first time, that number had dropped precipitously to forty.[46] When Reconstruction came to an end and the Jim Crow regime sprang to life, devices such as disenfranchising conventions quickly reversed the advances which blacks had made at the ballot box. By the turn of the century, black representation in Congress and in the southern state houses had become virtually non-existent.[47]

B. *The Supreme Court Fights Back—Southern Intransigence Versus the Guarantees of the Fourteenth and Fifteenth Amendments*

1. The Early *White Primary Cases*

Against this backdrop the Supreme Court confronted the issue of just how enforceable the Fifteenth Amendment[48] was going to be. As expected, because of the eventual need for a legislative remedy in the form of the Voting Rights Act of 1965,

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suffrage restrictions, and, in the waning years of the century, revision of "reconstructed" state constitutions to effect disfranchisement.

Id.

44. *Id.*

45. *See* J. Morgan Kousser, *The Voting Rights Act and the Two Reconstructions*, *in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 135, 140 tbl. I (Bernard Grofman & Chandler Davidson eds., 1992).

46. *See id.*

47. *See id.* In contrast to the peak of black representation in 1872, with 324 blacks serving in either Congress or southern state legislatures, by 1900, with disenfranchisement efforts at full force, the number had decreased to five. *See id.*

48. U.S. CONST. amend. XV.

the will of southern intransigents often prevailed over the case specific remedies provided by the judicial forum. The House Judiciary Committee Report accompanying the Voting Rights Act reflected the judicial inability to effectively secure the guarantees of the Fifteenth Amendment.[49]

Prior to the adoption of the Voting Rights Act, enforcement of the Fifteenth Amendment had been sporadic and ineffective. In a series of decisions known as the *White Primary Cases*,[50] the Supreme Court applied the Fourteenth and Fifteenth Amendments to invalidate a variety of discriminatory voting practices. In particular, the *White Primary Cases* concerned discriminatory voting practices in the context of the political party.

In the first of these cases, *Nixon v. Herndon*,[51] the Democratic Party of Texas refused to allow Nixon, a black voter, to cast a ballot in the primary election for the nomination of Democratic candidates to the United States Senate and House of Representatives. The Party relied on a state statute which provided that "in no event shall a Negro be eligible to participate in a Democratic party primary election to be held in the State of Texas."[52] The Attorney General of Texas argued that "the right to vote referred to in constitutions, and elections mentioned therein, do not include within their scope all elections and all voting by persons in the United States."[53] Rejecting

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49. H.R. REP. NO. 89-439 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2439-44. The House Judiciary Committee Report on the Voting Rights Act of 1965 explained that "[t]he history of the 15th Amendment litigation in the Supreme Court reveals both the variety of means used to bar Negro voting and the durability of such discriminatory practices." *Id. reprinted in* 1965 U.S.C.C.A.N. 2437, 2439. The report went on to note that "[p]rogress has been painfully slow, in part because of the intransigence of State and local officials and repeated delays in the judicial process. . . . The judicial process affords those who are determined to resist plentiful opportunity to resist. . . . Such experience amply demonstrates that the case-by-case approach has been unsatisfactory." *Id. reprinted in* 1965 U.S.C.C.A.N. 2437, 2439-41.

50. Nixon v. Herndon, 273 U.S. 536 (1927); Nixon v. Condon, 286 U.S. 73 (1932); Grovey v. Townsend, 295 U.S. 45 (1935); Smith v. Allwright, 321 U.S. 649 (1944); Terry v. Adams, 345 U.S. 461 (1953). For an excellent discussion of the *White Primary Cases* in general and the issue of the state action doctrine as it applies to political parties, see Arthur M. Weisburd, *Candidate-Making and the Constitution: Constitutional Restraints on and Protections of Party Nominating Methods*, 57 S. CAL. L. REV. 213 (1984).

51. 273 U.S. 536 (1927).

52. *Id.* at 540.

53. *Id.* at 538.

Texas' contention that the question presented was a political rather than a legal one, Justice Holmes belied the purported distinction between the primary and general election:

> If the defendant's conduct was a wrong to the plaintiff the same reasons that allow a recovery for denying the plaintiff a vote at a final election allow it for denying a vote at the primary election that may determine the final result.[54]

Moreover, in addressing the constitutionality of the statute, the Court held that it was "unnecessary to consider the Fifteenth Amendment, because it seems . . . hard to imagine a more direct and obvious infringement of the Fourteenth."[55]

In response to the Supreme Court's decision, the Texas legislature enacted a statute which more obliquely accomplished the same objectives as the one the Court found so blatantly discriminatory in *Nixon v. Herndon*. The new statute granted to the Executive Committees of Texas' political parties the power to determine for themselves the qualifications of their members. The statute, passed as an "emergency" measure, provided that the parties "shall in [their] own way determine who shall be qualified to vote or otherwise participate in such political par-

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54. *Id.* at 540. The Supreme Court, in *Morse v. Republican Party* 116 S. Ct. 1186 (1996), repeatedly discounted the distinction between the primary election and the nominating convention. Justice Stevens' opinion for the Court in *Morse* noted that the Court had "previously recognized that [Section] 5 extends to changes affecting nomination processes other than the primary." *Id.* at 1199. Furthermore, Justice Stevens explained that in previous cases the Court has been "unconcerned that the changes did not directly relate to the conduct of a primary, because they had an effect on the general election." *Id.* The concurring opinion in *Morse* also expressed the view that the superficial distinctions between the primary and the nominating convention were not significant in terms of resolving the question of whether Section 5 applied to the Republican Party of Virginia's convention because, "the case before us involves a nominating convention that resembles a primary about as closely as one could imagine." *Id.* at 1214 (Breyer, J., concurring). Speaking in terms remarkably similar to Justice Holmes in *Nixon v. Condon*, the *Morse* Court commented that regardless of the label attached to the nominating process, the damage to the excluded voter remains the same:

> To the excluded voter who cannot cast a vote for his or her candidate, it is all the same whether the party conducts its nomination by a primary or by a convention open to all the party members except those kept out by the filing fee. Each is an "integral part of the election machinery."

Id. at 1200 (citation omitted).

55. *Herndon*, 273 U.S. at 540-41.

ty . . . ."[56] Mr. Nixon was again refused the right to vote in a primary election, but this time it was under the auspices of a resolution adopted by the Democratic Party of Texas and the authority of the new statute, which provided that "all white democrats who are qualified under the constitution and laws of Texas . . . and none other, [shall] be allowed to participate in the primary elections . . . ."[57]

In disposing of the issue, the Supreme Court in *Condon*[58] held that the State's delegation of authority to the Party to determine its membership transformed the party into the "governmental instruments whereby parties are organized and regulated to the end that government itself may be established or continued."[59] The Court invoked the doctrine of state action, articulated in the *Civil Rights Cases*,[60] under which the terms of the Fourteenth Amendment apply to governmental entities, but not to private actors:

> The pith of the matter is simply this, that when those agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the State itself, the repositories of official power. . . . They are not acting in matters of merely private concern like the directors or agents of business corporations. They are acting in matters of high public interest, matters intimately connected with the capacity of government to exercise its functions unbrokenly and smoothly.[61]

Accordingly, the Court held that under the Fourteenth Amend-

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56. Nixon v. Condon, 286 U.S. 73, 82 (1932).

57. *Id.* at 82.

58. 286 U.S. 73 (1932).

59. *Id.* at 88.

60. 109 U.S. 3 (1883); *see* Ronna Greff Schneider, *The 1982 State Action Trilogy: Doctrinal Contraction, Confusion, and a Proposal for Change*, 60 NOTRE DAME L. REV. 1150, 1150 n.1 (1985) (noting that while the Civil Rights Cases have been most frequently cited for the proposition that the commands of the Fourteenth Amendment apply to governmental entities rather than private actors, the Supreme Court "had previously established the public/private distinction in United States v. Harris, 106 U.S. 629 (1882); *Ex Parte* Virginia, 100 U.S. 339 (1879); Virginia v. Rives, 100 U.S. 313 (1879); and United States v. Cruikshank, 92 U.S. 542 (1875).").

61. *Condon*, 286 U.S. at 88.

ment, it was charged with the duty of leveling "these barriers of color."[62]

Dissenting in *Condon*, Justice McReynolds challenged the state action doctrine applied by the Court to political parties, which by their very nature are voluntary associations. In so doing, Justice McReynolds addressed what he perceived to be the implications of the Court's decision:

> If statutory recognition of the authority of a political party through its Executive Committee to determine who shall participate therein gives to the resolves of such party or committee the character and effect of action by the State, of course the same rule must apply when party conventions are so treated; and it would be difficult to logically deny like effect to the rules and by-laws of social or business clubs, corporations, and religious associations, etc., organized under charters or general enactments. The State acts through duly qualified officers and not through the representatives of mere voluntary associations.[63]

The first two *White Primary Cases* illustrate the concerns Congress expressed when debating the merits of Section 5's preclearance requirement in 1965.[64] Congress viewed the *White Primary Cases* as evidence of the need for a legislative remedy in the form of preclearance to do what court decrees had proven incapable of doing: preventing the implementation of discriminatory voting practices in those jurisdictions where disenfranchisement was the rule rather than the exception.[65] Consider the testimony of President Johnson's Attorney General, Nicholas deB. Katzenbach, the principal author of the Voting Rights

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62. *Id.* at 89.

63. *Id.* at 103-04 (McReynolds, J., dissenting);. *see infra* Part V. Justice Thomas, dissenting in *Morse*, argued that political parties are not agents of the state simply because they take advantage of favorable state law. In rejecting the Court's reliance on the state action doctrine to find the actions of the Party subject to Section 5 of the Voting Rights Act, Justice Thomas argued that when the Party exercised its rights under state law to choose its method of nomination, that decision did not amount to "state action." "[E]xercise of the choice allowed by the state law where the initiative comes from it and not from the State, does not make its action in doing so 'state action.'" Morse v. Republican Party, 116 S. Ct. 1186, 1233 (1996) (Thomas, J., dissenting) (quoting Jackson v. Metropolitan Edison, 419 U.S. 345, 357 (1974)).

64. *See supra* note 48 and *infra* Part III.

65. *See infra* note 113.

Act. Attorney General Katzenbach articulated the inherent limitations on judicial enforcement of the right to vote in a discriminatory society: "even in those jurisdictions where judgment is finally won, local officials intent upon evading the spirit of the law are adept at devising new discriminatory techniques not covered by the letter of the judgment."[66] As the *White Primary Cases* evolved, the sentiment expressed by Attorney General Katzenbach became even more pronounced.

The state of the law after the first two *White Primary Cases* seemed relatively clear. State statutory authorization for a political party to determine the composition of its membership was sufficient to make the political party a state actor with respect to the prohibitions of the Fourteenth Amendment. Moreover, the Court looked beyond formalities; it considered the distinctions between the primary election and the general election insignificant for constitutional purposes. Perhaps underestimating the persistence of the Democratic Party of Texas, the Supreme Court muddied the waters just four years later when it was confronted once again with discriminatory voting practices in the context of the political party.

2. *Grovey v. Townsend*: A Temporary Setback

In spite of the soundness and logic of the first of the *White Primary Cases*, the Supreme Court retreated soon thereafter in its enforcement of the liberties of the Fifteenth Amendment. In *Grovey v. Townsend*,[67] a unanimous Supreme Court exalted form over substance by holding that the Texas Democratic Party did not act as an organ of the state when, in the absence of any statutory authority, it limited party membership to white males only. The Court noted that the Party's action was "upon its face . . . not state action."[68]

The petitioner argued that while no state statute prescribed the manner or authority of Texas' political parties to select their membership, state regulation of the primary election re-

66. McDonald, *supra* note 7, at 25 (quoting *Hearings on S. 1564 before the Senate Comm. on the Judiciary*, 89th Cong. pt. 1, at 14 (1965)).

67. 295 U.S. 45 (1935).

68. *Id.* at 48.

sulted in regulation of those elections as fully as the general elections. Thus, those persons conducting primary elections were "subject to state direction and control and as such were state actors for constitutional purposes."[69] In response, the Supreme Court deferred to pronouncements by the Supreme Court of Texas, in concluding that despite the regulation of the primary election process, the state had not attempted "to prescribe or to limit the membership of a political party . . . ."[70]

Finally, the Court rejected the petitioner's argument that in Texas, a nomination by the Democratic Party was the equivalent of election to the office itself. Noting that a person cannot, under the terms of the Federal Constitution, be denied the right to cast a vote at the general election, the Court nevertheless drew a distinction between the exercise of that right and the right of voluntary organizations to choose the composition of their members.[71]

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69. *Id.* at 50. Texas statutory law regulated nearly every facet of the primary election, save the manner by which political parties were able to select their membership. Among the requirements regarding the conduct of primary elections, the statutes provided that: every party whose members cast more than 100,000 votes in the previous election was required to elect its candidates at a primary election; the same qualifications for voting in general elections were required for voting in primary elections; the form of ballot for primary elections was specified in the Texas Code; the use of ballot boxes and voting booths was regulated by statute; etc. *See id.* at 49-50.

70. *Id.* at 52-53.

71. *Id.* at 54-55.

> A similar situation may exist in other states where one or another party includes a great majority of the qualified electors. The argument is that as a negro may not be denied a ballot at a general election on account of his race or color, if exclusion from the primary renders his vote at the general election insignificant and useless, the result is to deny him the suffrage altogether. So to say is to confuse the privilege of membership in a party with the right to vote for one who is to hold a public office. With the former the state need have no concern, with the latter it is bound to concern itself, for the general election is a function of the state government and discrimination by the state as respects participation by negroes on account of their race or color is prohibited by the Federal Constitution.

Id.

3. The Supreme Court's Growing Impatience: Rejection of the White Primary

The Court's decision in *Grovey* was short lived. Nine years later, the Supreme Court overruled *Grovey* in *Smith v. Allwright*.[72] In *Smith*, the Texas Democratic Party denied a black citizen the right to vote in a Democratic primary for the United States Senate and House of Representatives, the governorship, and other state offices. The basis for refusing petitioner the vote was again a resolution adopted by the Party providing that "all white citizens of the State of Texas who are qualified to vote under the Constitution and laws of the State shall be eligible to membership in the Democratic party, and, as such, entitled to participate in its deliberations."[73]

Since the *Grovey* decision, the Court had decided *United States v. Classic*,[74] holding Article I, Section 4 of the Constitution[75] gave Congress the authority to regulate primary elections as well as general elections "where the primary is by law

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72. 321 U.S. 649 (1944); *see* David A. Strauss, *State Action After the Civil Rights Era*, 10 CONST. COMMENTARY 409, 409-10 (1993). In his article Strauss notes that during the 1940s through the 1960s the "great state action cases . . . involved not just an incidental act of discrimination but an integral aspect of a broad discriminatory and segregationist regime." *Id.* Moreover, the discriminatory practices were generally defended on the basis that they were the action of private parties rather than the government. Strauss explains that

> [i]n this context the state action doctrine came to be seen by many as an accomplice to racism. Charles Black's great article on the subject expressed this view: [The state action doctrine] now exists principally as a hope in the minds of racists (whether for love or profit) that "somewhere, somehow, to some extent" community organization of racial discrimination can be so featly [sic] managed as to force the Court admiringly to confess that this time it cannot tell where the pea is hidden . . . . The amenability of racial injustice to national legal correction is inversely proportional to the durability and scope of the state action "doctrine," and of the ways of thinking to which it is linked.

Id. at 410 (quoting Charles L. Black, Jr., *The Supreme Court 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95, 70 (1970)).

73. *Smith*, 321 U.S. at 656-57.

74. 313 U.S 299 (1941).

75. U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").

made an integral part of the election machinery."[76] While *Classic* dealt with issues of election fraud, the *Smith* Court found that it had a direct bearing on *Grovey*,

> not because exclusion of Negroes from primaries is any more or less state action by reason of the unitary character of the electoral process but because the recognition of the place of the primary in the electoral scheme makes clear that state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function *that may make the party's action the action of the State.*[77]

Noting that the determinative factor in deciding the question presented remained whether the "exclusionary action of the party was the action of the State," the *Smith* Court found that the nature and extent of the State's regulation of the primary process and the State's delegation of the authority to conduct primary elections to the political parties were sufficient to conclude that the party's action was the action of the State.[78] "Primary elections are conducted by the party under state statutory authority."[79] The parties "certify [their] candidates to the appropriate officers for inclusion on the official ballot for the general election."[80] "No name which has not been so certified may appear upon the ballot for the general election as a candidate of a political party."[81] "[T]his statutory system for the selection of party nominees for inclusion on the general election ballot makes the party which is required to follow these legisla-

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76. *Classic*, 313 U.S at 318.

77. *Smith*, 321 U.S. at 660 (emphasis added); *see also id.* at 653 n.6 (detailing the Texas statutory scheme and its comprehensive regulation of the primary process). In *Morse*, Justice Stevens, writing for the Court, examined the relevant Virginia statutes in a manner similar to the *Smith* Court's analysis. Justice Stevens noted in *Morse* that it is not the extent of the state regulation of the political party which necessarily renders the party's activities those of the state for constitutional purposes. Instead, it is the state statutory delegation of authority over a matter traditionally reserved to the state itself, here the electoral process, combined with the Court's understanding of the importance of the primary in the electoral scheme, that establishes state action on the part of the private actor. Morse v. Republican Party, 116 S. Ct. 1186, 1196 n.17 (1996).

78. *Smith*, 321 U.S. at 661.

79. *Id.* at 663.

80. *Id.*

81. *Id.*

tive directions an agency of the State in so far as it determines the participants in a primary election."[82] Accordingly, the party's exclusion of petitioner from participation in the primary on account of his race violated the Fifteenth Amendment.

Terry v. Adams,[83] the last of the *White Primary Cases*, presented the Court with yet another attempt by Texas Democrats to exclude blacks from casting their votes in the nomination process. *Terry* gave more credence to earlier contentions that in the Texas political climate, the nominating process, rather than the general election, is what counts.[84] In *Terry* the Supreme Court considered the constitutionality of certain voting practices of the Texas Jaybird Association, which in name was not a political party and was not subject to any state regulation whatsoever. The Jaybird Association conducted a "pre-primary" of sorts, whereby its members (usually the same as the Democratic Party of Texas) voted for candidates to be placed on the primary ballot as part of the Democratic Party's ticket for nomination to the general election. The Jaybird Association limited its membership to whites only. The Court looked beyond the purported independence of the Jaybird Association and found, that while it professed to be simply a group of politically like-

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82. *Id.* at 663. The *Smith* court elaborated on the application of the state action doctrine in the context of this factual situation:

> When primaries become a part of the machinery for choosing officials . . . , as they have here, the same tests to determine the character of discrimination or abridgement should be applied to the primary as are applied to the general election. If the State requires a certain electoral procedure . . . it endorses, adopts and enforces the discrimination against Negroes, practiced by a party entrusted by Texas law with the determination of the qualifications of participants in the primary. This is state action within the meaning of the Fifteenth Amendment. . . .
>
> The privilege of membership in a party may be, as this Court said in *Grovey v. Townsend*, no concern of a State. But when, as here, that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the State makes the action of the party the action of the State.

Id. at 664-65 (citations omitted); *see infra* Part V. In *Morse*, Justice Stevens relied on what he considered to be the statutory delegation of authority to political parties of the right to decide "who will appear on the general election ballot" in concluding that the Republican Party of Virginia was subject to Section 5's preclearance requirement. *Morse*, 116 S. Ct. at 1194.

83. 345 U.S. 461 (1953).

84. *See* Grovey v. Townsend, 295 U.S. 45 (1935); *supra* note 70 and accompanying text.

minded citizens conducting "pre-primaries" to select candidates who would then run in the primary election, it had in fact "become an integral part . . . of the elective process."[85] Despite the trappings of the Jaybird Association, the Court found that the "party has been the dominant political group in the county since organization, having endorsed every county-wide official elected since 1889."[86]

Although there was no majority opinion in *Terry*, eight of the Justices concluded that the Jaybirds' exclusion of blacks from voting in their primaries violated the Fifteenth Amendment.[87] The Court rejected the claim that the three-step process which a Jaybird candidate had to follow in order to win the general election (*i.e.*, the Jaybird pre-primary, the Democratic primary, and the general election) differed, for purposes of constitutional significance, from the traditional two-step process. The Court noted that "such a variation in the result from so slight a change in form" does not insulate the Jaybirds from constitutional scrutiny.[88]

Justice Black, joined by two other Justices, held that the Jaybird Association violated the Fifteenth Amendment when it excluded blacks from participating in the "only election that counted."[89] Because the Jaybird primary was such an "integral part . . . of the elective process," Justice Black reasoned that the "Democratic primary and the general election have become no more than the perfunctory ratifiers of the choice that has already been made in the Jaybird elections from which Negroes have been excluded."[90] While not concerned so much with the level of state involvement in the Jaybird process, for ostensibly there was no positive state involvement, Justice Black concluded that the Jaybird primary was nevertheless subject to the

85. *Id.* at 469. The Court further noted that in reality the Jaybird Association was no different from a political party. The membership of the association was limited to whites only; it was run like other political parties "with an executive committee named from the county's voting precincts;" Jaybird candidates invariably entered the Democratic primaries and generally ran and won without any opposition for the Democratic nomination; etc. *Id.* at 463.

86. *Id.* at 463.

87. *Id.* at 470.

88. *Id.* at 465-66 n.1 (quoting Smith v. Allwright, 321 U.S. 649, 661 (1944)).

89. *Terry*, 345 U.S. at 469.

90. *Id.*

prohibitions of the Fifteenth Amendment: "The effect of the whole procedure, Jaybird primary plus Democratic primary plus general election, is to do precisely that which the Fifteenth Amendment forbids—strip Negroes of every vestige of influence in selecting the officials who control the local county matters that intimately touch the daily lives of citizens."[91]

As part of the concern regarding the practical aspects of the Jaybird's influence in the political climate, Justice Black defined the scope of "elections" with reference to the mandates of the Fifteenth Amendment, prior case law, and a congressional enactment pursuant to Section 2 of the Fifteenth Amendment.[92] Justice Black noted that "[c]learly the Amendment includes any election in which public issues are decided or public officials selected."[93] Justice Black did not receive support for this proposition from a majority of the Court.

Justice Frankfurter, writing alone, concluded that it was not so much the practical implications of the Jaybirds exclusion of blacks from the Jaybird primary that assumed Constitutional significance but rather the state action doctrine that served to prohibit the exclusionary activity.[94] Justice Frankfurter found that the Jaybirds acted as agents of the state when the state acquiesced to Jaybird activities:

> The exclusion of the Negroes from meaningful participation in the only primary scheme set up by the State was not an accidental, unsought consequence of the exercise of civic rights by voters to make their common viewpoint count. It was the design, the very purpose of the arrangement that the Jaybird primary . . . exclude Negro participation . . . . That it was the action in part of the election officials

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91. *Id.* at 469-70.

92. *See id.* at 466-69. In 1870, Congress provided that:

> All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

8 U.S.C. § 31 (1870) (recodified at 42 U.S.C. § 1971(a)(1) (1994)).

93. *Terry*, 345 U.S. at 468.

94. *See id.* at 476.

> charged by Texas law with the fair administration of the primaries, brings it within the reach of the law.[95]

Joined by three members of the Court, Justice Clark combined the reasoning of Justices Black and Frankfurter and concluded that both the practical role played by the Jaybird primary and the delegation of state authority to the Jaybirds brought their actions within the prohibitions of the Fifteenth Amendment.[96] Justice Clark noted that while the Democratic primary and the general election were indeed open to all, the reality of the Jaybird primary was to nullify the vote of blacks "at the sole stage of the local political process where the bargaining and interplay of rival political forces would make it count."[97] The practical results of the Jaybird primary led Justice Clark to conclude that the state action doctrine was properly invoked in this instance.[98] Thus, the actions of the Jaybirds were also those of the state. "When a state structures its electoral apparatus in a form which devolves upon a political organization the uncontested choice of public officials, that organization itself, in whatever disguise, takes on those attributes of government which draw the Constitution's safeguards into play."[99]

The *White Primary Cases* stand for the proposition that certain political party actions can violate the Fourteenth and Fifteenth Amendment. Thus, prior to the enactment of the Voting Rights Act of 1965, the Supreme Court held that the prohibitions of the Fourteenth and Fifteenth Amendments were applicable to political parties via the state action doctrine. Discriminatory political party activities are not shielded from constitutional scrutiny when the political party's actions form an integral part of the electoral machinery.

Interestingly, the *Morse* Court, in holding the Republican Party of Virginia subject to the provisions of Section 5 of the Voting Rights Act, relied on both rationales expressed in *Ter-*

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95. *Id.* at 476-77 (Frankfurter, J., concurring).
96. *See id.* at 481-82 (Clark, J., concurring).
97. *Id.* at 484 (Clark, J., concurring).
98. *See id.* (Clark, J., concurring).
99. *Id.* (Clark, J., concurring) (citing Smith v. Allwright, 321 U.S. 649, 664 (1944)).

ry.[100] The *Morse* Court was unconcerned with the actual distinctions between the primary and other forms of nomination. To those members of the *Morse* Court finding the Party subject to preclearance, the contrast between the primary and the nominating convention, like the differences between the Jaybird primary and the actual primary, was a distinction without a difference. Similarly, Justice Stevens, writing for the Court in *Morse*, found that the Commonwealth of Virginia, through its statutory scheme, delegated authority to the political parties in Virginia.[101] Thus, the actions of the Virginia political parties were the actions of the state for constitutional purposes and for the purposes of Section 5 coverage as well.[102]

While the *White Primary Cases* subject political parties to constitutional scrutiny under the state action doctrine, the relationship between the *White Primary Cases* and Section 5's preclearance requirements of is less clear. Applying the principles of *Smith v. Allwright*,[103] the *Morse* Court concluded that the Republican Party of Virginia was a state actor when it charged the delegate filing fee, thereby subjecting it to preclearance under Section 5.[104] The dissent in *Morse* argued that the state action doctrine and the terms of Section 5 were not necessarily coterminous. As such, the *Morse* dissent asserted that the state action doctrine of the *White Primary Cases* did not necessarily bring the Republican Party of Virginia within the mandates of Section 5.[105]

III. THE LEGISLATIVE HISTORY OF THE VOTING RIGHTS ACT AND CONGRESSIONAL EXTENSIONS OF THE ACT'S PRECLEARANCE REQUIREMENT

A. *The Need for Statutory Enforcement of the Fifteenth Amendment—Congressional Findings*

Congress passed the Voting Rights Act with several per-

100. *See* Morse v. Republican Party, 116 S. Ct. 1186 (1996).
101. *See id.* at 1193-94.
102. *See id.* at 1198.
103. 321 U.S. 649 (1944).
104. *See Morse*, 116 S. Ct. at 1206.
105. *See id.* at 1219.

manent provisions aimed at securing the rights of the Fifteenth Amendment for all of America's citizens regardless of the color of their skin. Numerous other provisions, including Section 5, were regarded as temporary provisions, aimed at certain voting practices in select parts of the country where disenfranchisement and discriminatory voting practices were most prevalent.[106]

When Congress first considered the Voting Rights Act, the debate focused more on "how" statutory enforcement of the rights embodied in the Fifteenth Amendment should be accomplished rather than on "whether" such congressional action was necessary and appropriate.[107] While the congressional discussion regarding the exact scope and purpose of Section 5 was limited,[108] certain pronouncements lead to the conclusion that Congress meant to reverse, in the broadest possible fashion, discrimination at the ballot box.[109] Congress, in addition to recognizing its responsibility to enforce the guarantees of the Fifteenth Amendment, noted that "[t]he historic struggle for the realization of this constitutional guarantee indicates clearly that our national achievements in this area have fallen far short of our aspirations."[110]

Congress premised much of its justification for the necessity of the Voting Rights Act on the ineffectiveness of the case-by-case method of enforcing the rights embodied in the Fifteenth

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106. *See supra* Part I.B.; Laughlin McDonald, *Racial Fairness—Why Shouldn't it Apply to Section 5 of the Voting Rights Act?*, 21 STETSON L. REV. 847, 849 (1992) ("When it was enacted in 1965, section 5 was a temporary, five year measure and applied primarily in the South where discrimination in voting against African-Americans had been particularly blatant and systematic.").

107. *See supra* Part I.A.

108. *See* Scott Gluck, *Congressional Reaction to Judicial Construction of Section 5 of the Voting Rights Act of 1965*, 29 COLUM. J.L. & SOC. PROBS. 337, 355-56 (1996). In his article, Gluck provides a thorough description and analysis of the legislative history of the 1965 Act and the 1970 and 1975 extensions of the Voting Rights Act. For a brief discussion of the legislative history of the 1982 extension of the Act, see Timothy G. O'Rourke, *Voting Rights Act Amendments of 1982: The New Bailout Provision and Virginia*, 69 VA. L. REV. 765 (1983).

109. *See* South Carolina v. Katzenbach, 383 U.S. 301, 308-15 (1966) (discussing the "voluminous" legislative history of the Voting Rights Act of 1965); Allen v. State Bd. of Elections, 393 U.S. 544, 566 (1969) (holding that "[t]he legislative history on the whole supports the view that Congress intended to reach any State enactment which altered the election law of a covered State in even a minor way.").

110. H.R. REP. NO. 89-439 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2439.

Amendment.[111] This case-by-case method "reveal[ed] both the variety of means used to bar Negro voting and the durability of such discriminatory policies."[112] The judicial forum presented two distinct problems in enforcing the right to vote. First, judicial remedies were often not sufficient to adequately redress the discriminatory practices which the courts sought to enjoin. As the House Judiciary Committee Report on the Voting Rights Act of 1965 (1965 House Report) noted, "even where a suit was brought to a successful conclusion, the scope of relief had to be wider than what was being afforded by the courts."[113] Second, challengers of the discriminatory voting practices had extreme difficulty mounting a successful attack, no matter how blatant the constitutional violation. "The judicial process afford[ed] those who [were] determined to resist plentiful opportunity to resist."[114] For example, in an action brought by the Department of Justice regarding voter discrimination in Dallas County, Alabama, it took nearly four years for the courts to enjoin the open and obvious use of literacy and government-knowledge tests.[115] Because "litigation on a case-by-case basis simply

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111. *Id. reprinted in* 1965 U.S.C.C.A.N. 2437, 2439-42.

112. *Id. See also* McDonald, *supra* note 7, at 24. Describing the inordinate efforts necessary to enjoin discriminatory voting practices prior to the enactment of the Voting Rights Act, McDonald quotes Attorney General Katzenbach's testimony before the Senate Judiciary Committee:

> Existing law is inadequate. Litigation on a case-by-case basis simply cannot do the job. Preparation of a case is extraordinarily time consuming because the relevant data—for example, the race of individuals who have actually registered—is frequently most difficult to obtain. Many cases have to be appealed. In almost any other field, once the basic law is enacted by Congress and its constitutionality is upheld, those subject to it accept it. In this field, however, the battle must be fought again and again in county after county. And even in those jurisdictions where judgment is finally won, local officials intent upon evading the spirit of the law are adept at devising new discriminatory techniques not covered by the letter of the judgment.

Id. at 24-25 (quoting *Hearings on S. 1564 before the Senate Comm. on the Judiciary*, 89th Cong., pt. 1, at 14 (1965)).

113. H.R. REP. NO. 89-439 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2440.

114. *Id. reprinted in* 1965 U.S.C.C.A.N. 2437, 2441.

115. *See id. reprinted in* 1965 U.S.C.C.A.N. 2437, 2441-42. The Department of Justice determined that from 1954 to 1960 only 14 blacks had been permitted to register to vote in Dallas County, of which Selma was the county seat. Moreover, even after the court enjoined the discriminatory registration practices only 383 of 15,000 blacks in Dallas County had been registered to vote. *See id. reprinted in* 1965 U.S.C.C.A.N. 2437, 2441.

[could] not do the job," Congress took the extraordinary step of requiring certain jurisdictions in the South to preclear any changes in voting, thereby shifting the burden to those jurisdictions to prove that the proposed changes would not discriminate on account of race or color.[116]

With regard to Section 5's scope and purpose, the principal author of the legislation, Attorney General Katzenbach, testified before the House Judiciary Subcommittee Number Five that the purpose of the preclearance requirement was to ensure that a state which had been found to discriminate in the past "should be subjected to some kind of limitations as to any new legislation that it might propose."[117] Beyond this statement and a few others, the exact scope of Section 5 was never fully explained during the committee hearings,[118] nor was its scope illuminated during the floor debate on the Act.[119] It has been argued that the debate regarding Section 5's scope lends support to the conclusion that Section 5, as enacted by the Eighty-ninth Congress, was likely intended to cover changes relating only to the process of registering and voting.[120]

The 1965 House Report on the legislation sheds little light on the exact parameters of Section 5. In its description of the legislation, the 1965 House Report notes that the preclearance requirement "deals with attempts *by a State or political subdivision* with respect to which the prohibitions of section 4 are in effect to alter by *statute or administrative acts* voting qualifications and procedures in effect on November 1, 1964."[121] While the 1965 House Report is merely paraphrasing the statutory

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116. McDonald, *supra* note 7, at 24-25 (quoting *Hearings on S. 1564 before the Senate comm. on the Judiciary*, 89th Cong., pt. 1, at 14 (1965) (statement of Nicholas Katzenback, Attorney General of the United states)); *see* South Carolina v. Katzenbach, 383 U.S. 301, 334-35 (holding that Section 5 of the Voting Rights Act "may have been an uncommon exercise of congressional power . . . but the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate."); *see also supra* note 40.

117. *Voting Rights Act: Hearings on H.R. 6400 before Subcomm. No. 5 of the House Comm. on the Judiciary.*, 89th Cong. 60 (1965) (statement of Nicholas Katzenbach, Attorney General of the United States).

118. *See* Gluck, *supra* note 108, at 347-56.

119. *Id.* at 355.

120. *Id.* at 356.

121. H.R. REP. NO. 89-439 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2457-58 (emphasis added).

language, of particular importance to the issue of Section 5 coverage of political parties is the Committee's emphasis on changes made via statute or administrative regulation by a "State or political subdivision."

The legislative history of the Voting Rights Act provides little support for the proposition that Congress intended political parties to be subject to the preclearance requirement of Section 5. It is beyond dispute that Congress was aware of the history of the *White Primary Cases* and the repeated attempts by the Supreme Court to halt discriminatory voting practices by political parties in those instances.[122] The legislative history of the Act, however, reveals that the case-by-case method with which Congress was concerned related to state and local officials in the South evading adverse court decrees by implementing new laws and practices that fell outside the parameters of those decrees.[123] The legislative history does not demonstrate Congress' belief that political parties should come within the ambit of the preclearance requirement.

B. *Congressional Extension of the Act's Temporary Provisions—The Continued Need for Preclearance*

When the temporary provisions of the Voting Rights Act first came before Congress for extension in 1970, Congress conducted fourteen days of committee hearings on the continued need for the preclearance requirement.[124] Congress was fully aware of the broad sweep which the Supreme Court had given the Act's prohibitions in *Allen v. State Board of Elections*.[125] The House

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122. *See id. reprinted in* 1965 U.S.C.C.A.N. 2437, 2439.

123. *See id. reprinted in* 1965 U.S.C.C.A.N. 2437, 2440-42 (noting that judicial enforcement of the Civil Rights Act of 1957, under which the Attorney General may institute a proceeding to "protect the right to vote from deprivation because of race or color," results in little progress because of the extraordinary time necessary to prepare a suit; and also noting that "even after apparent defeat, resisters seek new ways and means of discriminating. Barring one contrivance too often has caused no change in result, only in methods.").

124. *See* Gluck, *supra* note 108, at 360-68.

125. 393 U.S. 544 (1969); *see* H.R. REP. NO. 91-397 (1970), *reprinted in* 1970 U.S.C.C.A.N. 3277, 3284; Gluck, *supra* note 108 at 363. After reviewing the House and Senate Judiciary Committee hearings, Gluck notes that "*Allen* was mentioned on a number of occasions during the House and Senate hearings; although praise for the decision was not unanimous, there can be little doubt that Congress was well aware

Judiciary Committee, in its report on the 1970 extension of the temporary provisions of the Act (1970 House Report),[126] referred to the *Allen* decision with approval, noting that it "underscores the advantage section 5 produces in placing the burden of proof upon a covered jurisdiction to show that a new voting law or procedure does not have the purpose and will not have the effect of discriminating on the basis of color."[127]

The debate on the 1970 extension focused not so much on the progress that had been made in black voter registration,[128] but on the extent to which blacks nevertheless continued to lag behind their white counterparts in voter registration in the covered jurisdictions.[129] The 1970 House Report explained that while advances had been made, "several jurisdictions have undertaken new, unlawful ways to diminish the Negroes' franchise and to defeat the Negro and Negro-supported candidates."[130] Congressional concern regarding the shift from the obvious to the more subtle, yet no less invidious, methods of disenfranchisement led Congress to conclude that five years of preclearance was simply not enough. Senator Mathias aptly demonstrated this concern in the Senate hearings on the 1970 extension, recounting the shift from the overt to the more subtle discriminatory voting practices:

> The [Civil Rights Commission Study on Political Participation] indicates that the Negro vote has been diluted by switching to at-large elections, consolidating counties, gerrymandering, and by full-slate voting requirements. It further asserts that Negro candidates are thwarted by abolishing offices, extending terms of white incumbents, substituting appointment for election, increasing filing fees, adding

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of the implications of the decision." *Id.*

126. H.R. REP. NO. 91-397, (1970), *reprinted in* 1970 U.S.C.C.A.N. 3277.

127. *Id. reprinted in* 1970 U.S.C.C.A.N. 3277, 3284.

128. *See* Gluck, *supra* note 108 at 361. In the four years since the Voting Rights Act had become law, black voter registration had increased by 800,000.

129. *See Voting Rights Act Extension: Hearings on H.R. 4249, H.R. 5538, and Similar Proposals before Subcomm. No. 5 of the House Judiciary Comm.*, 91st Cong. 14 (1969). The Chairman of the House Judiciary Committee, Emanuel Celler, noted that "[n]ot only does Negro registration trail white in each of the [seven 'covered' states], but there are many individual counties and parishes where Negro registration is especially low." *See also* Gluck, *supra* note 108, at 362 n.100 (statistics compiled by the Voter Education Project, *Voter Registration in the South*).

130. H.R. REP. NO. 91-397 (1970), *reprinted in* 1970 U.S.C.C.A.N. 3277, 3283.

> requirements for getting on the ballot, and withholding information.[131]

Members of the Senate Judiciary Committee noted that "[i]f it had not been for Section 5 of the present Act, there is no telling to what extent the states and communities covered might have legislated and manipulated to continue their historical practice of excluding Negroes from the Southern political process."[132]

In contrast to those favoring the extension of Section 5, many Southern legislators argued that the scope of the Act had been distorted by the Supreme Court. The opposition argued that Section 5 of the Act was intended to operate solely as a corollary to Section 4's prohibition against the use of tests and devices. Opponents of extension argued that the Supreme Court had expanded the text of Section 5 in *Allen* to realms well beyond the original intent of the Eighty-ninth Congress.[133] Opponents of extension also sounded the common refrain that Section 5 heaped unduly burdensome administrative requirements on the covered jurisdictions. One State Attorney General asserted that Section 5's preclearance requirement was "tying up our entire legislative process with the Attorney General of the United States . . . ."[134]

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131. Gluck, *supra* note 108 at 362-63 (citing *Amendments to the Voting Rights Act of 1965: Hearings on S. 818, S. 2456, S. 2507 and Title IV of S. 2019 Before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm.*, 91st Cong. 9 (1969-70) (statement of Senator Mathias)).

132. Joint Views of Ten Members of the Judiciary Committee Relating to the Extension of the Voting Rights Act of 1965, 116 Cong. Rec. 5516, 5521 (1970). The Joint Views concluded by expressing the continued need for preclearance in terms of the potential for disenfranchisement in the absence of preclearance. The joint views quoted Vernon E. Jordon, Jr., the Director of the Voter Education Project of the Southern Regional Council to highlight their point:

> I know—as well as any man in this room that Canton and Grenada and Selma and Sandersville and hundreds of other Southern communities stand poised and ready to eliminate the burgeoning black vote in their jurisdictions. The slightest flicker of a green light from Washington is all these white-dominated communities need. When they receive the signal they will act.

Id. at 5523.

133. *See* Gluck, *supra* note 108 at 364-65. Testifying before the House Judiciary Committee Number 5, A.F. Summer, the Attorney General of Mississippi, noted that "[s]everal decisions, notably *Allen v. State Board of Elections*, have interpreted Section 5 in a manner which Congress could hardly have contemplated." *Id.* at 365 n.113.

134. *Id.* at 364 n.109; *see also* Morse v. Republican Party, 116 S. Ct. 1186, 1227

The 1970 House Report poignantly explained what the members of the Judiciary Committee believed to be the importance of the preclearance requirement in the overall statutory scheme of enforcing the guarantees of the Fifteenth Amendment:

> The committee is convinced that section 5's procedures are an integral part of the rights afforded by the 1965 Act. Federal review of voting law changes insures that, with discrimination in registration and at the voting booth blocked, the affected States and counties cannot, by employing changes in legislation undo or defeat the rights recently won by nonwhite voters.[135]

Despite the objections to Section 5 and several attempts to defeat its extension, it was ultimately extended by Congress in 1970. This result incorporated the intervening Supreme Court decisions interpreting Section 5.[136]

Just five years later, when Congress was again faced with the issue of extending the temporary provisions of the Voting Rights Act, the Senate Judiciary Committee Report (1975 Senate Report) stated the principal objectives of the legislation: "(1) to extend for an additional ten years the special provisions of the Voting Rights Act of 1965; (2) to make permanent the 1970 temporary ban on literacy tests and other devices; and (3) to expand the coverage of the Act to certain jurisdictions in which language minorities reside."[137] The Committee again recognized the advances that had been made in black voter registra-

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(1996) (Thomas, J., dissenting) (noting that the decision of the Court to include political parties within the ambit of Section 5's preclearance requirement "will increase exponentially the number of preclearance requests, for even the most innocuous changes, that the Attorney General must process within a statutorily limited amount of time. . . . That the inclusion of political parties under § 5 demeans the preclearance regime and so drastically increases its scope substantially undermines the possibility that Congress intended parties to preclear.").

135. H.R. REP. NO. 91-397 (1970), *reprinted in* 1970 U.S.C.C.A.N. 3277, 3284.

136. *See* 2B NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 49.09 (5th ed. 1992) (stating the cannon of construction that when a legislature reenacts a statute which has been interpreted by a court, the legislature "impliedly adopts the interpretation upon reenactment.").

137. S. REP. NO. 94-295, at 8 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 774.

tion,[138] but noted that preclearance nevertheless remained a viable and necessary enforcement tool.[139]

In 1975, Congress found that the "foresight and wisdom of the Eighty-ninth Congress in anticipating the need for future Federal review of voting changes in covered jurisdictions" had yet to fulfill its mission.[140] The Senate Judiciary Committee noted that recent objections interposed by the Attorney General with respect to Section 5 submissions "clearly bespeak the continuing need for this preclearance mechanism."[141]

Congress again considered the continued need for Section 5's

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138. *See id.* at 13, *reprinted in* 1975 U.S.C.C.A.N. 774, 779. The Senate Judiciary Committee noted that

> [r]egistration rates for blacks in the covered southern jurisdictions has continued to increase since the passage of the Act. For example, while only 6.7 percent of the black voting age population of Mississippi was registered before 1965, 63.2 percent of such persons were registered in 1971-72. Similar dramatic increases in black registration can be observed in Alabama, Georgia, Louisiana, and Virginia.

Id.

139. *See id. reprinted in* 1975 U.S.C.C.A.N. 774, 781. *See generally* U.S. COMMISSION ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER (1975) (discussing the Commission on Civil Rights' findings regarding, among other things, the implementation of the Voting Rights Act, the effect of the Act since its adoption, and the various barriers to suffrage existing throughout the country, including barriers to voting, registration, candidacy, fair representation in local governments, and representation in Congress and state legislatures).

140. *Id. reprinted in* 1975 U.S.C.C.A.N. 774, 781.

141. *Id.* at 16, *reprinted in* 1975 U.S.C.C.A.N. 774, 782. The number of changes submitted to the Department of Justice by the covered jurisdictions, the objections interposed by the Attorney General to those submissions, and the types of voting changes submitted by the covered jurisdictions, revealed what the members of the Senate Judiciary Committee considered to be potent evidence supporting another extension of Section 5. The pattern of Georgia is demonstrative of the evidence the Judiciary Committee considered. *See id. reprinted in* 1975 U.S.C.C.A.N. 774, 782. In 1967, Georgia made no submissions to the Attorney General under Section 5. By 1972, that number had risen to 226. In 1974, the year before the 1975 extension legislation, Georgia submitted 173 changes to the Attorney General. Similarly in 1967, the Attorney General, with not a single submission by Georgia, obviously made no objections. *See id.* at 17, reprinted in 1975 U.S.C.C.A.N. 774, 783. By 1972, the Attorney General interposed eleven objections to voting changes submitted by Georgia officials. In 1974, the Attorney General objected to nine of the changes proposed by Georgia. During the period of 1965 to 1974, the types of changes submitted to the Attorney General for preclearance covered a broad spectrum. *See id. reprinted in* 1975 U.S.C.C.A.N. 774, 783. The covered jurisdictions submitted 443 redistricting proposals; 1,025 annexation plans; 631 changes with respect to polling places; 80 changes regarding voter registration; and 1,549 ordinances or other legislation affecting election laws.

preclearance requirement in 1982. Upon signing the legislation which extended the provision an additional twenty-five years, President Reagan noted that "the right to vote is the crown jewel of American liberties, and we will not see its luster diminished."[142] When Congress re-examined the need for preclearance in 1982, many of the traditional justifications for extension of the special provisions of the Act remained.

With respect to the continued need for the preclearance requirement, the Senate Judiciary Committee Report on the Voting Rights Act Amendments of 1982 (1982 Senate Report) explained:

> [e]ach time that Congress has continued the special coverage of the Voting Rights Act the argument was made that Section 5 was no longer needed. Congress has had to balance a record of some progress against strong evidence of continuing discrimination. And each time Congress has decided to retain Section 5.[143]

Accordingly, the Senate Judiciary Committee found that extension of Section 5 was again warranted.

The testimony taken by the Senate Judiciary Committee during consideration of the 1982 extension reflected the numerous types of changes in voting that Section 5 continued to monitor. Among the most common changes were the use of at-large elections, redistricting, and majority vote requirements. In light of these perceived threats to minority voting, the Senate Judiciary Committee concluded that "since the adoption of the Voting Rights Act, covered jurisdictions have substantially moved from direct over[t] impediments to the right to vote to more sophisticated devices that dilute minority voting strength."[144]

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142. Remarks on Signing H.R. 3112 into Law, 18 WEEKLY COMP. PRES. DOC. 846, 847 (June 29, 1982).

143. S. REP. NO. 97-417, 7 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 184; *see also supra* notes 117, 127 (describing increases in black voter registration).

144. *Id.* at 10, *reprinted in* 1982 U.S.C.C.A.N. 177, 187. The Committee Report gave a terse description of what it perceived to be the motivation behind many of the more sophisticated changes in voting practices in the covered jurisdictions:

> Many of the practices to which objections have been entered are complex and subtle. Sophisticated rules regarding elections may seem part of the everyday rough-and-tumble of American politics—tactics used traditionally by the "ins" against the "outs." Viewed in this context, however, the schemes reported here are clearly the latest in a direct line of repeated

In addition to the continued need for preclearance based on discriminatory voting practices in the covered jurisdictions, the Committee found extension of Section 5 warranted by substantial non-compliance with the preclearance requirement.[145] The Committee found that "there has been continued widespread failure to submit proposed changes in election law for Section 5 review before attempting to implement the change."[146]

Taken as a whole, the legislative history of the Voting Rights Act of 1965 and its several extensions clearly indicate Congress' belief that those jurisdictions meeting the coverage requirements of Section 4(b) should carry the burden of demonstrating that any change in a voting practice or procedure would not have a discriminatory effect before they could implement such a change. The legislative history of the Voting Rights Act extensions reveals the congressional belief that while great strides had been made since the days of southern stonewalling in the face of adverse court decrees, preclearance remained a viable enforcement tool. The legislative history does not suggest that the relatively direct command of Section 5—that a covered "State or political subdivision" must preclear proposed changes in voting—somehow includes non-governmental entities such as political parties.

IV. THE SUPREME COURT AND THE VOTING RIGHTS ACT —A BROAD INTERPRETATION

A. *The Supreme Court Furthers the Goals of the Voting Rights Act*

Congress, fully aware of the ingenuity of those wishing to perpetuate the disenfranchisement of blacks and of the ineffectiveness of the case-by-case method of enforcing the Fifteenth Amendment's guarantees, passed the Voting Rights Act in an

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> efforts to perpetuate the results of past voting discrimination and to undermine the gains won under other sections of the Voting Rights Act.

Id. at 12, *reprinted in* 1982 U.S.C.C.A.N. 177, 189; *see* Strauss, *supra* note 72, at 410 (statement of Charles L. Black, Jr., noting the shift from the overt to the more subtle disenfranchising voting changes proposed by covered jurisdictions).

145. *Id. reprinted in* 1982 U.S.C.C.A.N. 177, 189.

146. *See* S. REP. NO. 97-417, at 12 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 189.

attempt to shift "the advantages of time and inertia from the perpetrators of the evil to its victims."[147] In upholding the constitutionality of various provisions of the Act, the Supreme Court in *South Carolina v. Katzenbach*[148] endorsed Congress' foresight in trying to prevent discriminatory practices in voting through Section 5's preclearance requirement.[149]

1. Types of Voting Changes Covered by Section 5

In decisions following *Katzenbach*, the Supreme Court rejected challenges to the Voting Rights Act that sought to have the terms of Section 5 preclearance applied narrowly to only the act of casting a ballot. In *Allen v. State Board of Elections*,[150] the Supreme Court held that Congress "intended to reach any state enactment which altered the election law of a covered State in even a minor way."[151]

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147. United States v. Board of Comm'rs, 435 U.S. 110, 121 (1978).

148. 383 U.S. 301 (1966).

149. In ruling on the constitutionality of Section 5, the Supreme Court held that:

> The Act suspends new voting regulations pending scrutiny by federal authorities to determine whether their use would violate the Fifteenth Amendment. This may have been an uncommon exercise of congressional power, as South Carolina contends, but the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate. Congress knew that some of the States covered by [Section] 4(b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees. Congress had reason to suppose that these states might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself. Under the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner.

Id. at 334-35 (citation omitted).

150. 393 U.S. 544 (1969).

151. *Id.* at 566. The Court "rejected a narrow construction" of Section 5, noting that the

> Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race. Moreover, compatible with the decisions of this Court, the Act gives a broad interpretation of the right to vote, recognizing that voting includes "all action necessary to make a vote effective."

Id. at 565-66 (citing Reynolds v. Sims, 377 U.S. 533, 555 (1964)); *see also* BERNARD GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 30 (1992) (noting that "[t]he significance of Section 5 did not become evident until the decision in *Allen v. State Board of Elections*, in which the Supreme Court applied this section to changes that diluted black citizen's votes as well as to devices that

In *Presley v. Etowah County Commission*,[152] the Supreme Court reaffirmed the principle that "all changes in voting must be precleared,"[153] while more precisely defining what constitutes a change in voting. In *Presley*, the Court, noting the history of its Section 5 decisions,[154] stated that *Allen's* holding that

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disenfranchised blacks").

The *Allen* Court also recalled the testimony of Attorney General Katzenbach before the House Judiciary Committee regarding the appropriateness of the extraordinary remedies found in Section 5:

> The justification for [the approval requirements] is simply this: Our experience in the areas that would be covered by this bill has been such as to indicate frequently on the part of the State legislatures a desire, in a sense, to out guess the courts of the United States or even to out guess the Congress of the United States . . . .

Allen, 393 U.S. at 567.

152. 502 U.S. 491 (1992).

153. *Id.* at 501.

154. Faced with the issue of whether changes made by two local County Commissions reducing the decision making authority of certain elected officials constituted changes in voting so as to be subject to Section 5 preclearance, the *Presley* Court adopted a categorical approach to determining whether a particular change by a covered jurisdiction is one that pertains to "voting:"

> The principle that [Section] 5 covers voting changes over a wide range is well illustrated by the separate cases we considered in the single opinion for the Court in *Allen* . . . .
>
> Our cases since *Allen* reveal a consistent requirement that changes subject to [Section] 5 pertain only to voting. Without implying that the four typologies exhaust the statute's coverage, we can say these later cases fall within one of the four factual contexts presented in the *Allen* cases. First, we have held that [Section] 5 applies to cases like *Allen v. State Bd. of Elections* itself, in which the changes involved the manner of voting. *See Perkins v. Matthews*, 400 U.S. 379, 387 (1971) (location of polling places). Second, we have held that [Section] 5 applies to cases like *Whitley v. Williams* [an *Allen* companion case], which involve candidacy requirements and qualifications. *See NAACP v. Hampton County Election Comm'n*, 470 U.S. 166 (1985) (change in filing deadline); *Hadnott v. Amos*, 394 U.S. 358 (1969) (same); *Dougherty County Bd. of Ed. v. White*, 439 U.S. 32 (1978) (rule requiring board of education members to take unpaid leave of absence while campaigning for office). Third, we have applied [Section] 5 to cases like *Fairley v. Patterson* [an *Allen* companion case], which concerned changes in the composition of the electorate that may vote for candidates for a given office. *See Perkins v. Matthews*, 400 U.S. at 394 (change from ward to at-large elections); *id.* at 388 (boundary lines of voting districts); *City of Richmond v. United States*, 422 U.S. 358 (1975) (same). Fourth, we have made clear that [Section] 5 applies to changes, like the one in *Bunton v. Patterson* [an *Allen* companion case], affecting the creation or abolition of an elective office. *See McCain v. Lybrand*, 465 U.S. 236 (1984) (appointed officials replaced by elected officials); *Lockhart v. United States*, 460 U.S. 125 (1983) (increase in the number of city councilors).

"the scope of Section 5 is expansive within its sphere of operation"[155] is nevertheless limited by the terms of Section 5.[156] "That sphere comprehends all changes to rules governing *voting*, changes effected through any of the mechanisms described in the statute. Those mechanisms are any 'qualification or prerequisite' or any 'standard, practice, or procedure with respect to *voting*.'"[157]

With that broad sphere in mind, the Court held in *Presley* that "[o]ur cases since *Allen* reveal a consistent requirement that changes subject to [Section] 5 pertain only to voting,"[158] and that "[c]hanges which affect only the distribution of power among officials are not subject to [Section] 5 because such changes have no direct relation to, or impact on, voting."[159] The *Presley* Court categorized the types of changes that "pertain" to voting according to four factual contexts: (1) changes affecting the manner of voting; (2) changes affecting the requirements and qualifications for candidacy; (3) changes affecting the composition of the electorate; and (4) changes creating or abolishing an elective office.[160]

> The first three categories involve changes in election procedures, while all the examples in the fourth category might be termed substantive changes as to which offices are elective. But whether the changes are of procedure or substance, each has a direct relation to voting and the election process.

Presley, 502 U.S. at 502-03.

155. *Id.* at 501.

156. *See* Carol A. Evans, Recent Developments, *Limitations of the Voting Rights Act of 1965*: Presley v. Etowah County Commission, 112 S. Ct. 820 (1992), 15 HARV. J.L. & PUB. POL'Y 1031 (1992). Evans argued that *Presley* represents a retreat from the command of *Allen* that Section 5 be given the broadest possible interpretation in keeping with the intent of Congress: "Although the majority claims to adhere to *Allen's* broad interpretation of the Act, *Presley* marks a retreat from the Court's prior commitment to guard against vote dilution and is incompatible with the intent of Section 5." *Id.* at 1037.

157. *Presley*, 502 U.S. at 501-02 (emphasis added).

158. *Id.* at 502.

159. *Id.* at 506; *see* Mary Massaron Ross, *The Voting Rights Act: Interpretation of the Statutory Text, the Political Subtext, and the Constitutional Overlay*, 26 URB. LAW. 723, 724 (1994) (noting that the recent Supreme Court decisions of *Holder v. Hall*, 114 S. Ct. 2581 (1994), and *Johnson v. DeGrandy*, 114 S. Ct. 2647 (1994), represent a continuation of the "Court's recent trend toward cutting back on its most expansive reading of the Voting Rights Act and emphasizing the necessity of workable judicial standards that avoid excessive intrusions of the federal courts into the decision-making sphere of state and local governments.").

160. *See Presley*, 502 U.S. at 502-03.

2. Types of Entities Within Covered Jurisdictions Subject to Preclearance

As the Supreme Court has given a broad reading to Section 5 with respect to the types of changes in election laws and practices that must be precleared, it has also given a liberal reading to Section 5 regarding the types of governmental entities within a covered jurisdiction subject to Section 5's requirements.[161] In *United States v. Board of Commissioners*,[162] the Court held that while a narrow reading of Section 14 of the Act would not bring the City of Sheffield—which was neither a county nor a parish and had never conducted registration for voting[163]—within the coverage of Section 5, "the language of the Act does not require such a crippling interpretation, but rather is susceptible of a reading that will fully implement the congressional objectives."[164] In keeping with its penchant for liberally construing the provisions of the Voting Rights Act, the Court held that

> [t]he language, structure, history, and purposes of the Act persuade us that [Section] 5, like the constitutional provisions it is designed to implement, applies to all entities having power over any aspect of the electoral process within designated jurisdictions, not only to counties or to whatever units of state government perform the function of registering voters.[165]

To hold otherwise, the Court noted, would be to permit "pre-

161. *See* 42 U.S.C. § 1973c (1994) (providing that preclearance applies to a state or political subdivision that meets the requirements of Section 1973b(a) and (b)); 42 U.S.C. § 1973l(c)(2) (1994) (defining "political subdivision" as "any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a state which conducts registration for voting."); *see also* 25 AM. JUR. 2D *Elections* § 114 (1996) (stating that political parties and their officials are not covered by Section 5).

162. 435 U.S. 110 (1978).

163. *Id.* at 117.

164. *Id.*

165. *Id.* at 118; *see also* Dougherty County, Georgia, Bd. of Educ. v. White, 439 U.S. 32 (1978) (applying *Sheffield* in holding that a county school board, as a governmental entity, is subject to Section 5).

cisely the kind of circumvention of congressional policy that [Section] 5 was designed to prevent."[166]

In *Sheffield*, the Court employed both a textual and an intent based approach in determining that Section 5 applies territorially to governmental entities within a covered jurisdiction. The Court's textual analysis concluded that

> Section 5 provides that it is to apply to the jurisdictions "with respect to which" [Section] 4(a)'s prohibitions are in effect. Since the States or political subdivisions "with respect to which" [Section] 4(a)'s duties apply are entire territories and not just county governments or the units of local government that register voters, [Section] 5 must, it would seem, apply territorially as well.[167]

Relying on the House and Senate committee reports from the 1975 extension of Section 5, the *Sheffield* Court found that the legislative history of the 1975 extension "preclude[s] the conclusion that [Section] 5 was not understood to operate territorially."[168] The *Sheffield* Court also highlighted the fact that during the floor debate on the extension of Section 5, none of the opponents of the measure took exception with the statement that "[a]ny [voting changes] . . . made in precincts, county districts, school districts, municipalities, or State legislatures, or any other kind of officers, ha[ve] to be submitted . . . to the Attorney General."[169] As such, the Court found that it was bound by the implications of Congress' re-enactment of Section 5: "When a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation, and this court is bound thereby."[170]

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166. *Sheffield*, 435 U.S. at 117.

167. *Id.* at 126.

168. *Id.* at 134 (citing S. REP. NO. 94-295, 12 (1975); H. R. REP. NO. 94-196, at 5 (1975)).

169. *Sheffield*, 435 U.S. at 134 (citing 121 CONG. REC. S13,331 (July 22, 1975) (remarks of Sen. Allen)).

170. *Sheffield*, 435 U.S. at 134; *see* SINGER, *supra* note 136, § 49.09 ("Where reenactment of a statute includes a contemporaneous and practical interpretation, the practical interpretation is accorded greater weight than it ordinarily receives, as it is regarded as presumptively the correct interpretation of the law." When a legislature reenacts a statute which has been interpreted by a court, the legislature "impliedly adopts the interpretation upon reenactment.").

B. *Judicial Pronouncements Regarding the Applicability of Preclearance to Political Parties Prior to* Morse

Prior to *Morse*,[171] the Supreme Court had yet to address the specific question of the applicability of Section 5's preclearance requirement to non-governmental entities. While the language of *Sheffield* spoke in broad terms, holding that Section 5 applied to "all entities having power over any aspect of the electoral process within designated jurisdictions,"[172] the factual context of *Sheffield's* holding was nevertheless limited to governmental entities.[173] The issue of political party coverage under Section 5, however, was not an entirely new one. Under regulations promulgated by the Justice Department, certain activities of political parties were considered to be subject to the preclearance requirement.[174] Several lower courts had held that political parties could be subject to preclearance in a variety of factual contexts. The question presented in *Morse* was ripe for consideration given the lower courts' holdings regarding

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171. *See infra* Part V.

172. *Sheffield*, 435 U.S. at 118.

173. *See* Morse v. Republican Party, 116 S. Ct. 1186, 1226 (1996) (Thomas, J., dissenting). Justice Thomas rejected the "all entities having power over any aspect of the electoral process" language of *Sheffield* used by Justice Stevens to justify applying Section 5 to non-governmental entities. Justice Thomas noted that the holding of *Sheffield* was limited by the factual setting in which the case was decided. He further concluded that, "*Sheffield* . . . stands, at most, for the proposition that a local unit of government, like a city, may be considered the 'State' for purposes of [Section] 5 . . . . There is no basis in *Sheffield* and its progeny for covering nongovernmental entities under [Section] 5." *Id.* (Thomas, J., dissenting).

174. 28 C.F.R. § 51.7 (1996). The Attorney General's regulation provides that under certain circumstances political parties in covered jurisdictions must preclear:

> Certain activities of political parties are subject to the preclearance requirement of section 5. A change affecting voting effected by a political party is subject to the preclearance requirement: (a) if the change relates to a public electoral function of the party and (b) if the party is acting under authority explicitly or implicitly granted by a covered jurisdiction or political subunit subject to the preclearance requirement of Section 5. For example, changes with respect to the recruitment of party members, the conduct of political campaigns, and the drafting of political platforms are not subject to the preclearance requirement. Changes with respect to the conduct of primary elections at which party nominees, delegates to party conventions, or party officials are chosen are subject to the preclearance requirement of Section 5. Where appropriate the term "jurisdiction" (but not "covered jurisdiction") includes political parties.

Id.

political party coverage under Section 5, the Attorney General's inclusion of political parties within the scope of Section 5, and the Supreme Court's decision in *Sheffield*.[175]

In *MacGuire v. Amos*,[176] the United States District Court for the Middle District of Alabama held that rules promulgated by the State's Republican and Democratic parties governing the election of delegates to the parties' national conventions were subject to the preclearance requirement of the Voting Rights Act.[177] The court first determined that political parties could be subject to the mandates of Section 5 even though they were neither a "State" nor a "political subdivision" as those terms are usually understood.[178] Under Alabama's election laws, the political parties were permitted to conduct primary nominating elections to determine their candidates for office.[179] The political parties were also authorized by statute to select their delegates to national conventions.[180] The *MacGuire* court determined that these statutory grants of power over the electoral process made the political parties potentially subject to Section 5:

> Clearly the State cannot avoid the strictures of the Act by empowering some body other than its legislature to regulate those electoral processes. Where the political parties are given such head by a specific statutory grant of authority, their actions rise to the level of actions by the State.[181]

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175. *Sheffield*, 435 U.S. at 118; *see supra* notes 161-70 and accompanying text.

176. 343 F. Supp. 119 (M.D. Ala. 1972); *see also* Kirke M. Hassan, Comment, MacGuire v. Amos: *Application of Section 5 of the Voting Rights Act to Political Parties*, 8 HARV. C.R.-C.L. L. REV. 199 (1973). After reviewing the decision of the *MacGuire* Court, Hassan argues that if, as the "constitutional cases" regarding political parties and voting rights recognize, "party action may be predominantly governmental in nature, equivalent to that of a state in its effect on the right to vote, the private nature of party action in other contexts does not require that Section 5 be read to exclude parties *per se*." *Id.* at 210.

177. *See MacGuire*, 343 F. Supp. at 121.

178. *See id.*

179. *See id.*

180. *See id.*

181. *Id. See also* Arthur M. Weisburd, *Candidate-Making and the Constitution: Constitutional Restraints on and Protections of Party Nominating Methods*, 57 S. CAL. L. REV. 213, 223-32 (1984) (discussing the state action doctrine in the context of political party activity).

Having determined that the scope of Section 5 included political parties acting under specific statutory authority, the *MacGuire* court then concluded that the particular party rules at issue—the drawing of voting districts within the state from which members of the party could run for a seat at the party's national convention—were "unarguably" changes with respect to voting "within the coverage of Section 5."[182]

In another decision holding political party activity subject to the requirements of Section 5 preclearance, the United States District Court for the Eastern District of New York concluded that party rule changes expanding the voting power of the party's executive committee "were changes requiring preclearance under the Voting Rights Act . . . ."[183] In *Fortune,* the executive committee of the county Democratic Party expanded the authority to vote on committee business from those members who were elected (mostly black) to include those members who were also appointed (mostly white). The plaintiffs challenged the action as one requiring preclearance. The court, applying both the statutory language and the Justice Department's regulation implementing Section 5,[184] concluded that the Party's actions were subject to preclearance.[185]

In *Hawthorne v. Baker,*[186] the Democratic Party of Alabama and many of its county committees sought to change the method by which the members of the various party executive committees were selected. The Justice Department had previously declined a preclearance request from the state party. While another request was pending, the state party and its county counterparts began implementation of the rule change.[187] The court held that, under *MacGuire,* it was settled law that political parties can be subject to Section 5.[188] Having so determined, the *Hawthorne* court heeded the Supreme Court's broad

182. *MacGuire,* 343 F. Supp. at 121.

183. Fortune v. Kings County Democratic County Comm., 598 F. Supp. 761, 765 (E.D.N.Y. 1984).

184. *See* 28 C.F.R. § 51.7 (1996); *supra* note 174.

185. *See Fortune,* 598 F. Supp. at 764-65.

186. 750 F. Supp. 1090 (M.D. Ala. 1990).

187. *See id.* at 1092-93.

188. *See id.* at 1094-95.

interpretation of Section 5, holding the change at issue to be one with respect to voting.[189]

V. THE SUPREME COURT ADDRESSES THE ISSUE OF POLITICAL PARTY COVERAGE UNDER SECTION 5 OF THE VOTING RIGHTS ACT IN *MORSE*

A. *Background to* Morse

In *Morse v. Republican Party*,[190] the Supreme Court determined that the Republican Party of Virginia's (Party) requirement that delegates to the state nominating convention pay a filing fee constituted a change in a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." As such, the Court held that the Party and its filing fee were subject to the preclearance requirement of Section 5 of the Voting Rights Act.[191]

In 1994, three law students attending the University of Virginia sought to participate in a convention at which Virginia Republicans were to select their candidate for the upcoming United States Senate race. The two candidates vying for the Republican nomination were Colonel Oliver North and James Miller, former Director of the Office of Management and Budget for the Reagan Administration.[192] The party informed the students that they were required to pay a filing fee to become delegates to the convention and to cast their vote for a candidate. Appellants filed a complaint alleging that the filing fee requirement violated Sections 5 and 10 of the Voting Rights Act, as well as the Equal Protection Clause of the Fourteenth

189. *See id.* at 1095. The court noted that "Supreme Court cases teach . . . that Congress intended the Act to reach any enactment which altered election procedures 'in even a minor way' and that the phrase 'standard, practice, or procedure' must be given the 'broadest possible scope.'" *Id.* (citations omitted).

190. 116 S. Ct. 1186 (1996).

191. *Id.* at 1192; *see* 42 U.S.C. § 1973c (1994); *see also* Loren Singer, *Fee Charged to Convention Delegates Required Preclearance, Supreme Court Decides*, WEST'S LEGAL NEWS, Mar. 28, 1996 *available in* 1996 WL 259410.

192. Colonel North prevailed at the Republican Convention, only to lose in the general election to the incumbent Senator Charles Robb.

Amendment and the prohibition against poll taxes of the Twenty-Fourth Amendment.[193]

Justice Stevens, joined by Justice Ginsburg, gave the opinion of the Court. Justice Breyer, joined by Justices Souter and O'Connor, concurred in the judgment. Justices Scalia, Thomas, Kennedy, and Rehnquist dissented. The Court ruled that Section 5 encompassed the Party's voting qualifications and procedures (in the form of the delegate filing fee) when its nominees are chosen at a convention. Justice Stevens explained why the district court's ruling was in error, and that coverage of the filing fee was mandated by the Court's consistent interpretation of Section 5.[194]

The district court, in granting the Party's motion to dismiss the Section 5 claims, reasoned that the Party's delegate filing

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193. *See Morse*, 116 S. Ct. at 1191-92; *see also* 42 U.S.C. § 1973c (§ 5) (1994); 42 U.S.C. § 1973h 2 (§ 10) (1994). In Section 10(a), Congress declared that "the constitutional right of citizens to vote is denied or abridged in some areas by the requirement of the payment of a poll tax as a precondition to voting." As such, Section 10(b) authorizes the Attorney General to institute "such actions, including actions against States or political subdivisions, for declaratory judgment or injunctive relief against the enforcement of any requirement of the payment of a poll tax as a precondition to voting . . . ." U.S. CONST. amend. XIV; *see also supra* note 41. U.S. CONST. amend. XXIV provides that: "The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax. The Congress shall have power to enforce this article by appropriate legislation."

Under Section 5 of the Voting Rights Act, a three-judge panel of the District Court of the Western District of Virginia took jurisdiction. The district court remanded the constitutional claims to a single-judge district court. The district court panel also remanded a separate statutory claim alleging that a loan made by the North campaign to appellant Morse covering the delegate filing fee violated Section 11(c) of the Voting Rights Act to a single-judge district court. With respect to the Section 5 and Section 10 claims, the district court panel granted the Party's motion to dismiss. *See* Morse v. Oliver North for U.S. Senate Comm., Inc., 853 F. Supp. 212 (W.D. Va. 1994). Section 5 of the Voting Rights Act provides that an appeal of the district court's ruling lies in the Supreme Court. As such, the Supreme Court noted probable jurisdiction, and in *Morse* reversed the district court's dismissal of appellant's Voting Rights claims in a five to four decision. *See Morse*, 116 S. Ct. at 1210. With respect to appellants' Section 10 claim, the Court held that a private right of action was implied under Section 10, even though it only authorizes the Attorney General to bring enforcement actions regarding poll taxes. *See id.* at 1211-13. Neither the constitutional claims under the Fourteenth and Twenty-fourth Amendments nor the Section 11(c) claim were before the Supreme Court in *Morse*.

194. *See Morse*, 116 S. Ct. at 1193.

fee for participation in a state convention was not subject to preclearance because: (1) a regulation by the Attorney General implementing Section 5 did not apply to Party activities outside of the primary process, and (2) the Supreme Court's affirmance of *Williams v. Democratic Party*[195] indicated that a political party's decision to "change its method of selecting delegates to a national convention" does not trigger Section 5 coverage.[196] Justice Stevens rejected both bases for ruling that the Party's delegate filing fee did not require preclearance.

B. *The Opinion of the Court*

1. The Attorney General's Regulation—28 C.F.R. § 51.7—Requires Preclearance

Under 28 C.F.R. § 51.7,[197] changes affecting voting made by political parties within a covered jurisdiction are subject to Section 5's preclearance requirement if "the change relates to a public electoral function of the party" and "if the party is acting under authority explicitly or implicitly granted by a covered jurisdiction or political subunit."[198] Justice Stevens found that the Republican Party of Virginia satisfied both of the regulation's requirements for political party coverage.[199]

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195. Civ. Action No. 16286 (N.D. Ga. Apr. 6, 1972), *aff'd*, 409 U.S. 809 (1972).

196. *See Morse*, 116 S. Ct. at 1192; Morse v. Oliver North for U.S. Senate Comm., Inc., 853 F. Supp. 212, 216 (W.D. Va. 1994).

197. 28 C.F.R. § 51.7 (1996). See also *supra* note 18 for those jurisdictions currently subject to the preclearance requirement of Section 5; 28 C.F.R. § 51.23 (1996) (providing that preclearance submissions are to be made "by the chief legal officer or other appropriate official of the submitting authority."). 28 C.F.R. § 51.23(b) provides that changes affecting voting made by a political party "may be submitted by an appropriate official of the political party." *Id.* Prior to the inclusion of the language regarding political party submissions in 28 C.F.R. § 51.23(b), there was no administrative authority on how a political party meeting the requirements of 28 C.F.R. § 51.7 should submit proposed changes in voting. *See* Williams v. Democratic Party, Civ. Action No. 16286 (N.D. Ga. Apr. 6, 1972) (holding that a political party did not have to preclear changes in voting because there was no administrative process for submission of such changes).

198. 28 C.F.R. § 51.7 (1996).

199. *Morse*, 116 S. Ct. at 1193. The Party did not dispute the fact that the delegate filing fee was a change in voting from that in effect on November 1, 1964. Nor did the Party dispute the fact that the filing fee relates to "a public electoral function of the party." *Id.* The Party claimed, however, that it was not acting under delegated State authority when it charged the filing fee. *See id.*

Under Virginia law,[200] the nominees of the two major political parties automatically appear on the general election ballot "without the need to declare their candidacy or to demonstrate their support with a nominating petition."[201] Justice Stevens reasoned that because the Commonwealth of Virginia has the sole authority to establish the qualifications for ballot access, and has delegated a portion of that authority to the two major political parties in the form of automatic ballot access for nominated candidates, "the parties ac[t] under the authority of Virginia when they decide who will appear on the general election ballot."[202]

Justice Stevens found support for applying the regulation to the Party in *Smith v. Allwright*.[203] In *Smith*, one of the *White Primary Cases*, the Court found action by the Democratic Party of Texas violative of the Fifteenth Amendment when it held that "state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the State."[204] The Court in *Morse* noted that it is not the extent of the state regulation over a political party's activities that determines whether there has been a delegation of state authority.[205] Rather, where the nominating procedure over which the State has delegated authority to a political party is "an integral part of the election machinery,"[206] the party functions as a state actor and can therefore be subject to Section 5 preclearance requirements.[207] Consequently, "[b]y the logic of *Smith* . . . the

200. See VA. CODE ANN. § 24.2-511 (Michie 1993) (providing that the Secretary of a political party is to certify the party's nominee, chosen at either a convention or a primary, to the State Board of Elections).

201. *Morse*, 116 S. Ct. at 1194; *see also* VA. CODE ANN. § 24.2-506 (Michie 1993) (requiring independent candidates for office to file both a statement of candidacy and a petition with a specified number of signatures from registered voters with the State Board of Elections in order to qualify for placement on the general election ballot).

202. *Morse*, 116 S. Ct. at 1194-95.

203. 321 U.S. 649 (1944). For a full discussion of the U.S. Supreme Court cases addressing state action and political activities, see Arthur M. Weisburd, *Candidate-Making and the Constitution: Constitutional Restraints on and Protections of Party Nominating Methods*, 57 S. CAL. L. REV. 213, 214-19 (1984).

204. *Smith*, 321 U.S. at 660.

205. *Morse*, 116 S. Ct. at 1196, n.17.

206. United States v. Classic, 313 U.S. 299, 318 (1940).

207. *Morse*, 116 S. Ct. at 1196-97. Justice Stevens considered the "only difference" between the factual setting of *Smith* and *Morse* to be one of degree. *See id.* In

Party acted under the authority of the Commonwealth," thereby satisfying the second requirement of the Attorney General's regulation.[208]

Justice Stevens conceded that the terms of 28 C.F.R. § 51.7 speak only of primary elections,[209] but he nevertheless deferred to the Department of Justice's interpretation of its regulation providing that the regulation applies "to changes affecting voting at a party convention."[210] Accordingly, Justice Stevens determined that "regulation required preclearance of the Party's delegate filing fee."[211]

2. The Language, Structure, and History of Section 5 Require Preclearance of the Party's Delegate Filing Fee

Justice Stevens concluded that Section 5, by its own force and independent of the Attorney General's regulation, encompassed "changes in electoral practices such as the Party's impo-

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Smith, the party was required by law to select its candidates at a primary election, while under Virginia law political parties are not required to choose their candidate via a primary election. Rather, under Virginia law, the parties may choose between the primary election and the nominating convention. VA. CODE ANN. § 24.2-509 (Michie 1993). For Justice Stevens, this choice "makes the delegation of authority . . . more expansive, not less, for the Party is granted even greater power over the selection of its nominees." *Morse*, 116 S. Ct. at 1196-97.

208. *Id.* at 1196; *see* 28 C.F.R. § 51.7 (1996) providing that

> A change affecting voting effected by a political party is subject to the preclearance requirement: (a) If the change relates to a public electoral function of the party and (b) if the party is acting under authority explicitly or implicitly granted by a covered jurisdiction or political subunit subject to the preclearance requirement of section 5.

209. *See* 28 C.F.R. § 51.7 (1996) (providing that "[c]hanges with respect to the conduct of *primary elections* at which party nominees, delegates to party conventions, or party officials are chosen are subject to the preclearance requirement of section 5." (emphasis added)). While the regulation speaks of "delegates to party conventions," it does so in the context of the conduct of primary elections, not the nominating convention itself. *See id.*

210. *Morse*, 116 S. Ct. at 1196-97. Justice Stevens stated that "[w]e are satisfied that the Department's interpretation of its own regulation is correct." *Id.* The court cited a letter from the Solicitor General to the Clerk of the Supreme Court noting that "[s]ince 1981, when the regulation was promulgated, there have been nearly 2,000 preclearance submissions involving more than 16,000 proposed changes by political parties in covered jurisdictions." *Id.* at 1196 n.18.

211. *Id.* at 1197. The conclusion reached by Justice Stevens that the Party was subject to Section 5 preclearance under the Attorney General's regulation did not receive support from the remaining seven members of the Court.

sition of a filing fee for delegates to its convention."[212] The Court in *Morse* noted that the terms of Section 5 and the definition of "vote" or "voting" in Section 14,[213] together with the broad reading which the Court has consistently given Section 5,[214] warranted finding the Party's delegate filing fee within the ambit of Section 5.[215] Justice Stevens noted that the Party's filing fee "operates precisely in the same fashion"[216] as other changes in voting laws and practices which the Court had previously found to be subject to preclearance.[217]

Justice Stevens appeared to be less concerned with the label that might be attached to the electoral procedure which the changed practice or procedure would affect, than with whether the change "weakens the 'effectiveness' of [the] vote cast in the general election itself."[218] Similarly, Justice Stevens argued that as long as a change has an effect on the general election, the Court has never hesitated to find the change within Section 5's coverage, notwithstanding the fact that the changed process was something other than a primary.[219]

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212. *Id.* at 1198.

213. *See* 42 U.S.C. 1973*l*(c)(1) (1994).

> The terms "vote" or "voting" shall include all action necessary to make a vote effective in any *primary, special, or general election,* including, but not limited to, registration, listing pursuant to this subchapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

Id. (emphasis added).

214. *See supra* Part IV.A.

215. *See Morse*, 116 S. Ct. at 1198-1200.

216. *Id.* at 1199.

217. *See* Presley v. Etowah County Comm'n, 502 U.S. 491, 502-03 (1992).

218. *Morse*, 116 S. Ct. at 1199.

219. *See id.* The *Morse* Court discussed two types of changes affecting nominating processes, other than primaries, which have been subject to Section 5 preclearance. In *Whitley v. Williams*, 393 U.S. 544 (1965), a companion case to *Allen*, the Court held that certain procedures for nominating independent candidates were subject to preclearance when a jurisdiction covered under Section 4(b) of the Act sought to implement them. In *Morse* Justice Stevens interpreted the *Allen* Court as being "unconcerned that the changes did not directly relate to the conduct of a primary, because they had an effect on the general election." *Morse*, 116 S. Ct. at 1199. Additionally, Justice Stevens noted that the Court has consistently held that changes potentially resulting in vote dilution are subject to Section 5 coverage. *See id.* at 1199-1200. In this regard, the *Morse* Court weakens the distinction between the nominating process and the general election in the context of vote dilution:

Interpreting the provisions of the Voting Rights Act in conjunction with one another, the Court found additional support for its conclusion that the delegate filing fee came within the provisions of Section 5. Section 14's[220] reference to "party office" led Justice Stevens to conclude that the filing fee appropriately fell within Section 5's coverage.[221] The Court stated that Section 2 of the Act, which prohibits discriminatory voting qualifications or prerequisites nation-wide, must be read in conjunction with Section 5.[222] A violation of Section 2 is found to exist when "it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation" to persons on the basis of their race.[223] The *Morse* Court reasoned that a new voting practice sought to be implemented in a covered jurisdiction that would be a violation of Section 2, must also be considered as a change that falls within the preclearance requirements of Section 5.[224]

> "Exclusion from the earlier stage . . . does not merely curtail . . . voting power, but abridges [the] right to vote itself. To the excluded voter who cannot cast a vote for his or her candidate, it is all the same whether the party conducts its nomination by a primary or by a convention open to all members except those kept out by the filing fee.

Id. at 1200; *see supra* notes 52-55 and accompanying text. In *Nixon v. Herndon*, 273 U.S. 536, the first of the *White Primary Cases*, Justice Holmes, writing for the Court, made a similar argument, focusing on the practical realities of the discriminatory practices. In *Herndon*, the Court was unconcerned with the superficial distinction between the general and the primary election: "If the defendant's conduct was wrong to the plaintiff the same reasons that allow recovery for denying the plaintiff a vote at a final election allow it for denying a vote at the primary election that may determine the final result." *Id.* at 538.

220. *See supra* note 213.

221. *Morse*, 116 S. Ct. at 1200. A delegate to a convention is also included in Section 14's reference to "party office."

222. *See id.* at 1200-01 (noting that if Section 5 was not as broad as Section 2, "then a covered jurisdiction would not need to preclear changes in voting practices known to be illegal.").

223. 42 U.S.C. § 1973 (1994).

224. *See generally* Haddad, *supra* note 22. Haddad explains that Congress amended Section 2 of the Voting Rights Act in 1982 to overrule the Supreme Court's decision in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), which held that to establish a claim under Section 2, a plaintiff had to prove discriminatory intent on the part of the government. Section 2, as amended, provides that "[n]o 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 1973b(f)(2) [applying to

The opinion of the Court in *Morse* also relied on the history surrounding the adoption of the Voting Rights Act as further support that the Party's delegate filing fee is covered by Section 5.[225] The purpose of the Voting Rights Act was to implement the guarantees of the Fifteenth Amendment.[226] The Court not-

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language minorities in certain jurisdictions]." 42 U.S.C. 1973 (1994) (emphasis added).

Because Congress amended Section 2 to incorporate the "results test," Haddad argues there is "direct evidence" that the Section 2 "results test" should apply to Section 5 as well. Haddad, *supra* note 22, at 151. Haddad points out that the Senate Judiciary Committee's Report accompanying the amendment to Section 2 indicates that "[i]n light of the amendment to section 2, 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 149-50.

The conclusion reached by Justice Stevens and Mr. Haddad is not without criticism. Justice Thomas, dissenting in *Morse*, criticized the conclusion that the parameters of Section 2 and Section 5 are necessarily coterminous. Noting the "patent discrepancy" between the scope of Section 2, which by its terms refers to "the political processes leading to nomination or election," and the scope of Section 5, which is limited by its reliance on the definition of "vote" found in Section 14 (limiting "vote" to a primary, special, or general election), Justice Thomas concluded that "[a]s long as [Section] 5 contains the term 'voting' and [Section] 14 in turn defines that word, I think we must adhere to the specific definition provided in [Section] 14." *Morse*, 116 S. Ct. at 1236 (Thomas, J., dissenting).

225. *See Morse*, 116 S. Ct. at 1201.

226. *See id.* at 1202. The Court in *Morse* explained the purpose of the Voting Rights Act by noting that:

> Congress passed the Voting Rights Act of 1964 [sic] because it concluded that case-by-case enforcement of the Fifteenth Amendment, as exemplified by the history of the white primary in Texas, had proved ineffective to stop discriminatory voting practices in certain areas of the country on account of the intransigence of officials who "resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees."

Id. at 1202-03. (quoting South Carolina v. Katzenbach, 383 U.S. at 335).

The *Morse* Court explained that the purpose of the Section 5 preclearance was to put an end to Southern intransigence. "By prohibiting officials in covered jurisdictions from implementing any change in voting practices without prior approval from the District Court for the District of Columbia or the Attorney General, [Congress] sought to 'shift the advantage of time and inertia from the perpetrators of the evil to its victims.'" *Morse*, 116 S. Ct. at 1202 (citing *Katzenbach*, 383 U.S. at 328.).

See also H.R. REP. NO. 89-439 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2439 (stating that "[a] salient obligation and responsibility of the Congress is to provide appropriate implementation of the guarantees of the 15th amendment to the Constitution."); Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249 (1989). McDonald explains that "Congress acted in this unprecedented manner because the targeted states since the days of the Reconstruction had systematically discriminated against blacks in voter registration, voting, and by adopting official policies of racial segregation in other areas of public and private life." *Id.* at 1251.

ed that the history of the *White Primary Cases* as well as the legislative history of the various extensions of Section 5 support the inclusion of political party activity, particularly the nominating convention, within Section 5's coverage.[227]

C. *The Concurring Opinion*

Justice Breyer, joined by Justices Souter and O'Connor concurred in the judgment of the court. Justice Breyer determined by negative implication that Congress could not have possibly intended the result which the Party asked the Court to read into Section 5.[228] The concurring opinion stated that "[i]n 1965, to have read this Act as excluding all political party activity would have opened a loophole in the statute the size of a

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227. Justice Stevens concluded that conventions and primaries are virtually the same for the purposes of determining Section 5 coverage. "The distinction between a primary and a nominating convention is just another variation in electoral practices that [Section] 5 was intended to cover." *Morse*, 116 S. Ct. at 1203.

Additionally, the Court found that *Terry v. Adams*, 345 U.S. 461 (1953), provided direct support for the proposition that nominating conventions are covered under Section 5. *Morse*, 116 S. Ct. at 1203-04. In *Terry*, the Court ruled that the Jaybird primary, a privately run nomination process in which the State had no involvement, excluded blacks from voting for candidates to be placed on the primary election ballot. Thus, the Jaybird primary violated the Fifteenth Amendment. *See Terry*, 345 U.S. at 469-70. In *Morse*, Justice Stevens, referring to the Jaybird primary as the "equivalent of the Party's nominating convention," concluded that "[i]f the Jaybird's nominating process violated the Fifteenth Amendment because black voters were not permitted to participate, despite the entirely voluntary nature of the Jaybird association, then [Section] 5—which requires preclearance of all practices with the potential to discriminate—must cover the Party's exclusion of voters from its convention." *Morse*, 116 S. Ct. at 1204.

Under Section 5, the issue of whether a change that is subject to preclearance will have the purpose or effect of discriminating on account of color, race, or membership in a language minority, is reserved to the judgment of the Attorney General or the District Court for the District of Columbia. *See* NAACP v. Hampton County Election Comm'n, 470 U.S. 166, 181 (1985); McCain v. Lybrand, 465 U.S. 236, 250 (1983); Perkins v. Matthews, 400 U.S. 379, 384-85 (1971); Allen v. State Bd. of Elections, 393 U.S. 544, 570-71 (1968). The standard of review for the court in deciding a challenge based on a failure to preclear, such as in *Morse*, is not whether the change in voting will result in discrimination, but rather whether "the challenged alteration has the *potential* for discrimination." *Morse*, 116 S. Ct. at 1204 (citing Hampton County Election Comm'n, 470 U.S. at 181 (1985)); *see also* McDonald, *supra* note 7, at 38 (more often than not the success or failure of a submission under Section 5 "turn[s] on the failure of the jurisdiction to carry its burden of proof, rather than on a positive finding of discrimination by the courts or the Attorney General.").

228. *See Morse*, 116 S. Ct. at 1213-14 (Breyer, J., concurring).

mountain."[229] The concurring opinion found some support in the legislative history for the proposition that Congress did not intend to exclude political party activity from Section 5's coverage. Indeed, the concurrence argued that Congress was acutely aware of the discriminatory practices of Southern political parties with respect to the operation of nominating conventions.[230]

In light of the legislative history of the Act and the state action doctrine applicable to political party activities as established in the *White Primary Cases*, the concurring opinion rejected the notion that "in 1965 Congress *intended* its words to place even a party's convention-based, all white evasive maneuvers beyond the statute's reach."[231] Finally, the concurring opinion deferred the exact scope of the Court's ruling in *Morse* to future cases: "In this case, I conclude that this Court has not decided the exact boundaries that the Constitution draws around the subcategory of party rules subject to [Section] 5. Further definition should await another day."[232]

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229. *See id.* at 1213 (Breyer, J., concurring).

230. *See id.* at 1214 (Breyer, J., concurring) (noting that Congress was well aware of the fact that Mississippi had excluded blacks from its nominating conventions, precinct meetings, and caucuses selecting delegates to the Democratic National Convention just years before the enactment of the Voting Rights Act). Justice Breyer relied on a statement by Representative Bingham during the debate on the Voting Rights Act that "to be most effective, [the Act] should include express coverage of party functions which directly, or indirectly, affect the primary or general elections in any State." *Morse*, 116 S. Ct. at 1214 (Breyer, J., concurring) (alterations in original).

231. *Id.* at 1214 (Breyer, J., concurring). The concurring opinion argued that the Court need not go further than determining that Congress could not have intended to exclude political party activity such as that at issue here from the coverage of Section 5's preclearance requirements. Specifically, the concurring opinion noted that the Court need not decide "when party activities are, in effect, substitutes for state nominating primaries because the case before us involves a nominating convention that resembles a primary about as closely as one could imagine." *Id.* at 1214-15 (Breyer, J., concurring). Additionally, Justice Breyer explained that the Court need not decide exactly which party activities at a convention fall within the coverage of Section 5. Justice Breyer noted that *Presley v. Etowah County Commission*, 502 U.S. 491, 502-03 (1992) clearly delineated the categories of voting changes that are subject to preclearance. *See Morse* 116 S. Ct. at 1215 (Breyer, J., concurring). Lastly, Justice Breyer concluded that the Court need not decide the First Amendment freedom of association claims raised by Justice Scalia's dissent, because "[t]hose questions . . . are properly left for a case that squarely presents them." *Id.* (Breyer, J., concurring).

232. *Morse*, 116 S. Ct. at 1216 (Breyer, J., concurring).

D. *The Dissenting Opinions*

Justice Scalia, joined by Justice Thomas, dissented on the basis that subjecting political parties to Section 5 preclearance requirements implicated First Amendment freedom of association concerns.[233] Justice Scalia argued that the Court's decision, holding political parties subject to Section 5, in turn renders the First Amendment's freedom of association (belonging to all political parties) subject to a "permit system." In this regard, Justice Scalia concluded that the "Court thus makes citizens supplicants in the exercise of their First Amendment rights."[234]

Justice Kennedy, joined by the Chief Justice, also dissented on the basis that "[Section] 5 of the Voting Rights Act does not reach all entities or individuals who might be considered the State for constitutional purposes."[235] Justice Kennedy viewed the Party's delegate filing fee as beyond the terms of Section 5. He explained that where Congress sought to "distinguish between the State and other actors,"[236] it demonstrated its ability to do so.[237] Justice Kennedy concluded that the language of

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233. *See id.* at 1216-19 (Scalia, J., dissenting).

234. *Id.* at 1218 (Scalia, J., dissenting). *See generally* Democratic Party of United States v. Wisconsin *ex rel.* La Follette, 450 U.S. 107 (1981); Cousins v. Wigoda, 419 U.S. 477 (1975); O'Brien v. Brown, 409 U.S. 1 (1972) (cited by Justice Scalia for the proposition that the Court has "always treated government assertion of control over the internal affairs of political parties . . . as a matter of the utmost constitutional consequence," *Morse*, 116 S. Ct. at 1215 (Scalia, J., dissenting)); Ray v. Blair, 343 U.S. 214, 220 (1951) (discussing the internal affairs of political parties generally); Victor Brudney, *Association, Advocacy, and the First Amendment*, 4 WM. & MARY BILL OF RIGHTS J. 1 (1995); Weisburd, *supra* note 181; Stephen E. Gottlieb, *Rebuilding the Right of Association: The Right to Hold a Convention as a Test Case*, 11 HOFSTRA L. REV. 191 (1982).

235. *Morse*, 116 S. Ct. at 1220 (Kennedy, J., dissenting).

236. *Id.* (Kennedy, J., dissenting).

237. *See* 42 U.S.C. § 1973i(a)-(b) (1994) (making it "unlawful for any person acting *under color of law* to fail or refuse to permit any person who is entitled to vote under specified provisions of the Act, or to willfully fail or refuse to tabulate, count, and report such person's vote." (emphasis added)). Justice Kennedy concluded that:

> [t]here is no apparent reason why the "under color of law" requirement of [Section 11, 42 U.S.C. § 1973i] should not also be considered coterminous with the state action requirement of the Amendment that the statute enforces, and we should infer from Congress' employment of that requirement an intent to distinguish between the State and those other actors to whom the governmental status must be imputed in some in-

Section 5, read in conjunction with the other provisions of the Act, rendered incomprehensible the notion that "Congress meant to include the Democratic and Republican Parties when it used the simple word 'State' in the Voting Rights Act."[238]

Justice Thomas, joined by Justice Scalia (and Justices Kennedy and Rehnquist regarding the portion of his dissent dealing with Section 10), wrote the most comprehensive of the dissenting opinions. Justice Thomas based his dissent on the plain meaning of Section 5.[239] For Justice Thomas, the preliminary question in determining whether the preclearance requirement of Section 5 is triggered is whether the entity affecting the change sought to be made subject to Section 5 is a State or political subdivision.[240] He argued that both the plain meaning of the statute, as well as the jurisprudential gloss that the Court has placed on the terms "State" and "political subdivision" in previous voting rights cases, augues against including a political party within the meaning of those terms.[241]

While the Court has broadly interpreted the types of entities subject to coverage under Section 5 in cases such as

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> stances. Congress knows the difference between regulating States and other actors, and in [Section] 5 chose only to regulate the States.

Morse, 116 S. Ct. at 1220 (Kennedy, J., dissenting) (citation omitted).

238. *Morse*, 116 S. Ct. at 1221 (Kennedy, J., dissenting).

239. *See id.* at 1222 (Thomas, J., dissenting). Justice Thomas framed the issue of the case accordingly:

> Two discrete questions of statutory interpretation control appellants' claim under [Section] 5 of the Voting Rights Act: whether the Republican Party of Virginia is a 'State or political subdivision' and, if so, whether the fee imposed upon its conventioneers constitutes a procedure "with respect to voting." The plain meaning of the Voting Rights Act mandates a negative answer to both of these questions.

Id. (Thomas, J., dissenting) (citation omitted).

240. *See id.* at 1222 (Thomas, J., dissenting).

241. *See id.* at 1222-34 (Thomas, J., dissenting). In *Holder v. Hall*, 114 S. Ct. 2581 (1994) (holding that a vote dilution challenge could not be maintained under Section 2 of the Voting Rights Act with respect to the size of a government body), Justice Thomas, concurring in the judgment of the Court, gave a scathing criticism of the Court's previous reading of Section 2 so as to permit vote dilution claims in particular, and the Court's willingness to expand *ad infinitum* the mandates of the Act in general. Justice Thomas, argued that a "systematic reassessment" of the Court's Section 2 jurisprudence was in order. *See id.* at 2591 (Thomas, J., concurring). Justice Thomas argued that he could "no longer adhere to a reading of the Act that does not comport with the terms of the statute and that has produced such a disastrous misadventure in judicial policy-making." *Id.* at 2592 (Thomas, J., concurring).

Sheffield,[242] Justice Thomas argued that the issue in *Sheffield*, and in nearly all other Section 5 cases, was whether a particular type of *governmental entity* fell within Section 5's coverage.[243] Accordingly, Justice Thomas concluded that "[t]he terms 'State' and 'political subdivision' should both be construed to refer solely to the various territorial divisions within a larger unit of territorially-defined government."[244] Justice Thomas rejected the notion that the Party acted as an "organ of the State," and thereby rejected the state action principles relied on by the majority.[245] Finding the plain meaning of Section 5 clear and unambiguous, Justice Thomas asserted that there was no reason for the Court to defer to the Attorney General's regulation requiring preclearance of voting changes effectuated by political parties.[246]

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242. United States v. Board of Comm'rs, 435 U.S. 110, 118 (holding that Section 5 "applies to all entities having power over any aspect of the electoral process within designated jurisdictions.").

243. *See Morse*, 116 S. Ct. at 1226 (Thomas, J., dissenting) ("Whether or not *Sheffield* was correct as an original matter, it stands, at most, for the proposition that a local unit of government, like a city, may be considered the 'State' for purposes of [Section] 5."). See *supra* note 4 for Supreme Court cases construing Section 5 of the Voting Rights Act.

244. *Morse*, 116 S. Ct. at 1223 (Thomas, J., dissenting); *see also Sheffield*, 435 U.S. at 126 (holding that "[s]ince the States or political subdivisions 'with respect to which' [Section] 4(a)'s duties apply are entire territories and not just county governments or the units of local governments that register voters, [Section] 5 must, it would seem, apply territorially as well.").

245. Justice Thomas concluded that:

> [T]he Republican Party of Virginia is not an organ of the State through which the State must conduct its affairs, and the Party has no authority to formulate state law . . . . This common sense understanding also explains why virtually every one of this Court's [Section] 5 cases has involved a challenge to, or a request for approval of, action undertaken by a State or a unit of state government.

Id. (Thomas, J., dissenting).

246. *See id.* (Thomas, J., dissenting). "In light of the plain meaning of the phrase 'State or political subdivision,' I see no reason to defer to the Attorney General's regulation interpreting that statute to cover political parties." *Id.; see also* Chevron USA v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984) (holding that while an administrative agency's interpretation of a statute is entitled to great deference, when Congress has "directly spoken to the precise question at issue . . . the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); SINGER, *supra* note 136, § 49.05; Richard J. Pierce, Jr., *Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988).

Justice Thomas also rejected the Court's dismissal of the "only precedent on the applicability of [Section] 5 to political parties."[247] In *Williams v. Democratic Party*,[248] the Supreme Court summarily affirmed the decision of the district court that Section 5 did not apply to the Georgia Democratic Party's change in procedures for nominating delegates to the Democratic National Convention.[249] Believing that the Supreme Court's affirmance of *Williams* was "entitled to precedential weight,"[250] Justice Thomas approvingly cited the decision of the district court for the proposition that "[t]he Act does not refer to actions by political parties but refers to actions by a '*State or political subdivision.*'"[251] In Thomas' opinion, because a political party cannot be considered a State or a political subdivision under the terms of Section 5, the Republican Party of Virginia's delegate filing fee should not be subject to Section 5 preclearance.

Addressing the *White Primary Cases* and the state action doctrine, Justice Thomas considered what he viewed as the "only conceivable basis in law for deeming the acts of the Party to be those of the State."[252] Justice Thomas, however, rejected the proposition that "the meaning of the statutory term 'State' in [Section] 5 is necessarily coterminous with the constitutional doctrine of state action."[253] Justice Thomas noted that "[t]here is a marked contrast between the language of [Section] 5 and other federal statutes that we have read to be coextensive with the constitutional doctrine of state action."[254] Because other portions of the Voting Rights Act contain the language which Congress has traditionally used to denote the inclusion of the constitutional state action doctrine—"acting under color of law"—Justice Thomas argued that Section 5 should not be read as being coextensive with the state action doctrine. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is gener-

247. *Morse*, 116 S. Ct. at 1225 (Thomas, J., dissenting).
248. Civ. Action No. 16286 (N.D. Ga. Apr. 6, 1972), *aff'd*, 409 U.S. 809 (1972).
249. *See id.*
250. *Morse*, 116 S. Ct. at 1225 (Thomas, J., dissenting).
251. *Id.* (Thomas, J., dissenting) (citing Civ. Action No. 16286, slip op. at 4) (emphasis added).
252. *Morse*, 116 S. Ct. at 1228 (Thomas, J., dissenting).
253. *Id.* (Thomas, J., dissenting).
254. *Id.* (Thomas, J., dissenting).

ally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[255]

In addition, Justice Thomas found that inclusion of the Party's delegate filing fee is not consistent with the "public function" test adopted by the Court in previous state action cases.[256] The public function doctrine provides that "'the relevant question is not simply whether a private group is serving a public 'function.' Instead, '[w]e have held that the question is whether the function performed has been 'traditionally the exclusive prerogative of the State.'"[257] Justice Thomas, quoting *Flagg Bros. v. Brooks*,[258] further noted that "it is only 'the conduct of the elections themselves [that] is an exclusively public function.'"[259]

Even if the Party could be considered a State in the statutory or constitutional sense, Justice Thomas concluded that the Court wrongly decided this case because charging a delegate filing fee as a prerequisite for participation in a state nominating convention does not constitute a change with respect to voting.[260] Justice Thomas rejected the assertion that the delegate filing fee at issue is a change with respect to voting because: (1) Section 14 of the Act defines "vote or voting" as actions relating only to "primary, special or general elections;"[261] (2) other federal election statutes specifically mention conventions in their coverage, and as a result "Congress obviously knows how to cover nominating conventions when it

255. *Id.* (Thomas, J., dissenting) (quoting Russello v. United States, 464 U.S. 16, 23 (1983)); *see* Fortune v. Kings County Democratic County Comm., 598 F. Supp. 761, 762 (implying a right of action based on context of section and mandate that Act be liberally construed).

256. *Morse*, 116 S. Ct. at 1231 (Thomas, J., dissenting).

257. *Id.* (Thomas, J., dissenting) (quoting Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982)); *see* Ronna Greff Schneider, *The 1982 State Action Trilogy: Doctrinal Contraction, Confusion, and a Proposal for Change*, 60 NOTRE DAME L. REV. 1150 (1985) (discussing the perceived retreat of the Supreme Court under Chief Justice Burger with respect to the state action doctrine from the relatively expansive interpretation of the doctrine under the Vinson and Warren Courts).

258. 436 U.S. 149 (1978).

259. *Morse*, 116 S. Ct. at 1231 (Thomas, J., dissenting) (quoting *Brooks*, 436 U.S. at 158).

260. *See id.* at 1234 (Thomas, J., dissenting).

261. *Id.* (Thomas, J., dissenting).

wants to;"[262] and (3) contrary to the contentions of the majority, there is a functional difference between conventions and primaries.[263]

VI. CONCLUSION—IMPLICATIONS OF THE *MORSE* DECISION

The question *Morse* does not answer is: What now? A splintered Supreme Court, with three factions and five separate opinions, struggled to find the Republican Party of Virginia and its delegate filing fee subject to Section 5 preclearance. Just as the Court struggled, those trying to understand the exact foundations and parameters of the decision are left to grapple with the Court's decision.

The *Morse* decision is unfortunate not because it is necessarily an expansion of Section 5 jurisprudence, nor because it marks in some way a retreat from what has been perceived as a tightening of the Court's reading of Section 5. Rather, the Court's decision in *Morse* is unfortunate because of its complete departure from the text of Section 5 in finding political parties subject to preclearance. The Supreme Court has consistently read Section 5 expansively. This expansive approach, was nevertheless founded in the statute's express mandates. The broad reading of Section 5 with respect to types of *governmental entities* subject to preclearance makes sense. A State attempting to change its voting laws is certainly subject to the commands of the preclearance requirement. The Court has also appropriately construed the term "political subdivision" to include virtually all forms of local government entities. As the Court noted in *United States v. Board of Commissioners*,[264] the statutory language would be emasculated if the term "political subdivision," as it is defined in Section 14,[265] applied only to a "county or parish."[266] The terms "State or political subdivision" operate territorially with respect to the types of entities within "covered" jurisdictions that are subject to preclearance.[267]

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262. *Id.* at 1234-35 (Thomas, J., dissenting).
263. *See id.* at 1235 (Thomas, J., dissenting).
264. 435 U.S. 110 (1978).
265. *See supra* note 36.
266. *Sheffield*, 435 U.S. at 117-18.
267. *Id.* at 118.

The broad reading of Section 5 regarding the types of changes in voting practices subject to preclearance also makes sense. The Court recently affirmed the principle, first established in *Allen v. State Board of Elections,*[268] that Section 5 was "intended to reach any state enactment which altered the election law of a covered state in even a minor way."[269] In *Presley v. Etowah County Commission,*[270] the Court relied on this language from *Allen,* which incidentally supports the proposition that Section 5 applies only to governmental entities, reiterating the view that changes proposed by covered jurisdictions are subject to preclearance only if they relate to "voting."[271] *Allen* and its companion cases provide the framework for determining which types of changes in fact pertain to voting: (1) changes involving the manner of voting; (2) changes affecting the requirements and qualifications for candidacy; (3) changes relating to the composition of the electorate; and (4) changes creating or abolishing an elective office.[272] Again, the statutory language and the judicial gloss given the preclearance requirement make this reading of Section 5 a reasonable accommodation of the language and purposes of the Voting Rights Act.

The legislative history of the Act and the several extensions also lend support to the expansive reading that the Court has heretofore given the terms of Section 5. Congress was well aware of the determination of southern states and political subdivisions in trying to evade unfavorable court decrees.[273] Because of the ineffectiveness of the case-by-case method, Congress responded in a "permissibly decisive manner,"[274] by requiring those states with track records of voting discrimination to preclear any proposed changes in their voting laws or procedures.

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268. 393 U.S. 544 (1969).
269. *Id.* at 566.
270. 502 U.S. 491 (1992).
271. *See id.* at 501-02.
272. *See id.*
273. *See* H.R. REP. NO. 89-439 (1965), *reprinted in* U.S.C.C.A.N 2437, 2439 (noting that the "history of the 15th Amendment litigation in the Supreme Court reveals both the variety of means used to bar Negro voting and the durability of such discriminatory policies").
274. South Carolina v. Katzenbach, 383 U.S. 301, 335 (1966).

Bringing political parties within the scope of Section 5 is, however, a wholly different matter. In terms of statutory construction, the Supreme Court took a giant leap in reading the terms "State or political subdivision" to somehow include political parties. Indeed, the two opinions in *Morse* supporting the outcome of the case barely attempt to justify the inclusion of political parties within Section 5 based on the language of the statute. When Justice Stevens does so, he reaches beyond Section 5, for in Section 5 there is no support for such a reading. Justice Breyer's concurring opinion, ignores the language of the statute altogether.

A strange result then is reached in an even stranger fashion. Regardless of one's belief as to the appropriate outcome of *Morse*, Justice Thomas accurately described the nature of the case.[275] *Morse*, first and foremost, is a case of statutory construction; do the terms "State or political subdivision" as they are used in Section 5 include within their meaning political parties? Other considerations, such as the legislative history, the historical backdrop within which the Eighty-ninth Congress operated, the precedential weight of the *White Primary Cases*, and the deference due the Attorney General's regulation, take their appropriate places in the interpretative landscape. Yet, when called upon to interpret the meaning of the words of the statute, it is those very words which the five members of the "majority" give short shrift.

The irony of the *Morse* decision is that if the Republican Party had chosen the route of a primary, which it had the option of doing under Virginia law,[276] no filing fee would have been necessary. Under the primary method, however, there would have been nearly complete state involvement, including expenditures from the public fisc. In choosing a method of nomination whereby the Party could eschew financial reliance on the State, the Party took on the role of a state actor when it charged a filing fee.[277] In attempting to operate outside the shadow of state involvement, an ideologically attractive option

275. Morse v. Republican Party of Virginia, 116 S. Ct. 1186, 1222 (1996) (Thomas, J., dissenting).

276. *See* VA. CODE ANN. § 24.2-509(B) (Michie 1993).

277. *Morse*, 116 S. Ct. at 1214-15.

for the Republican Party of Virginia, the Party instead became an agent of the state and as a result, became subject to Section 5.

While potentially expansive in its reach, the implications of the Supreme Court's decision in *Morse* are likely to be minimal. The division among the members of the Court, the First Amendment freedom of association concerns acknowledged by all five opinions in *Morse*, and the cautionary statements of the members that voted to include the Party's delegate filing fee under Section 5's coverage, indicate that *Morse*, while representing an expansion of the preclearance requirement, will not have a significant impact on voting rights cases.

One potentially expansive result of the decision arises from the rule that it is not *proven* discriminatory changes which are subject to preclearance, but rather *potentially* discriminatory changes. In this regard the Court failed to adequately describe how the Party's delegate filing fee, which was required of all convention-goers, was potentially discriminatory. The Court seems willing to include administrative mechanisms implemented by private entities, such as a filing fee, which facilitate the administration of a nominating process without relying on state funding or intervention, within the coverage of Section 5's preclearance requirements.

While *Morse* does not adequately answer the question, "what now?," the various factions of the Court and their splintered views may provide some insight as to the implications of *Morse* on political party coverage under Section 5 of the Voting Rights Act. The concurring opinion is the proper starting place. In that opinion, Justice Breyer concluded that the "Court has not decided the exact boundaries that the Constitution draws around the subcategory of party rules subject to [Section] 5."[278]

"What now?" can perhaps best be answered by reference to what the three members concurring in the judgment determined need not be decided in *Morse*. It was the questions that the Court chose not to address which will most likely confront it in the future. The concurring opinion concluded that the precise questions which a political party will likely ask itself

278. *Id.* at 1216 (Breyer, J., concurring).

after reading *Morse* need not be resolved. Justice Breyer noted that the Court "need not go further in determining when party activities are, in effect, substitutes for state nominating primaries."[279] The concurring opinion declined to answer "just which party nominating convention practices fall within the scope of the Act."[280] Finally, the Court postponed further clarification on the regulation of party activities under Section 5's preclearance requirements because "First Amendment questions about the extent to which the Federal Government, through preclearance procedures, can regulate the workings of a political party convention, are difficult ones."[281] It is ironic that those members of the Court who extended the scope of Section 5 to new realms on the one hand, felt compelled on the other to show judicial restraint in exercising their expansive interpretation.

Two aspects of the *Morse* decision provide guidance in predicting the answers to the questions which the Court felt constrained to address. First, when one of the unanswered questions in *Morse* presents itself for judicial resolution in the Supreme Court, *Morse* will be instructive in determining which members of the Court assume a pivotal role. The four dissenters in *Morse* concluded for various reasons that Section 5 of the Voting Rights Act did not apply to political parties. Justices Stevens and Ginsburg, on the other hand, determined that political parties were, under the terms of the Attorney General's regulation, subject to Section 5. Justices Breyer, O'Connor, and Souter made their roles pivotal by deciding that Congress could not conceivably have intended to exclude the delegate filing fee from preclearance, while refusing to further define the conditions under which a political party must preclear.

The alignment of the members of the Court leads to the second aspect of the *Morse* decision which aids in understanding its implications on political party activity. The concurring opinion, in recognizing that some "party nominating convention

279. *Id.* at 1214 (Breyer, J., concurring).
280. *Id.* at 1215 (Breyer, J., concurring).
281. *Id.* (Breyer, J., concurring).

practices"[282] are subject to preclearance, also recognized the limitations "as to which voting related 'practices and procedures' must be precleared."[283] These limitations are articulated in *Allen*[284] and *Presley*.[285] Only those changes which pertain to "voting" are subject to preclearance.[286] Furthermore, *Presley* instructs that the history of the Court's Section 5 cases suggests that there are four general categories of changes with respect to voting which are subject to preclearance.[287] The concurring opinion in *Morse* in turn instructs that the "substantial" limitation on the applicability of Section 5 to States and political subdivisions, as articulated in *Presley*, similarly applies to the applicability of Section 5 to political parties.[288] While providing some guidance for future cases regarding political party activities and preclearance, the most obvious and disturbing question that must be asked is where does a delegate filing fee to a nominating convention fall within these categories, for it does not very neatly fit within any.

Justice Breyer, perhaps inadvertently, places further limitations on the extent to which political party activity is subject to Section 5. One of the questions he declines to answer in *Morse* is "which *party nominating convention practices* fall within the scope of the Act."[289] This is very different from asking "which *party practices* fall within the scope of the Act." The importance of the words "party nominating convention practices," as distinguished from "party practices," is potentially significant. If the Republican Party of Virginia charges a fee of twenty-five to thirty-five dollars as a prerequisite for members to join its ranks in a year when it chooses its candidates in a primary election, must the fee be precleared. If the answer turns on the plain meaning of "which *party nominating convention practices* fall within the scope of the Act," the answer must surely be no.

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282. *Id.* (Breyer, J., concurring).
283. *Id.* (Breyer, J., concurring).
284. Allen v. State Bd. of Educ., 393 U.S. 544 (1969).
285. Presley v. Etowah County Comm'n, 502 U.S. 491 (1992).
286. *See id.* at 501-02.
287. *See id.* at 502-03.
288. Morse v. Republican Party, 116 S. Ct. 1186, 1215 (1996) (Breyer, J., concurring).
289. *Id.* (Breyer, J., concurring).

As five members of the *Morse* Court demonstrated, however, the plain meaning of certain words is of little import.

Matthew M. Farley