

## THE ALABAMA FOUNDATIONS OF THE LAW OF DEMOCRACY

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Reaching for the world, as our lives do,  
As all lives do, reaching that we may give  
The best of what we are and hold as true:  
Always it is by bridges that we live.<sup>1</sup>  
—Philip Larkin, *Bridge for the Living*

Bridges hold this power because they enable us to get across perilous gaps and to continue our journey forward. They are a physical manifestation of the urge to connect otherwise separated spaces. They are a triumph of human engineering. Their construction demands sustained effort and teamwork by scores of individuals.

The most famous bridge in American constitutional history is the Edmund Pettus Bridge. At that bridge fifty years ago, the marchers gave the best of what *they* were and held as true, and their bravery spurred the introduction and passage of the Voting Rights Act of 1965, which President Lyndon Johnson rightly characterized as “one of the most monumental laws in the entire history of American freedom.”<sup>2</sup> A leader of that march—then-student, now-Representative John Lewis—famously said that “Barack Obama is what comes at the end of that bridge in Selma,<sup>3</sup> but that is not the

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1. PHILIP LARKIN, *Bridge for the Living*, in COLLECTED POEMS 203, 204 (Anthony Thwaite ed., 1988).

2. Lyndon B. Johnson, President of the U.S., Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act (Aug. 6, 1965), in 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON, 1965, at 840, 841 (1966).

3. David Remnick, *The President's Hero: John Lewis and Barack Obama*, NEW YORKER, Feb. 2, 2009, <http://www.newyorker.com/magazine/2009/02/02/the-presidents-hero>.

full story. We do not know—and indeed, we can never fully know—what comes at the end of a “Bridge To Freedom,” and a journey toward equality, that began long before Bloody Sunday and that will continue long after any of us is here to participate. And just as important, the goal at the end of that bridge has always been more about empowering individual citizens than about electing particular candidates.

Transforming a nation’s ideals about democracy into practical reality—building a bridge from theory to implementation—is one of the central jobs of legal doctrine. At the end of the Selma to Montgomery March, when Dr. Martin Luther King Jr. returned to the city where the modern civil rights movement had one of its foundational moments, he observed that, while the movement had by then swept the country, “strangely, the climactic conflicts always were fought and won on Alabama soil.”<sup>4</sup> Strikingly, that has been equally true with respect to the development of legal doctrine regarding voting rights.

The history of voting rights is marbled with significant cases from Alabama, stretching back at least to *Giles v. Harris*<sup>5</sup> and forward to this past Term’s decision in *Alabama Legislative Black Caucus v. Alabama*.<sup>6</sup> This Article focuses on three intermediate developments that have shaped the current legal landscape: the announcement of one person, one vote; the creation of the Voting Rights Act’s preclearance regime; and the articulation of the framework for proving racial vote dilution under section 2 of the Act. In each case, the Alabama experience informed how the doctrine developed. This Article considers not only how these innovations came to be, but also what lessons they may provide as the United States confronts a new generation of voting rights challenges.

#### ONE PERSON, ONE VOTE

In his memoirs, Chief Justice Earl Warren called *Reynolds v. Sims*<sup>7</sup>—and not, say, *Brown v. Board of Education*,<sup>8</sup> *Loving v. Virginia*,<sup>9</sup> or *Miranda v. Arizona*<sup>10</sup>—his most important opinion.<sup>11</sup> To be sure, he was

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4. Martin Luther King, Jr., Address at the Conclusion of the Selma to Montgomery March (Mar. 25, 1965), in *A CALL TO CONSCIENCE: THE LANDMARK SPEECHES OF DR. MARTIN LUTHER KING, JR.* 119, 120 (Clayborne Carson & Kris Shepard eds., 2001).

5. 189 U.S. 475 (1903). For a penetrating treatment of *Giles*, see Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295 (2000).

6. 135 S. Ct. 1257 (2015). In the interest of full disclosure, I note that I worked on prior proceedings in this case, although I did not participate here.

7. 377 U.S. 533 (1964).

8. 347 U.S. 483 (1954).

9. 388 U.S. 1 (1967).

10. 384 U.S. 436 (1966).

overly optimistic about its potential. He thought that the Court had “insured that henceforth elections would reflect the collective public interest—embodied in the ‘one-man, one-vote’ standard—rather than the machinations of special interests.”<sup>12</sup> But gerrymandering and other electoral manipulations have continued.<sup>13</sup> Indeed, gerrymandering has become more sophisticated than ever. Still, the underlying idea that Chief Justice Warren was expressing—that how we draw electoral districts determines the kind of democracy we have—remains spot on.

In one sense, it was a fortuity that the Court announced the requirement of one person, one vote in a case from Alabama: the Court simultaneously decided six different state legislative apportionment cases,<sup>14</sup> and there were another dozen or so right behind them.<sup>15</sup> But in a deep sense, there is something especially fitting in *Reynolds* being selected as the flagship case to announce a principle of fundamental equality and democracy. Bernard A. Reynolds was the probate judge, and thus the chief election official, for Dallas County, Alabama<sup>16</sup>—whose county seat is (of course) Selma. Indeed, in 1965, he found himself a party in one of the first cases under the new Voting Rights Act, when he sought guidance about the conflicting commands he was receiving from the Department of Justice and from the state courts about how to handle the voter registration applications certified by federal examiners.<sup>17</sup>

More profoundly, Chief Justice Warren “used to say that if *Reynolds v. Sims* had been decided before 1954, *Brown v. Board of Education* would have been unnecessary.”<sup>18</sup> The connection he drew between unequal

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11. G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 337 (1982).

12. *Id.* Note that in his *opinion* he used the more inclusive phrase, “one person, one vote.” *Reynolds*, 377 U.S. at 558 (emphasis added) (quoting *Gray v. Sanders*, 372 U.S. 368, 381 (1963)).

13. See Pamela S. Karlan, *The Rights To Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1705 (1993) (stating that measured against Chief Justice Warren’s ambition, “*Reynolds* has been a spectacular failure” because “[a]dvances in the technology of districting have stripped the substantive principles of one-person, one-vote of any real constraining force” on political manipulation of district lines).

14. The other five decisions involved Colorado, see *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713 (1964); Delaware, see *Roman v. Sincok*, 377 U.S. 695 (1964); Maryland, see *Md. Comm. for Fair Representation v. Tawes*, 377 U.S. 656 (1964); New York, see *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964); and Virginia, see *Davis v. Mann*, 377 U.S. 678 (1964).

15. See generally J. DOUGLAS SMITH, ON DEMOCRACY’S DOORSTEP: THE INSIDE STORY OF HOW THE SUPREME COURT BROUGHT “ONE PERSON, ONE VOTE” TO THE UNITED STATES (2014) (discussing the various litigation).

16. Brief for Appellants B.A. Reynolds, etc., et al. at 15–16, *Reynolds*, 377 U.S. 533 (No. 23-1963), 1963 WL 105672, at \*15–16.

17. See *Reynolds v. Katzenbach*, 248 F. Supp. 593, 594–95 (S.D. Ala. 1965) (three-judge panel) (requiring Reynolds and his colleagues to place registrants on the voting rolls).

18. John Hart Ely, *The Chief*, 88 HARV. L. REV. 11, 12 (1974). It is interesting to note that the Court chose to make two cases from the South—*Reynolds*, 377 U.S. 533 (from Alabama, imposing the requirement on state legislative districts), and *Wesberry v. Sanders*, 376 U.S. 1 (1964) (from Georgia,

apportionments frozen in time and the persistence of Jim Crow was well understood by those who lived through the Second Reconstruction.<sup>19</sup> While attitudes towards de jure segregation were changing across the country, including in much of the South, the political composition of state legislatures failed to keep pace. Refusals to reapportion, combined with state constitutional provisions that allocated seats on the basis of county lines rather than population, gave disproportionate influence—often amounting to a veto power—to white legislators from under-populated, rural, and heavily black districts where the white minority was especially resistant both to black enfranchisement and to dismantling segregation.<sup>20</sup>

The *Reynolds* Court had only recently seen that resistance up close, when it confronted the notorious Tuskegee gerrymander in *Gomillion v. Lightfoot*.<sup>21</sup> The whole point of redrawing the city's municipal boundaries was to exclude as many highly educated, civically active black citizens as possible, and to do so before they could form a majority of the electorate in a majority black city.<sup>22</sup> Indeed, another one of Alabama State Senator Sam Englehardt's proposals would have abolished majority-black Macon

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imposing the requirement on congressional districts)—the flagship opinions for announcing the requirement of one person, one vote. When it came to striking down de jure segregation in public schools, the Court consolidated cases from Delaware (*Gebhart v. Belton*), Kansas (*Brown v. Board of Education*), South Carolina (*Briggs v. Elliott*), and Virginia (*Davis v. County School Board*). See *Brown v. Bd. of Educ.*, 347 U.S. 483, 486 n.1 (1954). Justice Tom Clark later explained that the Court “made *Brown* the first [one]” when it announced its opinion “so that the whole question would not smack of being a purely Southern one.” RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 540 (1975); see also Paul E. Wilson, *The Genesis of Brown v. Board of Education*, KAN. J.L. & PUB. POL'Y, Fall 1996, at 7, 14 (explaining that the NAACP chose Kansas as one of its targets along with several southern states because “it was felt that Kansas, with its unique history and relatively small black population, would offer less resistance to a lawsuit to end segregation than states where patterns of discrimination were broader and more firmly entrenched”).

19. See SMITH, *supra* note 15, at 5 (describing how “malapportionment served as a cornerstone of white supremacy, ensuring the overrepresentation of the most ardent segregationists”); *id.* at 131 (noting that in their brief in *Gray v. Sanders*, 372 U.S. 368 (1963), a malapportionment-based challenge to Georgia's county unit system, the plaintiffs “explicitly ma[de] the connection between [numerical] minority control and racial discrimination”).

20. See Samuel Issacharoff & Pamela S. Karlan, *Where To Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 544 (2004) (describing many pre-*Reynolds* legislatures as “backwater relics of past political deals, controlled by lawmakers from rural hamlets in decline whose reactionary politics stymied the interests of voters in the burgeoning cities and suburbs”); Anthony Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057, 1065–66 & 1065 n.44 (1958) (commenting on the consequences of malapportioned state legislatures for civil rights).

21. 364 U.S. 339 (1960).

22. See generally BERNARD TAPER, *GOMILLION VERSUS LIGHTFOOT* (1962); Luis Fuentes-Rohwer, *Doing Our Politics in Court: Gerrymandering, “Fair Representation” and an Exegesis into the Judicial Role*, 78 NOTRE DAME L. REV. 527, 574 (2003).

County altogether—it apparently foundered because no adjacent county was willing to take in Tuskegee.<sup>23</sup>

*Gomillion* was the opening wedge in the Supreme Court’s willingness to engage in judicial review of electoral boundaries. Justice Felix Frankfurter, the opinion’s author, relied on the Fifteenth Amendment, rather than the Fourteenth, in the hope that this would cabin the Court’s intervention to cases of racial discrimination.<sup>24</sup> But *Gomillion* was at its core a case about politics in a region where politics was inevitably inflected by race. This racial overlay apparently explains one of the major stumbling blocks the Alabama legislature faced when it first addressed reapportionment after the federal district court held that the state’s continued adherence to the 1901 apportionment violated equal protection. The adjoining counties were all unwilling to be placed in a district with Macon County lest the district ultimately be controlled by black voters.<sup>25</sup>

Although everyone involved in *Reynolds* understood the racial implications of the case,<sup>26</sup> it was framed and decided almost entirely as a case about individual rights. The Court insisted “the rights allegedly impaired” by population disparities among districts “are individual and personal in nature;”<sup>27</sup> this meant that “each and every citizen has an inalienable right to full and effective participation in the political processes of his State’s legislative bodies.”<sup>28</sup> Thus, the Court declared, “[t]o the extent that a citizen’s right to vote is debased, he is that much less a citizen.”<sup>29</sup> And as the Court explained the same day in its companion decision, *Lucas v. Forty-Fourth General Assembly*,<sup>30</sup> where it struck down an apportionment recently approved by a majority of the Colorado electorate, “[a]n individual’s constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a

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23. See ALA. CONST. amend. CXXXII (amending the state constitution in order to abolish Macon County altogether if necessary), *repealed by* ALA. CONST. amend. CDVI; ROBERT J. NORRELL, REAPING THE WHIRLWIND: THE CIVIL RIGHTS MOVEMENT IN TUSKEGEE 96–97 (1985).

24. See Jonathan L. Entin, *Of Squares and Uncouth Twenty-Eight-Sided Figures: Reflections on Gomillion v. Lightfoot After Half a Century*, 50 WASHBURN L.J. 133, 143 (2010).

25. See SMITH, *supra* note 15, at 130–31.

26. Ironically, “[h]ad legislative districts in Alabama remained skewed heavily in favor of the Black Belt counties, as they had been between 1901 and the 1964 Supreme Court decision in *Reynolds v. Sims*,” the enfranchisement of black voters after passage of the Voting Rights Act might have resulted in Alabama’s black community having “substantially more power” than they would enjoy “in an equally apportioned legislature.” J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965–2007*, 86 TEX. L. REV. 667, 690 (2008) (citing James U. Blacksher & Larry T. Menefee, *From Reynolds v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HASTINGS L.J. 1, 39 (1982)).

27. *Reynolds v. Sims*, 377 U.S. 533, 561 (1964).

28. *Id.* at 565.

29. *Id.* at 567.

30. 377 U.S. 713 (1964).

State's electorate."<sup>31</sup> Quoting the *Flag Salute Case*, the Court reiterated that "fundamental rights may not be submitted to vote; they depend on the outcome of no elections"<sup>32</sup>—and concluded that "[a] citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be."<sup>33</sup>

*Reynolds*, although it was a decision about what came to be called quantitative vote dilution, also provided the foundation for claims of qualitative vote dilution. These claims involve allegations that although an identifiable group of citizens are able to cast ballots and have those ballots counted, their preferences are being systematically canceled out by second-generation barriers, such as the use of at-large elections—ironically, the ultimate in one person, one vote—or the use of districting plans that carve up cohesive communities and submerge group members in districts where they are outvoted.<sup>34</sup>

What lessons might we learn from *Reynolds* and the one person, one vote cases? The first is to recognize the enduring connection between race and politics that often lurks under the surface even of political arrangements that are not on their face directed at racial issues.<sup>35</sup> A key question in much contemporary voting-rights litigation is whether a challenged practice rests on partisan or racial motivations. The answer to this perhaps-unresolvable question matters because if race is the "predominant factor" in explaining the configuration of a challenged electoral district, then strict scrutiny is triggered and the district will

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31. *Id.* at 736.

32. *Id.* (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)).

33. *Id.* at 736–37.

34. The distinction between "quantitative" and "qualitative" vote dilution claims was articulated in *Nevett v. Sides*, 571 F.2d 209 (5th Cir. 1978). "Quantitative" vote dilution cases are "based solely on a mathematical analysis" that shows that the votes of persons in one district are devalued relative to the votes of persons in a less populated district. *Id.* at 215. "Qualitative" vote dilution claims, by contrast, arise when, even though there is population equality across districts, "the election method impairs the political effectiveness of an identifiable subgroup of the electorate," and thus, "the quality of representation' the affected group receives is adversely affected." Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 176 (1989) [hereinafter Karlan, *Maps and Misreadings*] (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 142 (1971)); see also Pamela S. Karlan, *Answering Questions, Questioning Answers, and the Roles of Empiricism in the Law of Democracy*, 65 STAN. L. REV. 1269, 1289 (2013) [hereinafter Karlan, *Answering Questions*] (describing the move from quantitative to qualitative vote dilution claims).

35. For one recent example of how this inquiry plays out, see *Page v. Va. State Bd. of Elections*, 58 F. Supp. 3d 533, 540–50 (E.D. Va. 2014) (three-judge panel), *vacated and remanded sub nom. Cantor v. Personhuballah*, 135 S. Ct. 1699 (2015), *on remand*, No. 3:13cv678, 2015 WL 3604029 (E.D. Va. June 5, 2015) (three-judge panel), *petition for cert. docketed sub nom. Wittman v. Personhuballah*, No. 14-1504, 2015 WL 3604029 (U.S. Jun. 22, 2015), *question of jurisdiction postponed to hearing on merits*, 2015 WL 3867187 (U.S. Nov. 13, 2015).

survive a Fourteenth Amendment-based “*Shaw* challenge”<sup>36</sup> only if it is narrowly tailored to achieve a compelling government interest.<sup>37</sup> By contrast, if political motivations predominate, then plaintiffs may be out of luck because the Supreme Court has shown itself unwilling or unable to articulate a judicially enforceable prohibition for political gerrymanders under the Fourteenth Amendment.<sup>38</sup>

The distinction between the constitutional significance of racial and partisan motivations was developed largely in the context of challenges to so-called “second generation” practices—that is, structural features that dilute the effectiveness of the plaintiffs’ votes. By contrast, “first generation” practices involve “direct impediments to electoral participation, such as registration and voting barriers.”<sup>39</sup> For much of the Voting Rights Act’s history, there was relatively little section 2 litigation focused on first-generation problems—perhaps because “the effectiveness of the now-defunct section 5 preclearance requirements . . . stopped would-be vote denial from occurring” in many of the jurisdictions where it had historically occurred.<sup>40</sup> Recent years have seen the emergence of a second generation of first-generation problems involving practices such as restrictive voter ID laws and cutbacks in registration opportunities.<sup>41</sup>

*Reynolds* shows how sometimes even issues with a strong racial valence can be addressed, at least in important part, by rules of more universal applicability. Here, the widespread and rapid acceptance of one person, one vote shows the power that can come from principles couched in those more universal terms.<sup>42</sup>

The second lesson follows from that point. Early criticisms of one person, one vote focused in part on its mechanical quality. Justice Potter

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36. So called because this cause of action was first articulated in *Shaw v. Reno*, 509 U.S. 630 (1993).

37. *Miller v. Johnson*, 515 U.S. 900, 915 (1995).

38. See *Vieth v. Jubelirer*, 541 U.S. 267 (2004); Issacharoff & Karlan, *supra* note 20 (describing the legal landscape). Note that even if political considerations predominated, a district may be amenable to challenge under section 2 of the Voting Rights Act, 52 U.S.C.S. § 10301 (LexisNexis 2014), if purposeful racial discrimination played a role in its adoption or retention and the district’s configuration denies members of a racial or language minority group an equal opportunity to participate and elect candidates of its choice. See *Chisom v. Roemer*, 501 U.S. 380, 404 (1991); *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 766 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991).

39. Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1093 (1991) (describing this taxonomy).

40. *League of Women Voters*, 769 F.3d at 239.

41. See generally Dale E. Ho, *Voting Rights Litigation After Shelby County: Mechanics and Standards in Section 2 Vote Denial Claims*, 17 N.Y.U. J. LEGIS. & PUB. POL’Y 675 (2014); Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689 (2006).

42. See Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289, 1345–51 (2011) (discussing the power of the “universalist turn” in voting rights).

Stewart, for example, derided it as “the uncritical, simplistic, and heavy-handed application of sixth-grade arithmetic.”<sup>43</sup> But in a very important sense, the clear character of the rule is its strong suit, particularly once the realities of litigation are taken into account. Among other things, it has enabled line-drawers to know ahead of time what the rules of the game are. And it has enabled the Supreme Court to avoid inserting itself too visibly and too repeatedly into the political process. These considerations inform current litigation as well. Developing an analytic framework for first-generation challenges poses a series of challenges that practitioners and scholars are only beginning to undertake.<sup>44</sup> Still, existing doctrine cuts in favor of at least one bright-line rule with respect to first-generation challenges: *Any* partisan motivation for rules that impose a barrier to registering, casting a ballot, and having that ballot counted should fail constitutional scrutiny. The Supreme Court long ago held that “[f]encing out’ from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.”<sup>45</sup> Courts have already held that it is illegitimate to erect barriers to servicemembers’ registration and voting in order to “prevent the danger of a ‘takeover’ of the civilian community resulting from concentrated voting by large numbers of military personnel”;<sup>46</sup> to college students’ voting because “allowing students to register and vote would not be fair” to longer-term residents “who [will] be present in the county long after” students are gone;<sup>47</sup> or to recent arrivals’ voting because newly arrived residents “may have a more national outlook than longtime residents, or even may retain a viewpoint characteristic of the region from which they have come.”<sup>48</sup> It is even less possible to see any legitimate reason why a jurisdiction can deliberately choose election rules in part because they make it more difficult for voters affiliated with a particular political party to participate.<sup>49</sup>

The third lesson of *Reynolds* stems from the central consequence of one person, one vote. Advances in the technology of reapportionment have prevented one person, one vote from achieving the ambitious goal Chief

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43. *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 750 (1964) (Stewart, J., dissenting).

44. For important examples, see SPENCER OVERTON, *STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION* (2007); Fishkin, *supra* note 42; Ho, *supra* note 41; and Tokaji, *supra* note 41.

45. *Carrington v. Rash*, 380 U.S. 89, 94 (1965).

46. *Id.* at 93.

47. *United States v. Texas*, 445 F. Supp. 1245, 1248 (S.D. Tex. 1978) (three-judge panel), *aff’d sub nom. Symm v. United States*, 439 U.S. 1105 (1979) (mem.).

48. *Dunn v. Blumstein*, 405 U.S. 330, 355 (1972).

49. *Cf. Rutan v. Republican Party of Ill.*, 497 U.S. 62, 64 (1990) (holding that because “[t]o the victor belong only those spoils that may be constitutionally obtained,” the First Amendment prohibited differential treatment of most public employees on the basis of their political affiliation).



Justice Warren had for it. Nonetheless, one person, one vote continues to exert tremendous influence on the democratic process because its formal requirement of equipopulous districting interacts with the decennial census to mandate revisiting electoral boundaries every ten years. We might even take this lesson up a level or two of abstraction: *Reynolds* sends a message that it is important periodically to rethink how to achieve full, equal, and effective political participation by all citizens. Even rules that were entirely sensible when they were adopted may fail to provide equal opportunity in light of changed conditions.

#### THE PRECLEARANCE REGIME

If *Reynolds* was about unclogging the “channels of political change,” to quote John Hart Ely’s description of the second *Carolene Products* rationale for judicial review,<sup>50</sup> a second Alabama-inspired doctrinal development foregrounds a reciprocal notion—the concept of “freezing” existing arrangements into place to combat unfair changes.<sup>51</sup> And here we come to the emergence of the Voting Rights Act of 1965 whose semicentennial this Symposium celebrates. That Congress passed a voting rights statute in 1965 was the product of a wide array of social and political forces. That it passed *the* Voting Rights Act of 1965, with its “wide menu of innovative techniques,”<sup>52</sup> was in significant part due to the federal government’s experience in Alabama over the previous half-dozen years trying to vindicate the voting rights of the state’s black citizens.

The difficulties Alabama’s black citizens faced in registering to vote were the product of a constellation of factors. Alabama had long imposed a literacy requirement on voters.<sup>53</sup> Not only was the requirement often enforced in a discriminatory manner—with highly educated black applicants being turned down by the same registrars who permitted family members to fill out the form for illiterate whites—but discrimination in the public education system left many black applicants ill-equipped to pass even a fairly administered test.<sup>54</sup> On top of the literacy requirement,

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50. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 74 (1980).

51. The best account of the freezing principle appears in BRIAN K. LANDSBERG, *FREE AT LAST TO VOTE: THE ALABAMA ORIGINS OF THE 1965 VOTING RIGHTS ACT* 84–105 (2007).

52. *Id.* at 3.

53. See *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2619 (2013) (tracing Alabama’s use of the literacy test back to the disenfranchisement movement of the 1890s); *Davis v. Schnell*, 81 F. Supp. 872, 878–81 (S.D. Ala. 1949) (three-judge panel) (discussing the discriminatory evolution of Alabama’s literacy requirement), *aff’d*, 336 U.S. 933 (1949).

54. Cf. *Gaston Cnty., N.C. v. United States*, 395 U.S. 285, 296–97 (1969) (pointing to “the sad truth” that when a southern jurisdiction had “systematically deprived its black citizens of the

registrars often demanded that applicants be accompanied by a registered voter as a supporting witness—ostensibly to verify their identity.<sup>55</sup> But the effect of these vouching requirements was to make black suffrage dependent on white sufferance. And finally, voter registration was a decentralized affair, run at the county level by officials who offered voter registration for only a few hours each month<sup>56</sup> and who exercised hard-to-observe discretion in carrying out their responsibilities.

The federal experience challenging this registration system was not propitious. It took hundreds, even thousands, of hours per county to show that the test was being implemented in a discriminatory manner.<sup>57</sup> The most directly effective form of relief—an order placing a particular black citizen on the voting rolls—was available only when that individual had already attempted to register; it did very little for those citizens who had been deterred from trying, and nothing for those citizens who could not have passed even a fairly administered literacy test. And while the litigation was proceeding, the state implemented a more difficult registration form, meaning that black voters would face a more difficult process than their already registered white neighbors had confronted.<sup>58</sup>

In response to these difficulties, the federal government ultimately persuaded several courts, in Alabama and elsewhere across the South, to adopt a “freezing” principle. The principle had two complementary components. As Judge Richard Rives explained for the Fifth Circuit in a case involving registration in Dallas County that had been filed four years before Bloody Sunday, the freezing principle condemned the adoption of new laws that would undercut successes already achieved through litigation.<sup>59</sup> “Freezing,” he explained, “results when there have been past discriminatory practices, these practices are discontinued, but some action is taken which is designed to retain the status quo, the position of advantage which one class has already obtained over the other.”<sup>60</sup> Even new requirements that were neutral on their face might thus improperly

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educational opportunities it granted to its white citizens,” even “[i]mpartial’ administration of the literacy test today would serve only to perpetuate these inequities in a different form”).

55. See LANDSBERG, *supra* note 51, at 49; Peyton McCrary, Jerome A. Gray, Edward Still & Huey L. Perry, *Alabama, in* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990, at 38 (Chandler Davidson & Bernard Grofman eds., 1994).

56. See LANDSBERG, *supra* note 51, at 18.

57. See *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966) (observing that “[v]oting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 man-hours spent combing through registration records in preparation for trial”).

58. See LANDSBERG, *supra* note 51, at 19, 103.

59. *United States v. Atkins*, 323 F.2d 733, 743 (5th Cir. 1963).

60. *Id.*

burden “primarily those who bore the brunt of previous discrimination.”<sup>61</sup> The second aspect of the freezing doctrine therefore required that the prior standard applied to white applicants be frozen into place—“keeping in effect, at least temporarily, those requirements for qualification to vote, which were in effect, to the benefit of others, at the time the Negroes were being discriminated against.”<sup>62</sup>

When the Johnson Administration and Congress turned to the job of crafting a new federal voting rights law, the Alabama experience was central to three provisions of the Act.<sup>63</sup> The first was a temporary suspension of literacy tests and vouching requirements. Solicitor General Archibald Cox pointed out that the “unequal educational opportunities” provided to black citizens in southern states “impaired the fairness and relevance of such tests,”<sup>64</sup> and the House Judiciary Committee more pointedly worried that allowing these tests to continue “would simply freeze the present registration disparity created by past violations of the 15th amendment.”<sup>65</sup> That temporary suspension was later made permanent and nationwide.<sup>66</sup> Today a number of different federal voting rights laws permit—and sometimes require—assistance for voters who lack the literacy to accomplish registration on their own.<sup>67</sup>

A second important provision of the 1965 Act was designed to get black voters on the rolls quickly regardless of local foot-dragging of the kind that had plagued Alabama. It provided for the appointment of federal

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61. *McGill v. Ryals*, 253 F. Supp. 374, 376 (M.D. Ala. 1966) (per Johnson, J.); *see also* *United States v. Duke*, 332 F.2d 759, 768–69 (5th Cir. 1964) (discussing the freezing principle).

62. *Duke*, 332 F.2d at 769.

63. *See* LANDSBERG, *supra* note 51, at 162–72.

64. *Id.* at 158.

65. *Id.* at 154–55.

66. *See* 52 U.S.C.S. § 10501 (LexisNexis 2014); *see also* Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725, 727 n.13 (1998) (describing how the federal ban on literacy tests was broadened between 1965 and 1975).

67. For example, section 208 of the Voting Rights Act provides, among other things, that “[a]ny voter who requires assistance to vote by reason of . . . inability to read or write may be given assistance by a person of the voter’s choice.” 52 U.S.C.S. § 10508 (LexisNexis 2014). *See generally* JEANETTE LEE, TERRY AO MINNIS & CARL HUM, *ASIAN AMS. ADVANCING JUSTICE, THE RIGHT TO ASSISTANCE OF YOUR CHOICE AT THE POLLS: HOW SECTION 208 OF THE VOTING RIGHTS ACT SHOULD WORK TO PROTECT OUR VOTE AND OUR DEMOCRACY* (2014), [http://www.advancingjustice-aajc.org/sites/aajc/files/Final%20Section%20208%20Report\\_0.pdf](http://www.advancingjustice-aajc.org/sites/aajc/files/Final%20Section%20208%20Report_0.pdf) (discussing section 208). Section 7 of the National Voter Registration Act requires that specified social service agencies serve also as voter registration and “provide to each applicant” for their public assistance benefits “who does not decline to register to vote the same degree of assistance with regard to the completion of the registration application form as is provided by the office with regard to the completion of its own forms, unless the applicant refuses such assistance.” 52 U.S.C.S. § 20506(a)(6)(C) (LexisNexis 2014).

examiners in jurisdictions across the South, and required that applicants they certified be placed on the registration lists immediately.<sup>68</sup>

This provision is little discussed today, but its effect was swift and massive. In the two years following passage of the Act, the Administration used civil service employees to register more African-Americans in the South than had been registered in the entire century since the Fifteenth Amendment had been ratified.<sup>69</sup> In 2006, Congress found that the federal examiner provisions had “successfully served their purpose.”<sup>70</sup> In light of the “enactment of more recent Federal laws encouraging and supporting voter registration” like the National Voter Registration Act and the Help America Vote Act,<sup>71</sup> Congress found that the examiner provisions likely had “outlived their usefulness” and repealed them.<sup>72</sup>

Finally, of course, there was the preclearance regime of section 5—a codification of the “freezing” principle. The preclearance requirement forbid a jurisdiction from “enact[ing] or seek[ing] to administer” any change to its voting practices or procedures unless it first obtains a determination from either a three-judge federal court in the District of Columbia or the Attorney General of the United States that the change “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race” or membership in a language minority group.<sup>73</sup>

Preclearance—which was imposed on a group of jurisdictions that had had a history of purposeful discrimination in the electoral process—accomplished a slew of goals. By freezing the existing rules into place, it “shifted the advantages of time and inertia from the perpetrators of the evil to its victims.”<sup>74</sup> Aspiring voters did not have to race into court to prove that a new rule was discriminatory before it was applied to them in an upcoming election. Indeed, the burden of *disproving* discrimination was placed on the jurisdiction. Litigation itself became less important in enforcing voting rights, since section 5 coverage lawsuits were, in the

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68. See *South Carolina v. Katzenbach*, 383 U.S. 301, 316 (1966) (describing the interlocking provisions of the original version of the Voting Rights Act that provided for “the assignment of federal examiners on certification by the Attorney General to list qualified applicants who are thereafter entitled to vote in all elections”).

69. Chandler Davidson, *The Voting Rights Act: A Brief History*, in *CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE* 7, 21 (Bernard Grofman & Chandler Davidson eds., 1992).

70. H.R. REP. NO. 109-478, at 61 (2006), as reprinted in 2006 U.S.C.C.A.N. 618, 662.

71. *Id.* at 62.

72. *Id.*

73. 52 U.S.C.S. § 10304(a) (LexisNexis 2014).

74. *United States v. Bd. of Comm’rs*, 435 U.S. 110, 121 (1978); see also *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966) (describing this as Congress’s strategy with respect to the preclearance regime).

main, fairly straightforward, and preclearance itself was usually handled administratively.<sup>75</sup>

What lessons does the experience that produced the Voting Rights Act of 1965 teach? Here, as with *Reynolds* and the reapportionment revolution, the presence of clear-cut, easily applicable rules played a huge role in the Act's success. Moreover, Congress transformed the South by its decision to use its Reconstruction Amendment enforcement powers to ban discriminatory practices wholesale and to use an effects test—subsequently refined by the Supreme Court to a retrogression standard with a clear baseline<sup>76</sup>—rather than to require case-by-case adjudication of whether a particular practice in a particular jurisdiction had been adopted, maintained, or applied for a racially discriminatory purpose. Preclearance also prevented last-minute pre-election changes that disadvantaged minority voters. And the federal examiner provisions show that when there is a political commitment to effective voter registration, it *can* be accomplished swiftly.

#### THE GINGLES TEST

But voter registration is only one step on the journey that took the marchers over the Edmund Pettus Bridge. To be sure, being registered and casting a ballot is a powerful symbol of equality no matter the outcome of the election. In recent challenges to state voter identification laws, numerous witnesses have testified about how important voting is to their dignity as full citizens.<sup>77</sup> But voting also serves a critical *functional* purpose: It is designed to aggregate the preferences of individual citizens to reach some collective outcome—most often, in this republic, choosing the officials who will represent them in making policy.<sup>78</sup>

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75. For a discussion of this point, see generally McCrary et al., *supra* note 55.

76. See *Holder v. Hall*, 512 U.S. 874, 883 (1994) (plurality opinion) (noting that in section 5 cases, “[t]he baseline for comparison is present by definition” because it consists of the preexisting system).

77. See, e.g., *Texas v. Holder*, 888 F. Supp. 2d 113, 141 (D.D.C. 2012) (three-judge panel) (quoting testimony about how certain African-American senior citizens “want to go to the voting polls and stand in line and vote at the voting polls” because “[t]here’s a certain degree of dignity for them to do this”), *vacated and remanded*, 133 S. Ct. 2886 (2013). I have characterized this value as one of “civic inclusion”: “a sense of connectedness to the community and of equal political dignity; greater readiness to acquiesce in governmental decisions and hence broader consent and legitimacy.” Karlan, *Maps and Misreadings*, *supra* note 34, at 180; see also Guinier, *supra* note 39, at 1085 (discussing how voting, particularly in support of black candidates, served the civil rights movement’s goals of “affirmation of self-worth and human dignity”).

78. In earlier work, I introduced a three-part taxonomy for thinking about the right to vote: First, voting involves *participation*: the formal ability of individuals to enter into the electoral process by casting a ballot. Second, voting involves *aggregation*: the choice among rules for tallying individual votes to determine election outcomes. Finally, voting involves

Here, outcomes matter. And the outcome of an election can be influenced—indeed sometimes even determined—by how an electoral system is structured. Assertions that these rules are unfair involve claims of vote dilution, as opposed to vote denial.

To the best of my knowledge, the first racial vote dilution case brought in the modern era also arose in Alabama: *Smith v. Paris*.<sup>79</sup> The plaintiffs in *Smith* claimed that the Barbour County Democratic Executive Committee had switched from using district-based elections to using at-large elections suspiciously soon after the Voting Rights Act had resulted in majority-black electorates within four of the districts. Judge Frank Johnson had little trouble finding that, in light of the background history and “where the manifest consequences and clear effect of the resolution greatly diminish the effectiveness of the Negroes’ right to vote, an inference of a discriminatory purpose is compelling.”<sup>80</sup>

Vote dilution suits—some challenging recent enactments reacting to growing black or Latino political participation and others challenging longstanding practices—proliferated in the years after 1965.<sup>81</sup> In 1980, in yet another Alabama case, *City of Mobile v. Bolden*,<sup>82</sup> the Supreme Court held that plaintiffs bringing a racial vote dilution claim under either the Fourteenth Amendment or section 2 of the Voting Rights Act as it then stood were required to prove that the challenged practice had been adopted or maintained for a racially discriminatory purpose.<sup>83</sup> Such purposes were difficult and costly to prove; it took the Mobile plaintiffs several more years and several hundred thousand dollars’ worth of attorneys’ time to make the showing.<sup>84</sup> In the meantime, Congress amended the Voting Rights Act to establish a test for section 2 violations that looks at whether the challenged practice *results* in minority citizens having less opportunity than

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*governance*: It serves a key role in determining how decisionmaking by elected representatives will take place.

Karlan, *supra* note 13, at 1707–08.

79. 257 F. Supp. 901 (M.D. Ala. 1966), *modified*, 386 F.2d 979 (5th Cir. 1967).

80. *Id.* at 904.

81. For discussion of these suits, see McCrary et al., *supra* note 55.

82. 446 U.S. 55 (1980).

83. *Id.* at 62, 66.

84. Chandler Davidson, *The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities*, in QUIET REVOLUTION IN THE SOUTH, *supra* note 55, at 21, 29 (noting that the plaintiffs’ lawyers “logged 5,525 hours and spent \$96,000 in out-of-pocket fees” to prove Mobile’s at large system had been adopted and maintained for racially discriminatory purposes, and that these figures do not include the expenses incurred by the Department of Justice after it intervened or the costs of hiring the three historians who traced the history of Mobile’s election system, because those fees were not then compensable).

their white counterparts to participate in the political process and elect candidates of their choice.<sup>85</sup>

The statutory test for determining whether a practice violates section 2 looks to the “totality of circumstances.”<sup>86</sup> In explaining what this phrase means, Congress adverted to a list of nine illustrative factors that the old Fifth Circuit had distilled from a series of pre-*Bolden* Supreme Court decisions.<sup>87</sup>

But as the doctrine developed, the Supreme Court superimposed a more structured test on the practices most often challenged under section 2 after the 1982 amendments—at-large elections, multimember districts, and single-member district boundaries.<sup>88</sup> The test is known as the *Gingles* test because it was announced in a 1986 Supreme Court decision, *Thornburg v. Gingles*.<sup>89</sup> To be sure, that case was not itself from Alabama; it concerned the post-1980 round of state legislative redistricting in North Carolina. But even here, the test is rooted in Alabama. It was the brainchild of two graduates of the University of Alabama’s law school. And contrary to Chief Justice Roberts’ dismissal of legal scholarship as typically “likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in eighteenth-century Bulgaria, or something, which I am sure was of great interest to the academic that wrote it, but isn’t of much help to the bar,”<sup>90</sup> they articulated the test in a law review article.

Jim Blacksher and Larry Menefee were—and are—lifelong voting rights lawyers in Alabama.<sup>91</sup> They had been counsel for the plaintiffs in *City of Mobile v. Bolden*, and their frustration at the contrast between the success white plaintiffs had in the one person, one vote cases and the

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85. See 52 U.S.C.S. § 10301(a) (LexisNexis 2014) (providing 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 membership in a specified language minority group in subsection (b)).

86. *Id.* § 10301(b).

87. See S. REP. NO. 97-417, at 28–29 (1982), as reprinted in 1982 U.S.C.C.A.N. 177, 205–07.

88. For discussions of this doctrinal evolution and the reasons for it, see *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 940–43 (7th Cir. 1988). See also Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1673–75 (2001); Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833 (1992).

89. 478 U.S. 30 (1986).

90. Interview by J. Harvie Wilkinson III with John G. Roberts Jr., Chief Justice of the U.S. Supreme Court, at the Annual Fourth Circuit Court of Appeals Judicial Conference, in White Sulphur Springs, W. Va. (June 25, 2011); see also Ross E. Davies, *In Search of Helpful Legal Scholarship, Part I*, 2 J.L. 1, 1 (2012).

91. Most recently, Blacksher served as one of the appellants’ counsel in *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015).

difficulties of proof confronting black plaintiffs in vote dilution cases<sup>92</sup> led them to propose a test that they contended would, “[i]n terms of certainty and consistency, . . . promise[] to be nearly as manageable as the population equality rule”<sup>93</sup> announced in *Reynolds v. Sims*. They argued that the use of at-large or multimember elections should be held to dilute minority strength impermissibly when it “permit[s] a bloc-voting majority, over a substantial period of time, consistently to defeat candidates . . . supported by a politically cohesive, geographically insular racial or ethnic minority group.”<sup>94</sup> In *Gingles*, the Supreme Court lifted its new test for claims under section 2 nearly verbatim from Blacksher and Menefee’s proposed constitutional standard: “Stated succinctly, a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group.”<sup>95</sup>

The three “*Gingles* factors,” as they came to be known, were: first, that the racial group is “sufficiently large and geographically compact to constitute a majority in a single-member district”; second, that the racial group is “politically cohesive”; and third, that the majority “votes sufficiently as a bloc” so as usually to defeat the minority group’s candidate of choice.<sup>96</sup> The latter two factors were essentially the flip side of one another; together, they constituted racially polarized voting.

The *Gingles* test created a clear roadmap for bringing and winning section 2 vote dilution cases. In the decade following its articulation, it produced literally thousands of opportunities for black, Latino, Native American, and Alaska Native voters to elect representatives of their choice. It transformed the composition of school boards, city councils, county commissions, state legislatures, and Congress. Fittingly, perhaps the most transformative single section 2 lawsuit was spearheaded by Blacksher and Menefee, along with another lifelong Alabama voting rights attorney, Edward Still. The massive *Dillard* litigation led 13 Alabama county commissions, 24 Alabama county boards of education, and 142 Alabama municipalities to change their election systems to ones that gave black voters a more equal opportunity to elect candidates of their choice.<sup>97</sup>

Not only did the post-*Gingles* section 2 litigation transform the composition of elected bodies, it also influenced the policies those bodies

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92. See Blacksher & Menefee, *supra* note 26, at 1.

93. *Id.* at 57.

94. *Id.* at 51.

95. Thornburg v. Gingles, 478 U.S. 30, 48–49 (1986).

96. *Id.* at 50–51.

97. James Blacksher et al., *Voting Rights in Alabama: 1982–2006*, 17 S. CAL. REV. L. & SOC. JUST. 249, 264–65 (2008). Along with other attorneys at the NAACP Legal Defense and Educational Fund, I had the privilege of working with Blacksher, Menefee, and Still on this pioneering litigation.



enacted. Like the one person, one vote and retrogression standards, it was relatively straightforward and easy to apply. It rested heavily on quantitative analysis.<sup>98</sup>

Today, section 2's vote dilution standard remains important, both in jurisdictions where new challenges are being brought and as a rule governing how redistricting is accomplished. But voting rights law seldom stands still. It bears out Frederick Douglass's observation that "[p]ower concedes nothing without a demand. It never did and it never will."<sup>99</sup> So the question becomes how voting rights doctrine will respond to the challenges posed by new restrictions on the ability to register, such as draconian photo identification requirements, cutbacks on voter registration opportunities, or changes to the laws regarding which provisional ballots get counted.<sup>100</sup> The history of doctrinal development to this point suggests at least a few considerations that will likely inform future doctrine: developing clear-cut and easily administrable rules for courts to apply is important; real democracy requires equal opportunities to participate; concerted federal action can make a real difference; courts must be sensitive to the ways in which new rules will perpetuate past inequities; and last, but on this occasion certainly not least, legal scholarship has an important role to play in developing the law.<sup>101</sup>

#### CONCLUSION

In Tom Stoppard's *Rosencrantz and Guildenstern Are Dead*, he has the fictional Guildenstern remark: "We cross our bridges when we come to them and burn them behind us, with nothing to show for our progress except a memory of the smell of smoke, and a presumption that once our eyes watered."<sup>102</sup> Perhaps the key lesson of the Voting Rights Act is that, having crossed the Edmund Pettus Bridge, we cannot rest to remember the smoke and our watery eyes but must instead continue to pursue the path towards greater equality and fuller participation.

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98. See Issacharoff, *supra* note 88.

99. Frederick Douglass, *West India Emancipation* (Aug. 3, 1857), <https://www.lib.rochester.edu/index.cfm?PAGE=4398>.

100. See *supra* text accompanying note 39–41.

101. See Karlan, *Answering Questions*, *supra* note 34, at 1272–78 (discussing the contributions legal and social scientific scholarship have made to contemporary election law doctrines).

102. TOM STOPPARD, *ROSENCRANTZ AND GUILDENSTERN ARE DEAD* 43 (Faber & Faber 1968).