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Report on San Antonio Hearings Related to the Extension and/or Expansion of the Federal Voting Rights Act

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Statement in Preface

Our objective in this paper is to analyze the importance of the Voting Rights Act, in particular Sections 2 and 5, in effectively protecting the voting rights of African Americans and Mexican Americans in Texas. Through analyses of the history of voting and election litigation associated with the VRA, governmental and partisan political actions, and African-, Anglo-, Asian-, and Mexican-American behavior in Texas, we show how critically important the VRA continues to be in protecting the rights of minorities today. We have intentionally followed the proof model that was used in the 1975 hearings to demonstrate the necessity and propriety of extending the special provisions of the act to cover Texas. Essentially, we update that proof. In doing so, we weave the past into the present into potential futures, so to speak, to see future Texas with and without the protections of the VRA. We suggest that the voting, access, and representational rights of minorities would change dramatically given the alternate scenarios. These differing states of the law would consecrate or thwart the recurring practices that are deprivations of adequate and equitable representation of African and Mexican Americans. The alternate states of the law shall determine the degree and quality of egalitarian and representative democracy in this land of ordered liberty.

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Indeed, the findings support the argument that the VRA has impact, both as a remedial reaction to and as a deterrent that inhibits governmental improprieties. The findings that we present here clearly support the argument that a “day” without the VRA can only mean disaster for minority communities in a state that is so expansive in geography and population that communities can almost act with impunity in their exclusion of African American and Mexican American communities in their local, state and federal governing affairs. Recent Department of Justice disclosures of memoranda are yet another indicator of the political nature of justice in Texas elections, voting, and representation. Both the attempt and effective ability to repress and subjugate minority populations by the powerful controllers of “majoritarian” institutions would increase, enabling the illegal shenanigans of the repressive past to become the legitimate practices in the full light of a democratic and republican day.

We attempted to kill two birds with one stone by holding hearings in conjunction with representatives of the League of Latin American Citizens (LULAC). The hearings and testimony not only developed information for this paper, but also enabled LULAC to present formally at this early date, in preparation for its participation in the public debate relating to the extension, termination, or expansion of components of the Federal Voting Rights Act. We held two public hearings. We invited witnesses who testified about their experiences with the Voting Rights Act and provided justification for the continued coverage of Texas under the special provisions. The first public hearing included participation by the League of Latin American Citizens including Dr. Gabriella Lemos and Brent Wilkes of their national office in Washington. We were also joined by Luis Vera of San Antonio who is the National General Counsel for LULAC.

Noted VRA counsel Jose Garza, Judith Castro, Rolando Rios and George Korbel testified as well. Mr. Garza is former Texas Director of the Mexican American Legal Defense and Educational Fund (MALDEF) and chief of their voting-rights litigation effort. Ms. Castro is a former director of MALDEF political litigation. Mr. Rios was the former general counsel of the Southwest Voter Registration Project (SWVRP) and has handled more than 200 successful lawsuits under Section 2 on behalf of Hispanics and African Americans in all parts of the State of Texas. Mr. Korbel is a former Texas Regional Counsel for MALDEF, Director of the Texas Rural Legal Aid Voting Litigation project, the lead counsel for Hispanic Intervenors in *White v. Regester*, as well as one of the fact witnesses before Congress in the successful effort in the early 1970s to bring Texas under the special provisions of the Voting Rights Act of 1965 (as amended).

In a second hearing, elected officials and expert witnesses testified about the difficulties that minority Texans have in participating in the political process. They provided examples of what sorts of things Hispanics and African Americans can accomplish when they are elected to office.

The organization of this paper positions Texas relating to Section 5 (preclearance) provisions of the Voting Rights Act. Second, the authors discuss the testimony at the hearings in the context of the political/legal analysis that Congress has directed that Courts use in suits brought under Section 2 of the Federal Voting Rights Act. Finally, the authors analyze the testimony relating to possible improvements in Sections 2 and 5 as well as what might be expected to happen if the Voting Rights Act is weakened or not renewed.

In an effort at brevity, we will not describe the Voting Rights Act in detail. In general, it is a law passed originally in 1965 and amended several times thereafter. It was designed to open up restrictive laws and practices found in certain states and parts of others states. Mr. Korbel referred to it as the delayed continuation of Reconstruction after the Civil War.

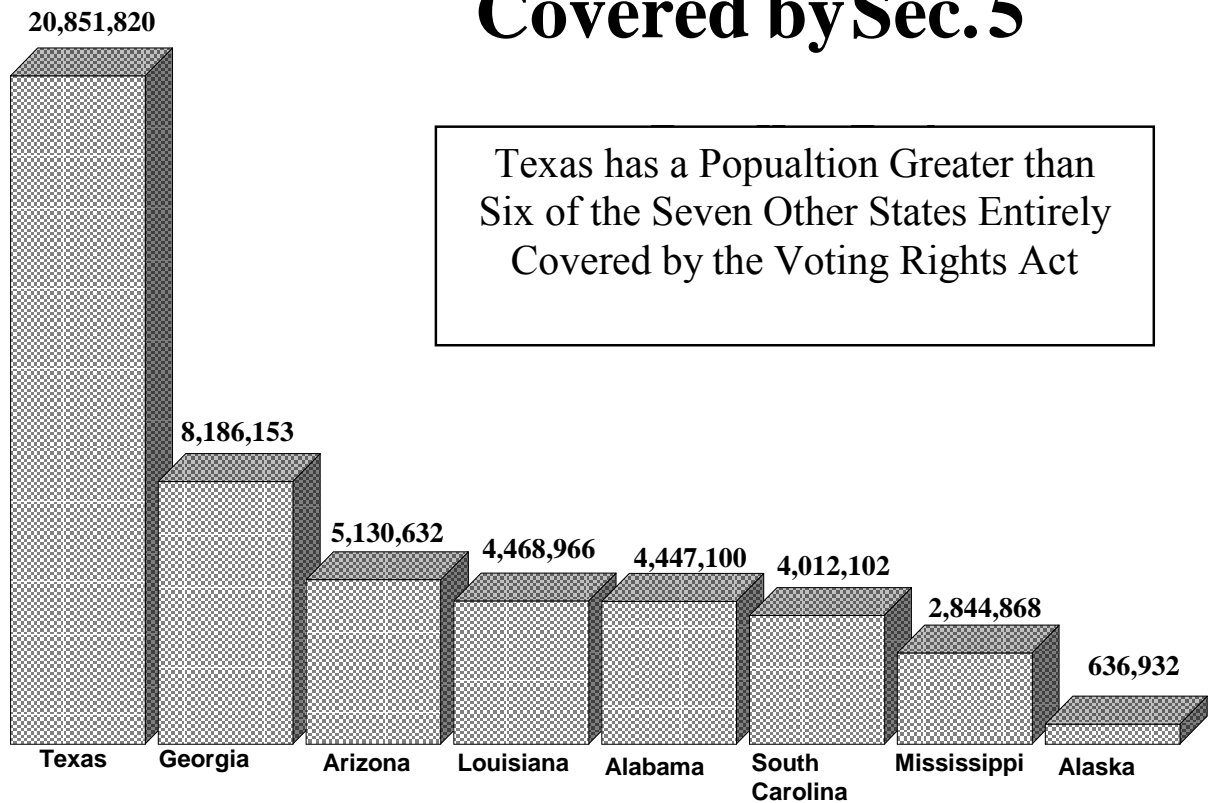
Essentially, Section 5 requires Federal pre-approval (preclearance) of any change in election practices or procedures. Before any such change can be implemented or enforced, there must be either an administrative or a judicial finding that the governmental action will not make it more difficult for Hispanics and/or African Americans to participate in the political process and elect representatives of their choice. In this procedure, the burden is on the jurisdiction to make this showing of non-discrimination.

Section 2 of the Act establishes an individual cause of action to proceed as a “private attorney general” to enforce the provisions of the act in civil proceedings. Section 2 is used most commonly to attack at-large election systems and replace them with single member districts or other remedial election procedures. In these cases, the burden is on the plaintiff rather than on the jurisdiction as in Section 5 of the act. In the law, when the burden is on the other side it frequently is the whole ballgame.

Section 5 Coverage:

There are eight states entirely covered by Section 5. These are Texas, Georgia, Arizona, Louisiana, Alabama, South Carolina, Mississippi and Alaska. Certain parts of other states are also covered. Texas has a greater population than six of the other seven entirely covered states combined.

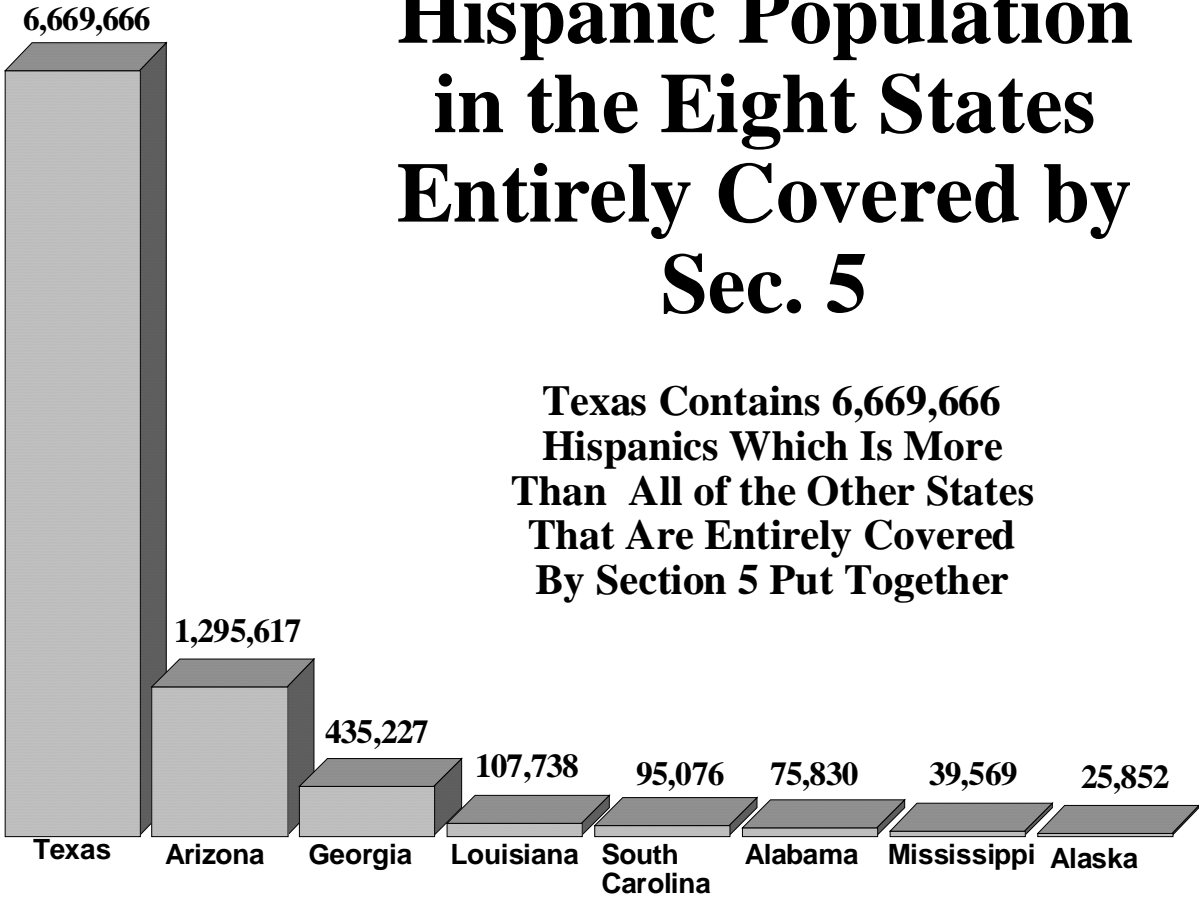
States Entirely Covered by Sec. 5



As discussed in more detail later in the paper, the significance of the Texas size and population in and of itself complicates participation in the political access on a statewide level.

The coverage of Hispanics and areas where Hispanics live in the Southwest essentially initiated with the 1975 Amendments of the Voting Rights Act. Then, as now, Texas population includes more Hispanics than all of the other entirely covered states combined.

Hispanic Population in the Eight States Entirely Covered by Sec. 5

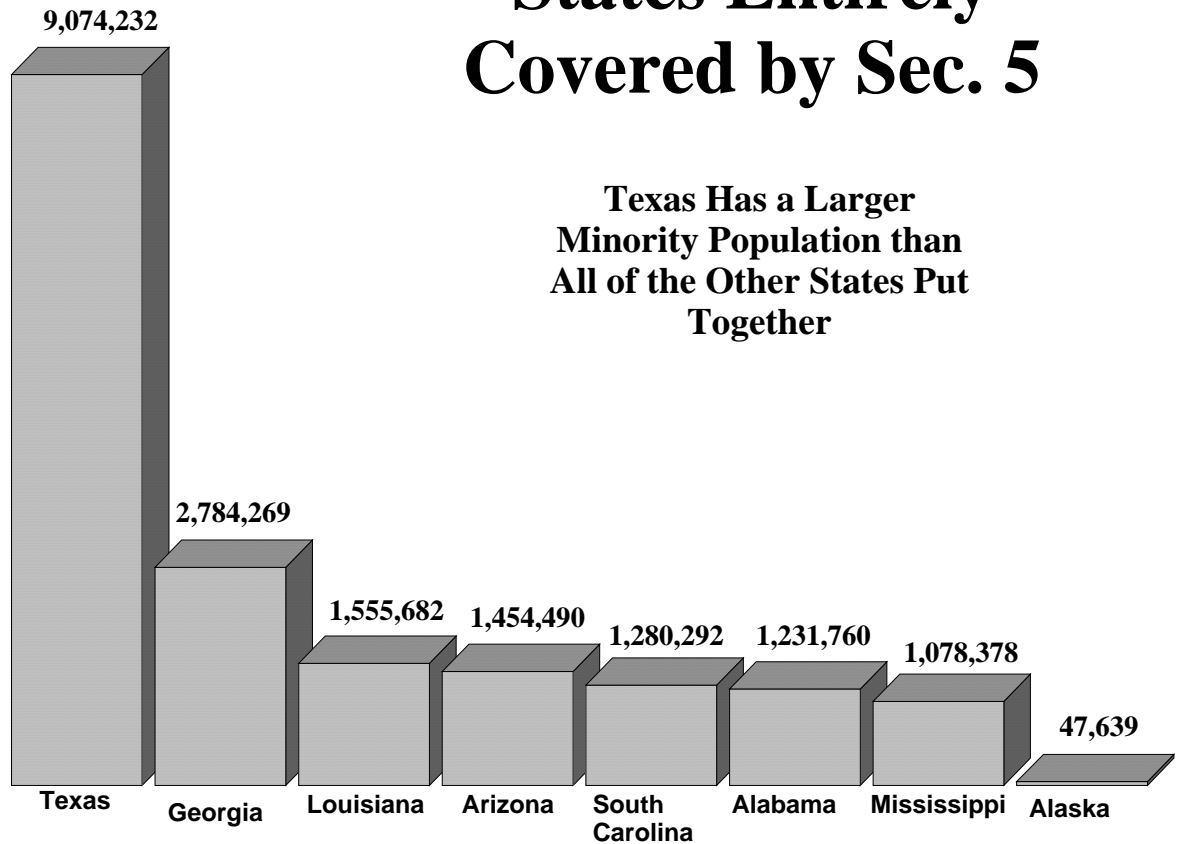


**Texas Contains 6,669,666
Hispanics Which Is More
Than All of the Other States
That Are Entirely Covered
By Section 5 Put Together**

Hispanics and African Americans are the two minority populations that primarily protected by Section 5 of the voting Rights Act. Texas has more minorities than all of the other seven states combined.

States Entirely Covered by Sec. 5

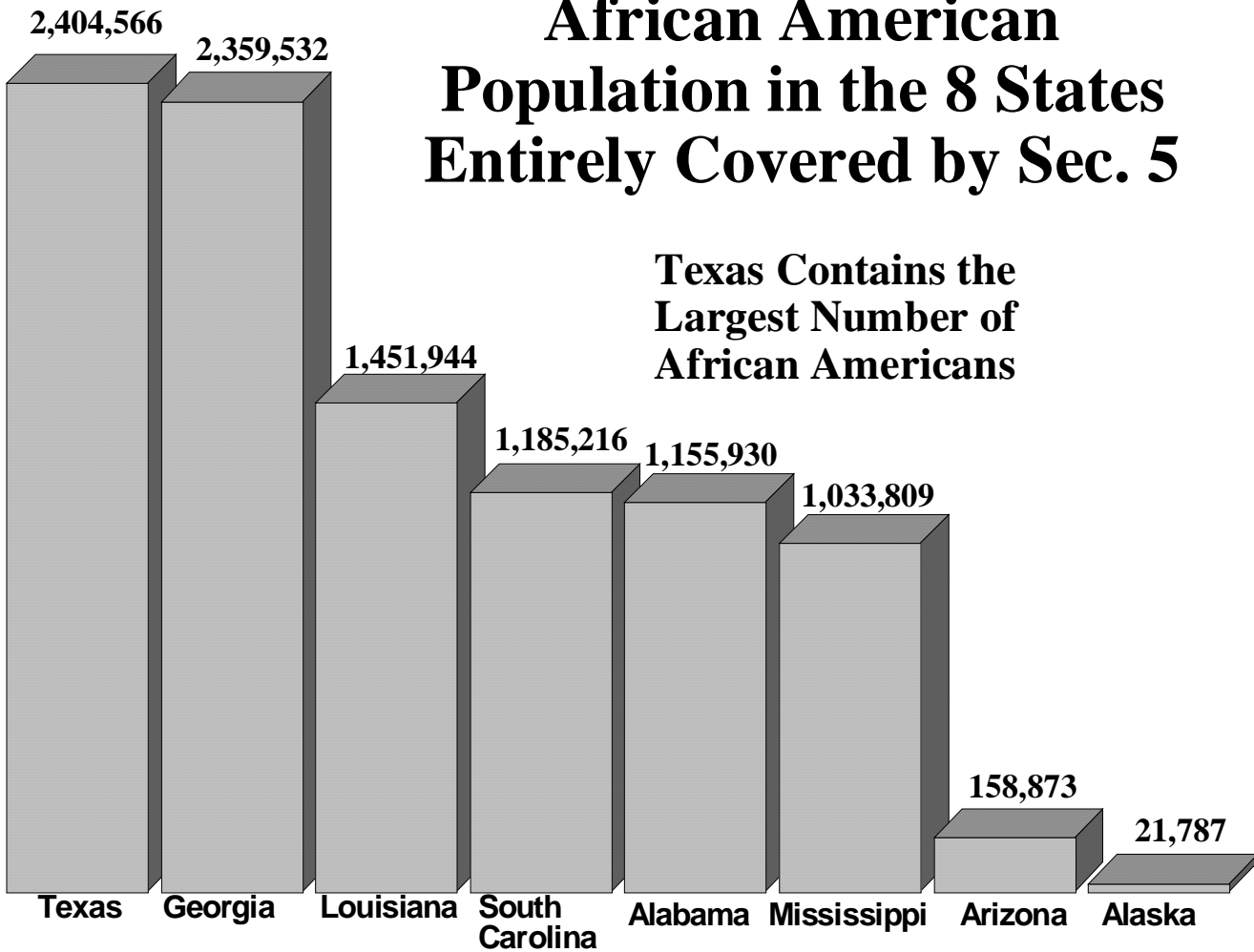
Texas Has a Larger Minority Population than All of the Other States Put Together



Texas has a larger African American population than any of the other states entirely covered by the special provisions of the act. Texas is home to more African Americans than Alabama and Mississippi combined.

The African American population of the Texas is located primarily in the large urban areas. (Houston, Dallas, San Antonio, Fort Worth and Austin). However, they are also a presence in each of the counties in East Texas where they make up significant voting blocks.

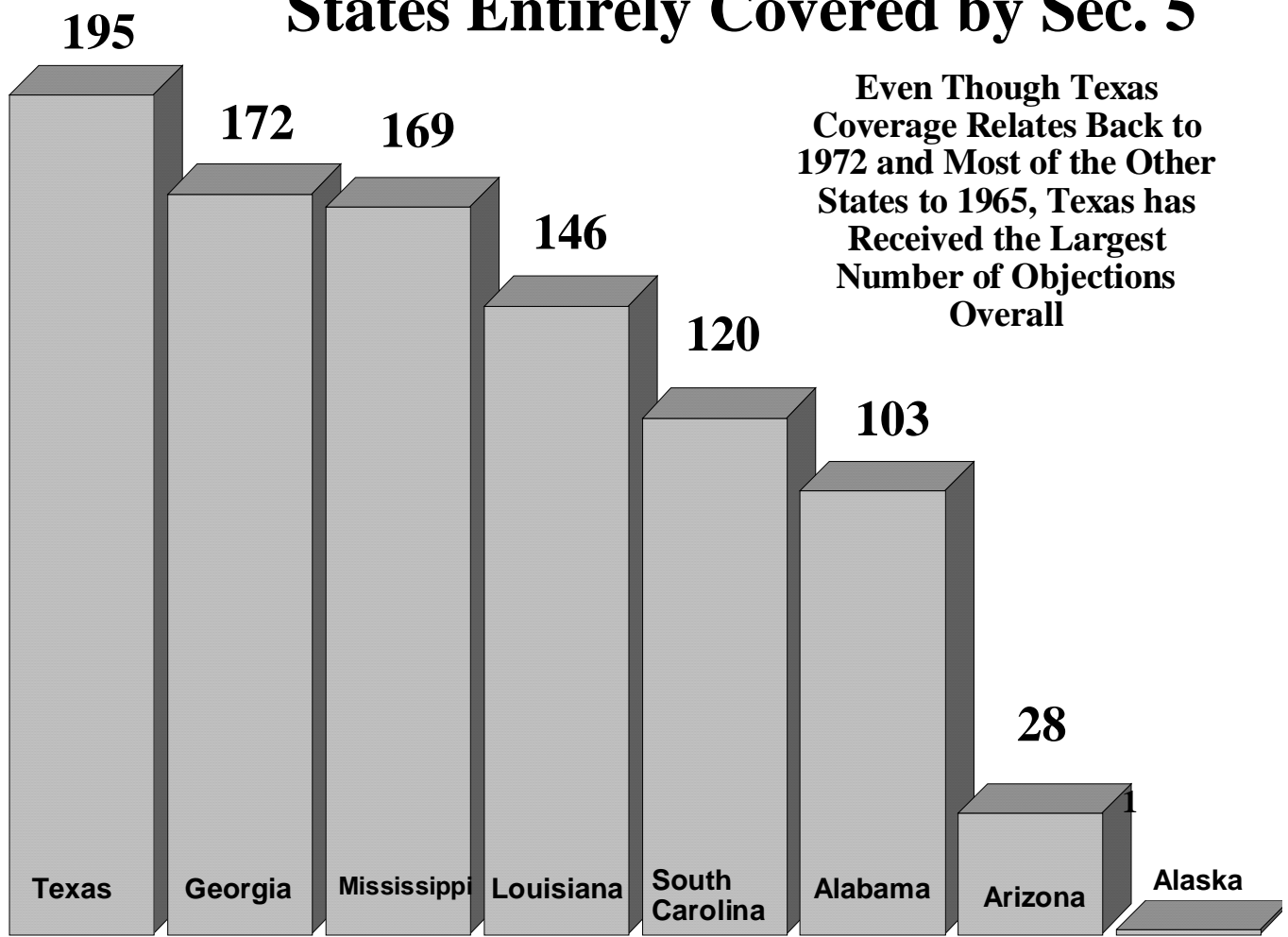
African American Population in the 8 States Entirely Covered by Sec. 5



Section 5 Objections:

Texas has sustained more Section 5 Objection than any of the other states.

States Entirely Covered by Sec. 5



Mr. Garza made much about 2001 Section 5 Objection to the reapportionment of the Texas House of Representatives. In particular, he described this as an overt Gerrymander against Hispanics. Although the Hispanic population provided the lion's share of Texas growth in the decade 1900-2000, the Department of Justice specifically found in a 2001 Section 5 Objection that the 2001 House redistricting plan would have actually eliminated three Hispanic State Representatives. All of the witnesses agreed that this objection letter, itself, should be an adequate justification for extension of the Voting Rights Act. Mr. Korbel and Mr. Garza concluded, "It is clear from the letter that Texas still does not get it or worse thinks it can still get away with it." A copy of the Objection Letter is included with this report or is available on line at the DOJ Voting Section.

Particularly objectionable was the effort to gerrymander the District from which the Chairman of the Texas Hispanic Caucus was elected. The plan dropped the Spanish Surnamed voter registration in District 74 from the mid 50s to the lower 40s. It would be virtually impossible for an Hispanic in West Texas to win with those numbers. Another district which had elected a Mexican American from San Antonio for three decades was entirely eliminated in spite of the fact that the state conceded to the Department of Justice that this was not necessary. The Spanish Surnamed voter registration percentages in two other districts in South Texas were significantly reduced, The Department of Justice determined that these changes in South Texas were so severe that there was a danger that two long time Hispanic Members would be eliminated. The Department of Justice specifically found that one of these South Texas gerrymanders was, for all intents and purposes, identical to a gerrymander in the House plan objected to in 1991. A Power Point program prepared by attorneys Rios, Garza and Korbel consisting of several detailed slides explaining this gerrymander was offered in evidence at the hearing and is submitted with this document.

There was also discussion about the infamous Delay Redistricting of Congressional Districts in 2003. This was referred to as the Delay-mander. Much has been made about the reduction of Democratic Congressional seats in the national press. The plan was certainly motivated, at least in part, by partisan considerations. But more important for our purposes, the plan eliminated seven impact Congressional Districts where Hispanics and or African Americans provided the winning margin. This included at least two districts where Hispanics were a growing minority and on the verge of being the dominant force. The testimony centered on the Districts that elected an Anglo with the help of minority voters in Dallas County as well as other such districts in South, East and West Texas. In these areas which are usually hostile to minority political efforts, coalitions had been forged over many years. In each instance, the architects of the 2003 Congressional redistricting plan eliminated the efficacy of the coalitions between Anglo and minority interests. At our hearing several of the witnesses claimed that the failure of the Department of Justice to object to this Congressional plan was because of political pressure and outright intervention from Congressman Delay. Since that time, much of this has been documented by the *New York Times* and the *Washington Post*. Political appointees in Department of Justice, political appointees overturned the internal, unanimous recommendation that there be an objection to the “Delay” redistricting plan, clearing way for its implementation. A lengthy Power Point presentation on this Delay Gerrymander^{1/} was presented by attorneys Korbel, Rios and Garza and made a part of the record. It details how the districts were realigned and the relationship that exists between partisan and racial gerrymandering in Texas. It also highlights issues that VRA advocates and petitioners have in the Fifth Circuit, U.S. Court of Appeals. Mr. Rios testified:^{2/}

¹ It was testified that although the former Majority Leader Tom Delay was involved in this gerrymander, it is appropriate to point out that in the 1971, 1981 and 1991 redistricting (passed by Democratic) had similar negative effects on minority participation in the political process.

² / In some cases, the quotations in this paper are based on notes. Funding for the production an actual complete transcript is pending.

If redistricting experts and counsel can justify the changes in political, partisan terms, then the federal courts will ignore the racial consequences in this Circuit. Political discrimination trumps a racial discrimination claim and legitimizes the adverse impact upon racial minorities.

Luis Vera from LULAC was more specific:

This turns the 1982 amendments to the Voting Rights Act, adopting the *White* test, on its ear. Redistricting is not some adolescent food fight. It is what determines legislative possibilities and executive priorities. When minority participation is lessened or cut out, Section 2 should be there as a safety net. In the Fifth Circuit, it simply isn't there any more.

An Examination of the Totality of the Texas Circumstances

Probably the best way to measure the need for continuation or expansion of the Voting Rights Act is to run through the touchstones sometimes referred to as the Senate or *White* factors.

The Supreme Court has said:

The "right" question, as the [Senate] Report emphasizes repeatedly, is whether "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes **and to elect representatives of their choice.**" [footnote omitted] S.Rep. at 28, U.S. Code Cong. & Admin. News 1982, p.206.

In order to answer this question, a court must assess the impact of the contested structure or practice on minority electoral opportunities" on the basis of objective factors." *Id.*, at 27 U.S. Code Cong. & Admin. News 1982 p. 25.

Thornburg v. Gingles, (supra) 478 U.S. at 44, 106 S.Ct. at 2763.

The Senate Report, considering the adoption of Section 2 of the Voting Rights Act, sets out several areas of inquiry to be used in answering the "right question" in Section 2 cases.

LULAC v. Midland I.S.D., 812 F 2d 1494, 1497 (5th Cir. 1987). These include the history of official discrimination in the state and the jurisdiction; the existence of racially polarized voting;

the effects of other voting procedures which tend to enhance the opportunity for discrimination against the minority group; the current effects of past discrimination; the exclusion of members of the minority group from the candidate slating process; and the extent to which minority candidates have been successful in being elected. *Thornburg v. Gingles*, (supra) 106 S. Ct. at 2764. However, the Senate Committee was careful to stress that:

[T]here is no requirement that any particular number of factors be proved, or that the majority of them point in one way or the other." S.Rep. at 29, U.S. Code Cong. & Admin. News 1982 p 207. Rather the Committee determined that "the question of whether the political processes are equally open depends upon a searching practical evaluation of the 'past and present reality.'" *Id.* at 30, U.S. Code Cong. & Admin. News 1982 p 208. (footnote omitted), and on a "functional" view of the political process. *Id.* at 30, n. 120, U.S. Code Cong. & Admin News 1982, p 208.

Thornburg v. Gingles, (supra) 106 S. Ct. at 2764.

Congress has directed that Courts considering cases under the Voting Rights Act of 1965 (as amended) consider a nonexclusive list of issues referred to as the "*Regester-Zimmer* factors" or "Senate Report factors." *Holder v. Hall*, 512 U.S. 874, 954 (U.S. 1994).^{3/} The Senate factors were framed by the Fifth Circuit in *LULAC v. Midland I.S.D.* 812 F. 2d 1494, 1497-98 (5th Cir. 1987).

1. the extent of any official history of discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or to otherwise participate in the democratic process.

2. the extent to which voting in the state or political subdivision is racially polarized.

3. the extent to which the state or political subdivision has used unusually large districts, majority vote requirements, anti-single shot provisions, or other

³ / "The Senate Report accompanying the 1982 amendments to the Act directed that the vote-dilution inquiry include an examination of the factors identified in *White v. Regester*, 412 U.S. 755, 37 L. Ed. 2d 314, 93 S. Ct. 2332 (1973), and refined and developed in *Zimmer v. McKeithen*, 485 F.2d 1297 (CA5 1973) (en banc), aff'd, 424 U.S. 636, 47 L. Ed. 2d 296, 96 S. Ct. 1083 (1976) (per curiam)." *Holder v. Hall*, 512 U.S. 874, 954 (U.S. 1994)

voting practices or procedures that may enhance the opportunity for discrimination against the minority group.

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process.

5. the extent to which the members of the minority group bear the effects of discrimination in such areas as education, employment and health which hinders their ability to participate effectively in the political process.

6. whether political campaigns have been characterized by overt or subtle racial appeals.

7. the extent to which the candidates of the minority group have been elected to public office in the jurisdiction.

SENATE/WHITE FACTOR ONE: The extent of any official history of discrimination in the state or political subdivision that touched the right of the members of the minority group to Register, to vote, or to otherwise participate in the democratic process.

The State of Texas has a well documented history of discrimination against Hispanics and African Americans. ^{4/} See generally *Graves v. Barnes*, 343 F. Supp. 704, 725 (W.D. Tex. 1973) (three-judge) aff'd in relevant part sub nom. *White v. Regester*, 412 U.S. 755 (1973).

This history extends to this very day. See the list of recent litigation and Section 5 objections.

^{4/} For example these historic problems have included the white primary *Smith v. Allwright*, 321 U.S. 649; the poll tax *United States v. Texas*, 252 F. Supp. 234 (W.D. Tex. 1966) aff'd 384 U.S. 155 (1966); excessive restrictions on voter registration *Gonzalez v. Stephens*, 427 S.W. 2d 694 (Tex. Civ. App. Corpus Christi 1968); an annual voter registration system held to be more restrictive than the poll tax which it replaced *Beare v. Smith*, 321 Fed. Supp. 1100 (S. D. Tex. 1971) aff'd sub nom *Beare v. Briscoe*, 498 F. 2d 244 (5th Cir. 1974); an absolute prohibition on the use of interpreters by non-English speaking voters *Garza v. Smith*, 320 F. Supp. 131 (W.D. Tex. 1970); and unconstitutionally high candidate filing fees *Carter v. Dies*, 321 F. Supp. 1358 (N.D. Tex. 1970) aff'd sub nom. *Bullock v. Carter*, 405 U.S. 134 (5th Cir. 1973) see also *Error! Main Document Only.Duncantell v. City of Houston*, 333 F. Supp. 973 (S.D. Tex. 1971). Property ownership requirements *Puente v. Crystal City*, Civil Action No DR-70-CA-4 (W.D. Tex. April 3, 1974), Mexican American children were segregated on the basis of ethnicity and forced to attend "Mexican" or "Latin American Schools" even though no state statute required such segregation. See *United States v. Texas*, 342 F. Supp. 24 (E.D. Tex. 1971); *Cisneros v. Corpus Christi I.S.D.*, 324 F. Supp. 599 (S.D. Tex. 1970); *Independent School District v. Salvatierra*, 33 S.W. 2d 790 (Tex. Civ. App. San Antonio) cert. denied 284 U.S. 580 (1931), *Delgado v. Bastrop I.S.D.*, Civil Action No. 388 (Western District of Texas Austin Div. June 15, 1948), *Perez v. Sonora I.S.D.*, Civil Action No. 6-224 (N.D. Tex. Nov. 5, 1970) (unreported); *Hernandez v. Driscoll Consol. Error! Main Document Only.I.S.D.*, 2 Race Rel. L. Rept. 329 (S.D. Tex. 1957), *Chapa v. Odem I.S.D.*, Civil Action No. 66-C-92 (S.D. Tex. July 28, 1967), Hispanic and African Americans excluded from participation on juries *Smith v. Texas*, 311 U.S. 128 (1940); *Hill v. Texas*, 316 U.S. 400 (1942); *Cassell v. Texas*, 339 U.S. 282 (1950); *Hernandez v. State of Texas*, 347 U.S. 475 (1954), *Muniz v. Beto*, 434 F. 2d 697 (5th Cir. 1970), *Rodriguez v. Brown*, 437 F. 2d 34 (5th Cir. 1971), *Juarez v. State*, 102 Tex. Crim. 297, 2777 S.W. 1091 (1925). See also *League of United Latin American Citizens v Midland I.S.D.*, 648 F. Supp 596, 613-621 (W.D. Tex. 1986).

SENATE/WHITE FACTOR TWO: The extent to which voting in the state or political subdivision is racially polarized.

Included with this report is a document that assembles many findings of racially polarized voting by Federal Courts and in recent Voting Rights Objections. This is organized by county. In many of these counties, there have been dozens of such findings over the recent years. Most of these cases were filed by the witnesses Castro, Garza, Korbel, and Rios.

A long and detailed series of reports based on hundreds of election regressions which were state exhibits in the 2004 retrial of the Congressional redistricting case were offered into evidence at our hearing and are included with this report. These were done by the State's expert Dr. Keith Gaddie. This studies document the degree of polarization in partisan elections in the last decade and indicates that if anything, the problem is becoming more acute.

An analysis of a San Antonio Mayoral run-off in 2005 was also offered to show the currency of polarization. The Hispanic in the race had an undergraduate degree from Stanford and a law degree from Harvard. He had worked for one of the traditionally conservative, defense oriented, Texas mega law firms before serving two terms on the San Antonio City Council. The Anglo was a 70 year old former personal injury lawyer and retired former Democratic appellate judge. Mr. Korbel stated that there was a high degree of correlation between votes cast and racial identification. San Antonio has ten single member council districts. The Hispanic candidate carried seven of the ten districts in which Hispanics are the majority of the population with multiples of up to 3-1. The successful Anglo carried the three Anglo dominated districts with multiples of up to 6-1.

The significance of this is underlined by the decades old bitter struggle between conservatives and trial lawyers. Lawsuit reform is one of the more successful political battle

cries uniting conservative and Republican voters. The analysis of the election by one of the witnesses at the hearing showed that it was these same conservative voters who came out in exceedingly large numbers to vote for the Anglo even though he made his reputation as a liberal trial lawyer.

Another vantage for the analysis of racially polarized voting came from Mr. Rios. He posited that, at least in statewide elections, Texas is a one party Republican State. An extremely red state where for almost a decade all no Democrat has been elected to a statewide position. Some statewide races are not even contested in the general election by Democrats, the outcome foreknown to be Republican. Minority Texans vote overwhelmingly as Democrats ranging from 3-1 among Hispanics to in excess of 9-1 among African Americans. Anglos vote primarily as Republicans in the range of 3-1. There has been a significant effort by Republican Governors (starting with Bill Clements, increasing with George W. Bush, and continuing under Rick Perry) to bring minority Texans into the Republican tent. “This effort has centered around symbolic politics including the appointment of Hispanics and African Americans to fill high-profile, unexpired terms including positions such as Judges on our District Courts, as Justices on our Courts of Appeal and Supreme Court, as Railroad Commissioners, and as Secretary of State.”^{5/}

When minorities run as Democrats statewide they lose. The facile answer to the history of minority political failures, at least in a partisan context, would be for Hispanics and African Americans to become and run for office as a Republican.^{6/} However, it is not that simple. There have been a number of instances where Hispanics have been appointed to serve out unexpired terms only to loose in their first election to an Anglo conservative in the Republican primary,

^{5/} This appointment phenomenon is also discussed later in this paper in the context of a slating group a la the DCRG identified in the *Graves I*.

^{6/} **Error! Main Document Only.** Of course, there are positions that the Republican party takes on affirmative action, school finance, welfare and the like which make it difficult for most would minority politicians to align themselves as Republicans and remain true to the group needs. This is all to say nothing of their First Amendment rights to politically associate.

despite the public support and bankrolling of the party leadership. The most recent case was in 2002, when Xavier Rodriguez was appointed to the Texas Supreme Court by Governor Perry. After serving with distinction on the Texas Supreme Court for more than a year, Justice Rodriguez was overwhelmingly defeated by an Anglo lawyer whose claim to fame was that he was the lawyer who brought and tried the famous reverse discrimination case of *Hopwood v. Texas*, 78 F. 3d 932 (CA5 1996), against the University of Texas law school. Justice Smith spent virtually no money while Justice Rodriguez was well financed and endorsed by all Republican statewide elected officials. Smith accused Rodriguez of being an affirmative action appointee. Smith carried 226 of the 254 counties in Texas and defeated Justice Rodriguez by a large margin.

SENATE/WHITE FACTOR THREE: The extent to which the state or political subdivision has used unusually large districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group.

Unusually Large Political subdivisions.

Texas contains three of the ten largest cities in the United States.^{7/} Mr. Korbel and Drs. Rosales and Gambitta pointed out that more than a dozen Texas Counties are in excess of half a million persons. Two school districts are in the million-person range. Several special purpose districts are also that size. The state has 254 Counties ranging in population from 64 (Loving) to over 3.67 million (Harris) in 2005. There are more than a thousand school districts, some with as few as a few dozen to one with significantly more than a million persons. There are more than a thousand organized cities and several thousand special purpose districts. The scale of size is magnified because of the vast distances from one side of the state to the other. It takes the better part of the day to get from Houston to El Paso (750 miles), further from Texarkana to El Paso (815 miles), and even further south to north from Brownsville to Texline (about 930 miles).

^{7/} Houston (Total 1,953,631 including 505,101 (25.9%) Af.Am. and 730,865 (37.4%) Hispanic); San Antonio (Total 1,144,646 including 84,250 (7.4%) Af.Am. and 671,394 (58.7%) Hispanic); Dallas (Total 1,188,580 including 314,678 (26.5%) Af.Am. and 422,587 (35.6%) Hispanic).

When a Southwest airline plane bound from Houston to Los Angeles stops in El Paso, it is more than half way there. When snowbirds travel from their winter homes in and around Brownsville to their midwestern farms near the Canadian border, they are just short of half of the way home when they pass out of Texas at Texline. All of these distances (geographic and otherwise) make public and/or private enforcement of state and federal election laws difficult. In this regard, Mr. Korbel pointed out that the Department of Justice has not been actively involved in voting litigation in Texas. In addition, few of the national civil rights groups such as the Lawyers Committee and the Legal Defense Fund have been involved in voting litigation in Texas—particularly in recent years. It has been left to LULAC, private litigants, local chapters of the NAACP, and regional groups such as the Mexican American Legal Defense Fund to support efforts on behalf of African Americans and Hispanics. Nor is there any enforcement of Texas laws dealing with electoral discrimination. Texas incorporates a tax-low, spend-low ideology, putting few fiscal or personnel resources into civil rights enforcements at the state or local levels. With vast space and limited scrutiny, voting rights offenses become less detectible and reportable.

There was an extensive dialogue between Mr. Garza, Mr. Rios and Mr. Vera about how difficult it is to get people, particularly in the rural areas to complain or become plaintiffs. Rios pointed out that he use to bring voting litigation in these places using only the name of “LULAC Statewide” but that Judges started requiring that he list actual plaintiffs. “We were forced to dismiss some and not bring others because of the fear and concern expressed by local contacts.”

Texas’ thousands of jurisdictions contain a hodge podge of voting practices and procedures that enhance the opportunity for discrimination against minority groups. These include a prevalence of at-large elections with multiple restrictions on the use of single shot voting. Most jurisdictions with at large elections do not have a sub-district residency requirement that could in some degree offset the disadvantage of a voting minority in at-large

elections. "Thus," as here, "all candidates may be selected from outside the [minority] residential area." *White v. Regester*, 412 U.S. 755 (1973). This potentially discriminatory electoral feature was identified as particularly significant in *Zimmer v. McKeithen*, 485 F. 2d 1297, 1305 (5th Cir. 1973). This is what continues to happen where elections are still held at-large.

Let us take one jurisdiction as an exemplar- Harris County. Until litigation brought by private parties, the state representatives in Harris County were elected at large from the entire county. Until these countywide at-large elections were eliminated, no Hispanic or African American had ever been a successful candidate. Until the reapportionment of the County in 2001, after serious threats of litigation from the Hispanic community, no Hispanic had ever been elected as a Harris County Commissioner. The City of Houston, faced with a retrial of a Section 2 case and a series of Section 5 objections, reluctantly abandoned at-large elections.^{8/} After the federal courts ordered remedies specifically related to Section 2 including single member districts, voters have elected Hispanics and African Americans in numbers that reflect the overall population of the City. Now the Council is majority minority. Representation proved a function of structure.

There was testimony that almost identical patterns have played out in Dallas, San Antonio, and virtually all of the other large cities in Texas. In all of these cases, the Department of Justice was nowhere to be found. The importance of action by Section 2 "private attorneys general" has proven critical to equitable reform and relief.

^{8/} The city of Houston, approaching 2 million persons is larger than more than a third of the states in this country. In terms of land area, the City of Houston could contain the entire mass of four of the other ten largest cities in the United States with room left over for Minneapolis and St Paul.

SENATE/ WHITE FACTOR FOUR: If there is a candidate slating process, whether the members of the minority group have been denied access to that process.

This part of the test asks whether there is a *slating group* and if so, do Hispanics and African Americans have access to it.^{9/} Plaintiffs do not lose anything if there is no slating group. Rather this test is placed in the formula to insure that courts considering claims of this sort pay careful attention to the sorts of slating groups that virtually control elections. In most cases, there may be various organizations that endorse candidates, but it is unusual to find a group that is so powerful that its slates are always successful. See e.g. *U.S. v. Dallas County Alabama Commissioners*, 739 F. 2d 1529, 1539 (11th Cir. 1984), *United States v. Marengo County*, 731 F. 2d 1546, 1569 (11th Cir. 1984). As a result, this factor is seldom identified in single member district cases. *LULAC v. Midland County I.S.D.*, (supra) 648 F. Supp. at 603 (W.D. Tex. 1986) ("There was no proof that there ever was a slating process in the election of school trustees, hence there was no proof that any minority group was denied access to that system").

Mr. Korbel likened the procedures of the Republican party to a slating group. Statewide, all eighteen justices on the state's two highest courts, Texas' Supreme Court and Court of Criminal Appeals, are Republicans. Texas elects its appellate courts in partisan elections. In the case of the Supreme Court and the Court of Criminal Appeals, the Governor usually appoints

^{9/} This slating group gloss grows out of the Dallas County situation in *White v. Regester* where the Dallas Committee for Responsible Government (D.C.R.G.) had a virtual lock on picking successful candidates. This was due in part to the fact that Dallas elected eighteen state representatives at large in a county of more than 1.3 million persons. None of the state's witnesses, even the Dallas County Democratic Chairman, could name all of the representatives from Dallas. As a result, the evidence indicated, people relied in large part upon the slating of the well respected businessmen who made up the D.C.R.G. The Supreme Court found that D.C.R.G. "a white-dominated organization [had] effective control of Democratic Party Candidate slating." *White v. Regester*, (supra) 412 U.S. at 766-67. Since, with only one exception, only Democratic candidates were elected to the legislature from Dallas County, the real election contest in Dallas took place when candidates sought to be slated by the D.C.R.G. Accordingly, the Court inquired in to whether minority residents of Dallas County had real access to this "white-dominated" slating process.

This is much like the "Jaybird Primary" considered by the U.S. Supreme Court in *Terry v. Adams*, 345 U.S. 461 (1953) in which the "Jaybird Democratic Club" met and held a pre-primary nomination process in which African American residents were not allowed to participate.

persons to serve out unexpired terms so that when they run for office, they run as an incumbent, therein increasing their electoral potency. For instance, Governor Perry appointed a majority of the current Texas Supreme Court to their initial term, including the Chief Justice (an African American male) and four Associate Justices (one Hispanic and three Anglo males.) Two of the three statewide African American elected officials serve on the Supreme Court and the other is a Railroad Commissioner^{10/}. There is one Hispanic Railroad Commissioner first appointed by Governor Perry^{11/} and one member of the Supreme Court.

Although no systematic evidence exists at this time on the issue, political experts discuss what is sometimes referred to as the “Republican Primary Curse.”^{12/} For example, current Ambassador to Mexico Tony Garza lost his Republican primary contest to an Anglo when he ran for attorney general in 1994. More recently, after Governor Perry appointed Xavier Rodriguez to the Texas Supreme Court, he “lost the 2002 GOP primary for his seat to the poorly financed Steven Smith, who went on to win the general election.”^{13/} There is further discussion of the Rodriguez election in the section on racially polarized voting.

Mr. Rios pointed out:

Although not well documented, it is well known among those familiar with Texas politics that as a result of the “curse” statewide Republican Party officials take extraordinary efforts to “clean out” serious potential primary opponents to minority candidates.” This is not to say that it is wrong to appoint minority

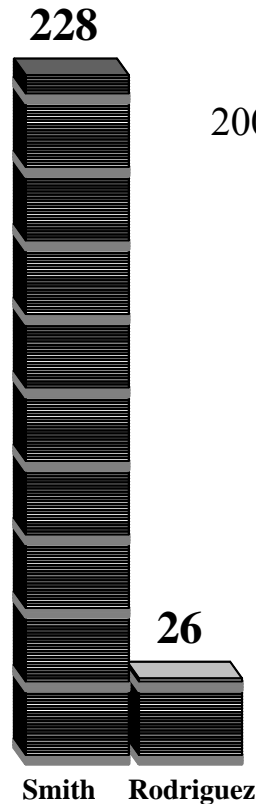
^{10/} <http://www.rrc.state.tx.us/commissioners/williams/bio.html>

^{11/} <http://www.victor2004.com/newsDisplay.php?id=15>

^{12/} “Republican leaders have been worried that Carrillo would fall victim to the Hispanic GOP primary curse that has plagued some running for statewide offices” Houston Chronicle, RG Ratcliffe, Houston Chronicle Austin Bureau webb posted March 10, 2004 at 7:40AM
<http://www.chron.com/cs/CDA/printstory.mpl/ec/primaries/2441572>

^{13/} Houston Chronicle, RG Ratcliffe, Houston Chronicle Austin Bureau webb posted March 10, 2004 at 7:40AM
<http://www.chron.com/cs/CDA/printstory.mpl/ec/primaries/2441572>

elected officials or to clean out the primary to aid in their election— in fact the Republican Party is to be commended for this sort of affirmative action. Rather it demonstrates that the Republican Party is functioning in a similar fashion to the slating done by the DCRG identified in *Graves/ White (supra)*.^{14/}



State of Texas

2002 GOP Primary Justice of the Supreme Court

Incumbent Justice Rodriguez Lost Carrying only 26 of the 254 Texas Counties in the Republican Primary Contest with Activist Attorney Stephan Smith

There Were Fewer than 60 Votes Cast in 9 of the Counties Rodriguez Carried

Activist Attorney Stephan Smith is Best Known as the Lawyer for the White Plaintiffs in the Case Against the U.T. Law School Claiming Reverse Discrimination Against White Applicants

Dr. Gambitta put the same thought in another context:

The attempt of the Republican Party is often successful but where it fails, and it does fail, it is because of racially polarized voting in these primaries.

¹⁴ / “In essence, we find that the plaintiffs have shown that Negroes in Dallas County are permitted to enter the political process in any meaningful manner only through the benevolence of the dominant white majority. If participation is to be labeled "effective" then it certainly must be a matter of right, and not a function of grace.” *Graves v. Barnes*, 343 F. Supp. 704, 726 (D. Tex. 1972)

Two other witnesses pointed that this sort of thing also goes on at the local level. In most urban counties, the largest number of countywide elected officials are district judges. They are elected Countywide. The governor also appoints district judges to serve out unexpired terms. In order to run for office, all candidates in partisan elections have to “get through the primary.” On local levels, Republican operatives also take steps to discourage opponents to Hispanic and African American candidates to retain party diversity. The scale of this “local” effort is underlined by the size of Texas Counties. More than a third of the members of the US Senate have smaller electorates than a Harris County District Judge. District Judges in Dallas and San Antonio face electorates larger than ten states. Dr Gambitta added that the “Republican primary obstacle” is due to racially polarized voting. One classic example cited often is from Bexar County (San Antonio) where a highly qualified Hispanic gubernatorial appointee to a District Court bench lost the Republican primary to an Anglo candidate whom had actually withdrawn from the race under Republican Party leadership pressure, but whose name remained on the ballot. A form of slating exists.

One witness observed that slating groups have the most impact in at-large elections and that the slating groups in Dallas and San Antonio city council elections literally dropped from the face of politics with the advent of single-member districts. He concluded “shoe leather politics in single-member districts trumps a slating group every time.”

Three witnesses referred to other sorts of local slating groups many of which are still active, but much less formal. For example, in the case of the Pasadena ISD, a slating group was identified by the identical dates of checks written by a group of businessmen who did business with the school district including attorneys, architects, and insurance men. In most cases, unless the candidate received contributions from these individuals, they were not successful. Though often *sub rosa*, slating groups exist even at these local levels.

SENATE/WHITE FACTOR FIVE. The extent to which the members of the minority group bear the effects of discrimination in such areas as education, employment and health which hinders their ability to participate effectively in the political process.

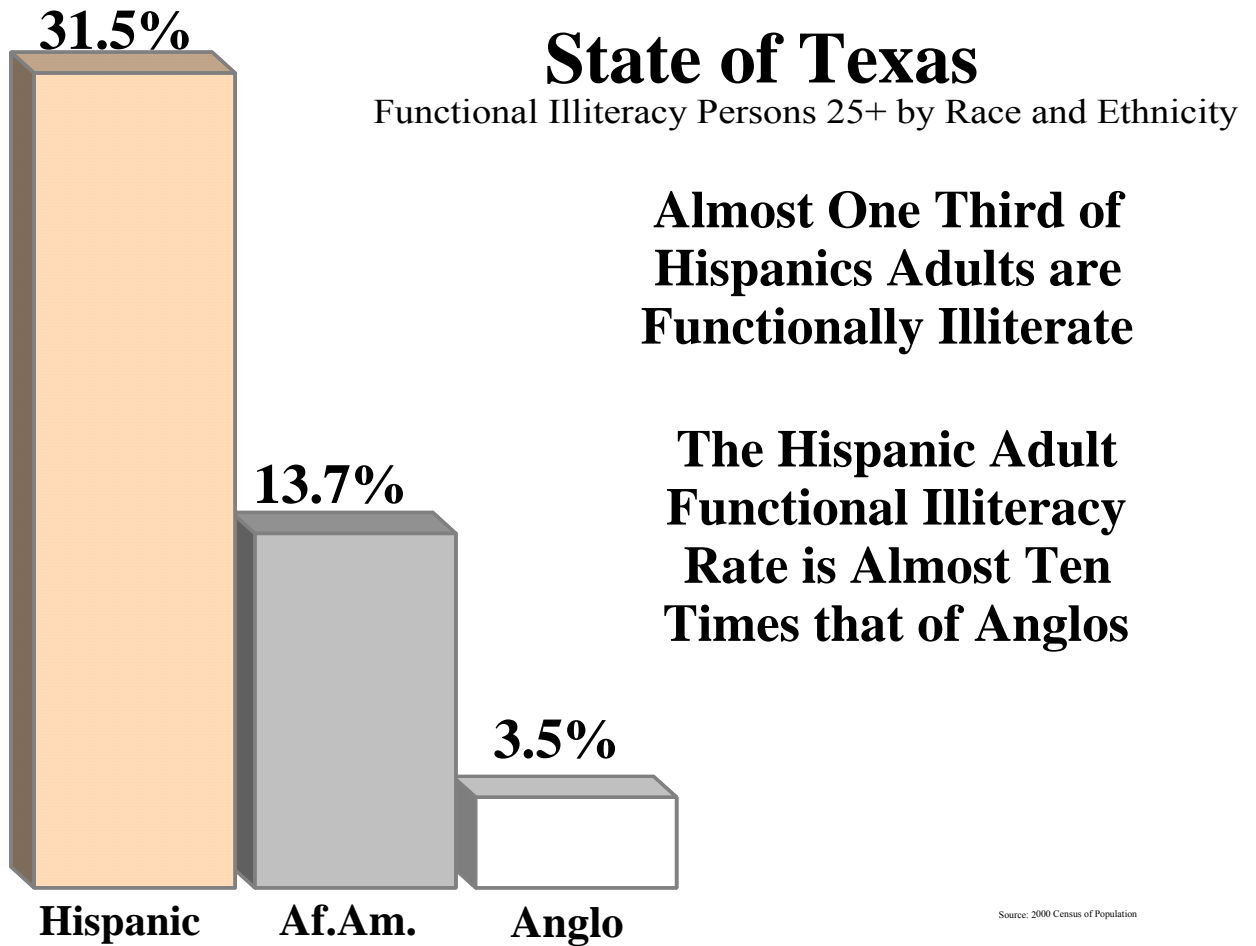
More than 40 years ago— early in the modern Civil Rights era, then Chief Judge Brown of the Fifth Circuit said: "[In] the problem of racial discrimination, statistics often tell much, and courts listen." *Alabama v. United States*, 304 F.2d 583, 586 (5 Cir. 1962). The social and economic situations of Hispanics and African Americans provide both an example of the current effects of past discrimination and the extreme difficulty that many in these groups have in participating in the political processes.

There is no aspect of human endeavor, in general, and of American life in particular in which the ability to read, write and understand...is more important than politics.
Graves v. Barnes, 343 F. Supp. 704 (W.D. Tex. 1971) (three-judge) aff'd in relevant part sub nom *White v. Register*,

In the City of Corpus Christi single member district case, Judge Kazen noted: Historically, Mexican Americans have been the subject of discrimination throughout the State of Texas and including the City of Corpus Christi. This discrimination was pervasive, involving employment, housing, public accommodations, education, and political access. [Matter omitted] Of course, the most blatant forms of discrimination have since disappeared such as the poll tax, segregated schools, restrictive covenants, segregated public accommodations, etc. Vestiges do remain. Thus the average family income and the educational level of the Mexican American population of Corpus Christi is significantly lower than that of the Anglo population Mexican Americans comprise a much lower percentage] of the High School graduates [than] Anglos. The mean family income in Corpus Christi [is likewise lower] for Mexican American families.
Alonzo v. Jones, C-81-227 (S.D. Tex. Feb. 2, 1983) unreported slip opinion at 6.

One of the expert witnesses at the hearing offered a Power Point presentation showing the social and economic conditions prevalent today in Texas. His current findings echoed the findings of the Courts thirty years ago. Hispanics and African Americans are considerably lower on all of the scales that are used to identify social and economic conditions. For example,

approximately a third of the Hispanics over the age of 25 are functionally illiterate as compared with 3.5% of the Anglo population in that age group.

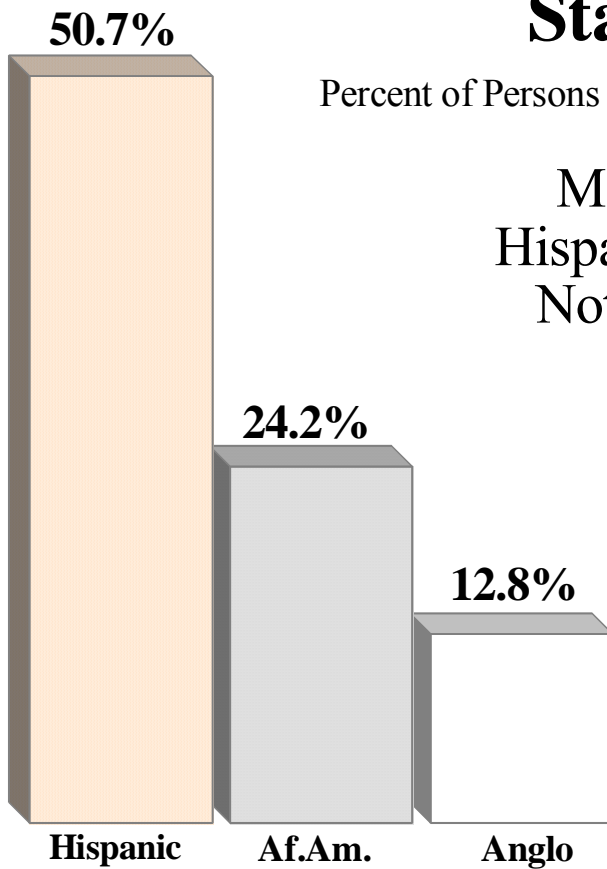


More than 50% of the Hispanics over the age of 25 in the area have not graduated from High School as compared with slightly over 12% of the Anglos.

State of Texas

Percent of Persons 25+ Who Are Not High School Graduates

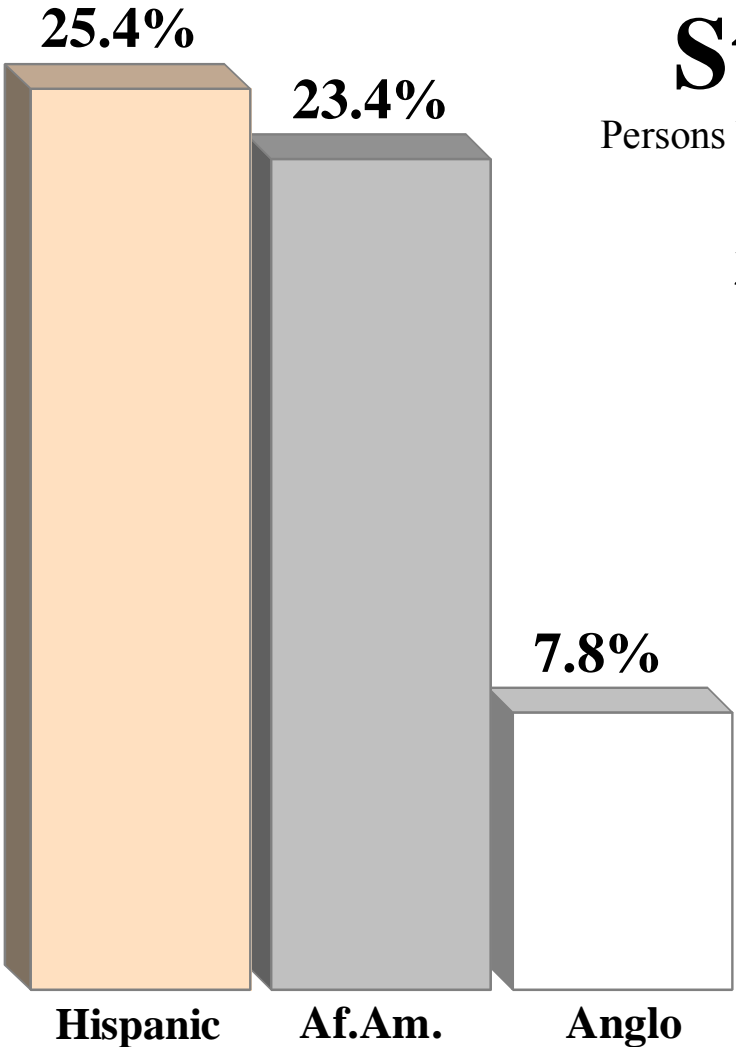
More Than Half of
Hispanics Over 25 Have
Not Graduated From
High School



The unemployment rate for Hispanics in the labor force is three to four times that of Anglos. The per capita income rates for Anglos are more than twice that of Hispanics. More than 25% of Hispanic and African Americans (combined) live below the poverty level as compared with only 7.8% of the Anglo population.

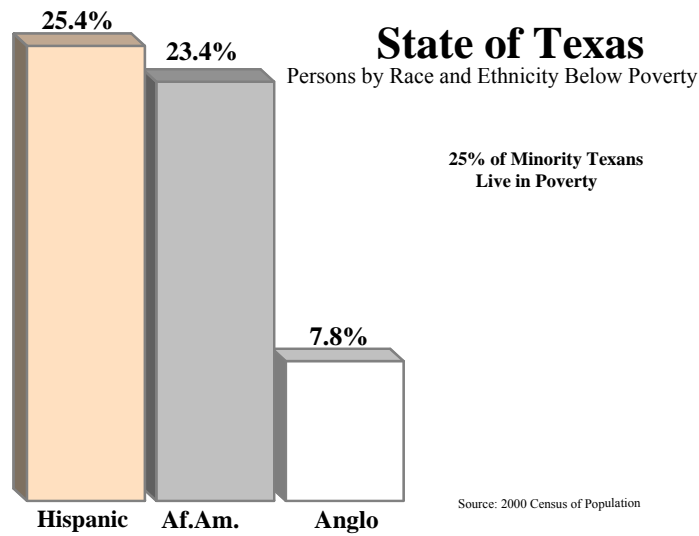
State of Texas

Persons by Race and Ethnicity Below Poverty



**25% of Minority
Texans Live
Below Poverty
Compared to
7.8% of Anglos**

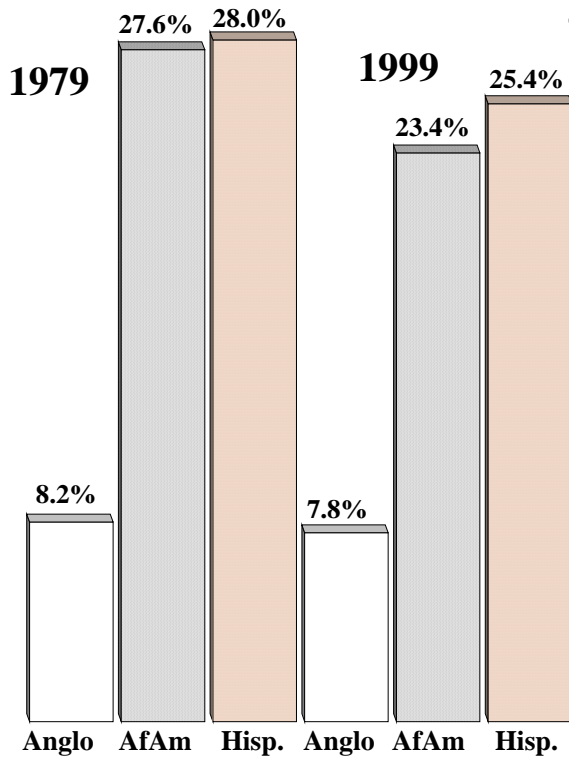
Source: 2000 Census of Population



One expert presented a series of slides documenting these sorts of poverty rates at the time that the special provisions of the Voting Rights Act were originally applied to Texas. All witnesses were surprised how little change has occurred in these statistics over the decades.^{15/}

¹⁵ / The expert explained why he had chosen 1989 and 1999 for comparison. “Well, the special provisions were applied to Texas in 1976. The closest Census was that taken in 1980. It is labeled 1989 since the statistics on this sort of thing actually reflect the year previous to the taking of the census. In the case of the 1980 census that would be 1979. In the case of the 2000 census it would be 1999.”

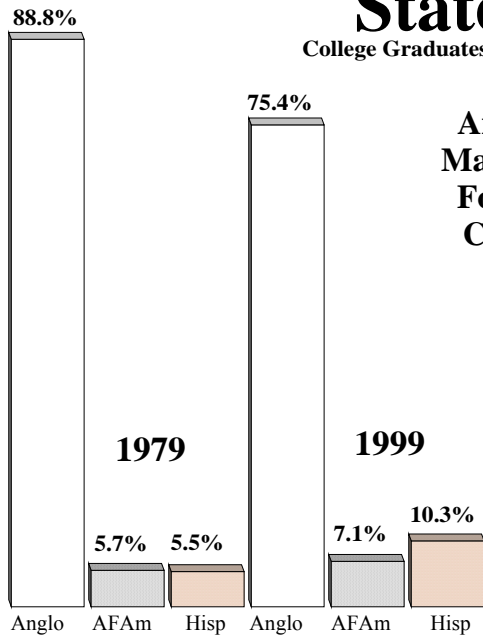
State of Texas



**Poverty Rates:
1979 and 1999**

State of Texas

College Graduates Persons 25 and Over 1979 and 1999



**Anglos Continue to
Make Up Over Three
Forths of the Texas
College Graduates**

One of the expert witnesses stressed the fact that the academic literature and Court opinions have identified the relationship between lower socio-economic status and the necessity for participation in the political process:

This lower socio-economic status gives rise to special group interests centered upon those factors. At the same time, it operates to hinder the group's ability to participate in the political process and to elect representatives of its choice as a means of seeking governmental awareness of and attention to those interests. *Gingles v. Edmisten*, 590 F. Supp. 345, 363 (E.D. North Carolina 1984) affirmed in relevant part sub nom *Thornburg v. Gingles*, 106 S. Ct. 2572 (1986).

The Courts have not required plaintiffs to show a "causal nexus between their relatively depressed socio-economic status and a lessening of their opportunities to participate in the political process." *Id.* at n. 23. See also S.Rep. No. 97-417 n. 114. As the Fifth Circuit has stressed:

The Supreme Court and this Court have recognized that disproportionate educational, employment and living conditions tend to operate to deny access to political life. [Matter omitted] It is not necessary in any case that a minority prove ... that these economic and education [al] factors have "significant effect" on political access.... Inequality of access is an inference which flows from the existence on economic and educational inequalities. *Kirksey v. Board of Supervisors*, 554 F. 2d 139, 145 (5th Cir.) cert. denied, 434 U.S. 968 (1977).

One of the commentators put it somewhat differently:

Political Science recognizes that these variables relate to lower participation—lower education, lower income and lower age—all indicative of the Texas Latino and African American population.

Educational disadvantages translate into economic disadvantages, and both of these translate into electoral, representational, political, and legislative disadvantages, which translate in turn into educational and economic disadvantages.

SENATE/WHITE FACTOR SIX. Whether political campaigns have been characterized by overt or subtle racial appeals.

This factor is another gloss that seems to have grown out of the Dallas County portion of *White v. Regester* (supra). In that case, Plaintiffs demonstrated that, in Dallas County, the D.C.R.G. (the very powerful slating group) had utilized racial tactics to identify and defeat African American Candidates not slated by the DCRG. For example, flyers were sent to Anglo neighborhoods with pictures of African American candidates on them. Sometimes billboards would be used. As time passes, few of these cases tend to identify this element. See e.g. *United States v. Dallas County Alabama*, 739 F. 2d 1529, 1539 (11th Cir. 1984). See also *United States v. Maringo County*, 731 F. 2d 1546, 1571 (5th Cir. 1984); *LULAC v. Midland I.S.D.*, (supra) 648 F. Supp at 605 ("There was no proof that this existed in any school board election").^{16/}

Since African Americans usually have Anglo-Saxon surnames, it is was important in a County the size of Dallas to identify the Black candidates to effectuate the racial prejudice of the White community. No similar evidence was produced in the Bexar County portion of *White* where the minority candidates had all been Mexican Americans who are usually self identified by their surnames. One of the witnesses pointed out that one of the stories Senator Bob Vale use to tell on the stand when he testified in at-large election cases was that he got by this polarization phenomenon since his name could be Anglo in the Anglo neighborhoods and a Spanish Surname in the Mexican American parts of town.

^{16/} In the Corpus Christi City Council single member district case, Judge Kazen noted that "the only evidence of an open ethnic appeal during a City Campaign in recent history involved the 1971 election. [Matter omitted] The appeals were couched in terms of opposition to the Steelworkers' Union and 'the causes they support'. Other campaign propoganda that year was more explicit, reminding people that the union had "sponsored the [*Cisneros v. Corpus Christi ISD*] school busing case". *Alonzo v. Jones*, C-81-227 (S.D. Tex. Feb. 2, 1983) unreported slip opinion at 15.

It was generally agreed that instead of the more blatant racial engineering, in political campaigns now focuses on more subtle public identifications with race. In smaller areas whisper campaigns frequently come out of organizations and even churches that are racially and ethnically segregated. These include country clubs, business organizations and the like. It was agreed by all of the witnesses that race is and continues to be an integral part of Texas elections particularly in the smaller cities and towns in the state.

Another witness identified recent problems with attempts to discourage minority vote. In Dallas in the 1980s, signs were posted by sitting State District Judges only in minority voting polling places warning that persons convicted of a felony would commit a crime if they attempted to vote. While it is a statement of the obvious, there was a great deal of confusion over what crimes were actually felonious and many voters simply determined that it would be safer just not to vote. Texas law actually prohibits signs that have not been specifically approved by the Secretary of State and these were not approved. In addition, there was a specific Federal Court injunction at the time against the Texas Secretary of State from doing things of this nature. When the person in charge of the Dallas effort sought the approval of the Secretary of State, he was specifically advised of the injunction and so became subject to it. The ultimate tragedy of this whole process was not the posting of the signs or the damage that they did. Rather, one of these Judges was appointed to the Fifth Circuit and three more were appointed to and subsequently elected as State Appellate Judges.

The Texas Secretary of State in the 1980s attempted to create a list of persons believed to be felons. This list was sent to all of the County election officials in the state. It was directed that this list be used to invalidate registrations and at the polls to prevent felons' from voting. One of the witnesses said that:

We were able to prove that the Secretary of State had been warned by the Department of Public Safety that the list was inaccurate before they began to use it. In deposition, we were able to show that in the range of only 10% of the persons claimed on the list to be felons had ever actually been convicted of committing a felony. You could use a page out of the Dallas phone book and be almost that accurate. The Federal Court directed that all the copies of the list be collected and destroyed and that the examples in evidence be sealed. Nevertheless, the damage was done.

Another of the witnesses observed that there was this young guy working for the Republican Governor Clements at the time named Karl Rove. Proving the old adage that those that ignore history etc. Rove would later pull the same trick in Florida before the 2004 presidential elections.

Ms. Castro pointed out that in the 1980s and into the early 1990s every election began with the formulation of election integrity task forces, sometimes by the US Attorneys with much fanfare and publicity. In particular, allegations were made that there was fraud going on in the “[Rio Grande] Valley.” FBI agents and state investigators were sent and they would make public statements about potential fraud. “I do not recall anyone ever being prosecuted as a result of these efforts. But the damage was done with the press conferences.” Mr. Vera added “It is difficult to get people living in poverty and illiteracy to risk voting with all of these sort of statements being made.”

Mr. Garza observed that he had represented a middle-aged Hispanic who had violated the law by witnessing the application of more than one illiterate person to vote absentee. “This poor man witnessed two in 1990 and was prosecuted.” The next year more than a thousand persons who had voted in the Harris County Republican Primary illegally voted in the Democratic runoff between a Hispanic and an Anglo in Houston. Although the election was set aside because of this fraud, there was no prosecution of any of the persons who had voted illegally. Earlier, in that same year, an Anglo consultant with the unlikely name of Rocky Mountain was hired to

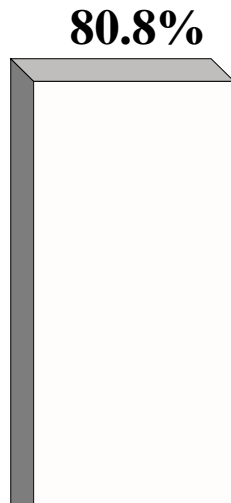
collect nominating petitions for the Pierre Dupont who was a candidate for a president in the Republican Primary. Rocky had hired a number of high school students to solicit signatures. When that effort appeared to falter, Rocky took all of his petition gathers to a motel conference room, bought several six packs of beer and had what he referred to as a “signature party.” “We called it forgery by Rocky and his intoxicated high school students,” observed Mr. Korbel. Again, although he pleaded guilty, Rocky got off with public service and a promise that he would no more under age signature parties.

Dr. Rosales stressed the currency of this problem. “Although many of these things took place some years ago, the effect is the same as an urban legend– minority voters still talk about these things and they continue to have an effect.” Ms. Castro responded, “except that an urban legend usually has never happened, all of these sort of things have actually occurred.” Mr. Korbel pointed out that if anyone had any doubt about the effect of these sorts of efforts to discourage the minority vote, he or she should look at the amounts of money some minority candidates spend on hiring lawyers to be at the ready just in case this sort of thing happens again.

SENATE/WHITE FACTOR SEVEN. The extent to which the minority group have been elected to public office in the jurisdiction.

Even after all of the litigation and Section 5 objections, African Americans and Hispanics have still a long way to go to and bring electoral success into alignment with their population percentages in Texas. We looked at all of the statewide elected officials in Texas. ^{17/} Although Anglos comprise somewhat less than half of the population, they make up 80% of the officials with Hispanics at 7.6% and Anglos at 11.9%. All are Republican.

^{17/} These are: Governor, Lt. Governor, Land Commissioner, Comptroller, Railroad Commissioners (3), Supreme Court (9) and Court of Criminal Appeals (9)



State 0

Race/Ethnic Breakdown

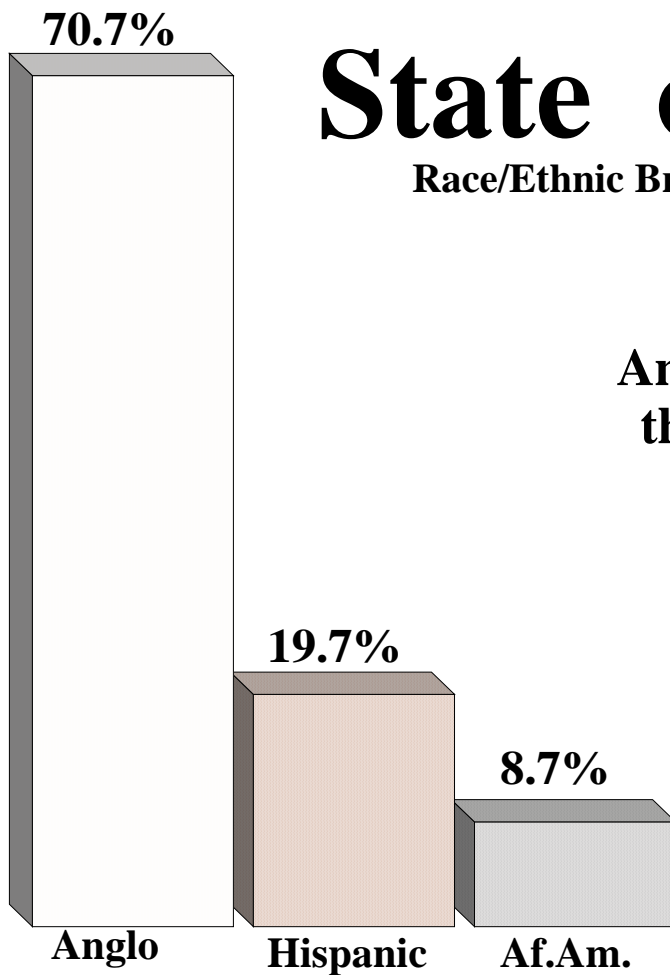
Angl
 Approxin
 Texas Pop
 up 80%
 Elec

All of these statewide officials are elected at large with no single-member districts. When we looked at offices that are elected by district, however, the pattern was the same. After more than 30 years of intensive litigation and Section 5 intervention, Hispanics and blacks, now a majority of the state's population still constitute only 28% of the members of the Texas House of Representatives.

State of Texas

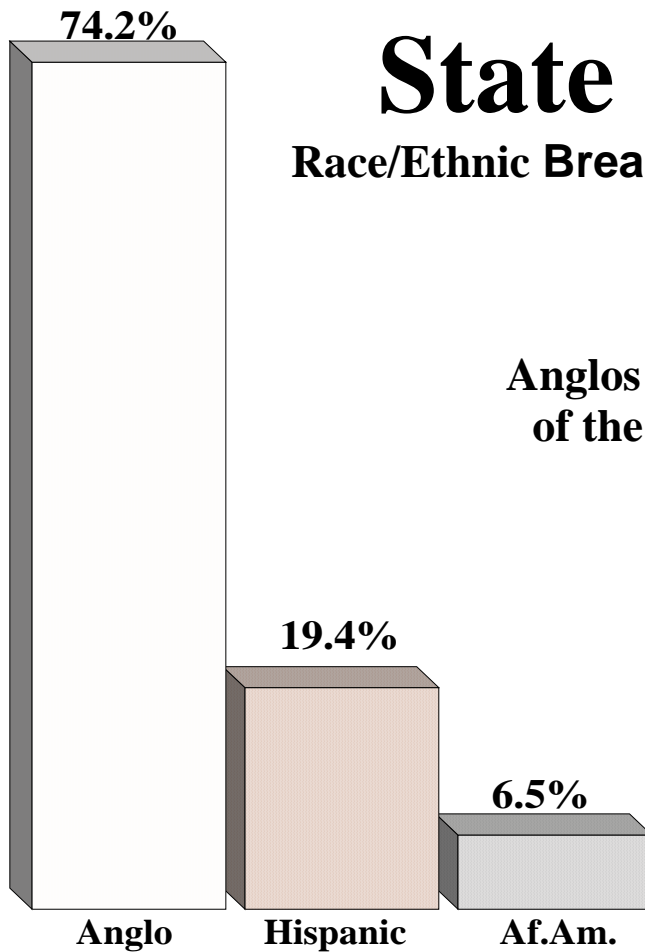
Race/Ethnic Breakdown of the State House of Representatives

Anglos Comprise More than 70% of the State House of Representatives



Source: <http://www.house.state.tx.us/welcome.php>

Hispanics and African Americans are also under represented in the Texas State Senate, constituting only 26% of the membership.



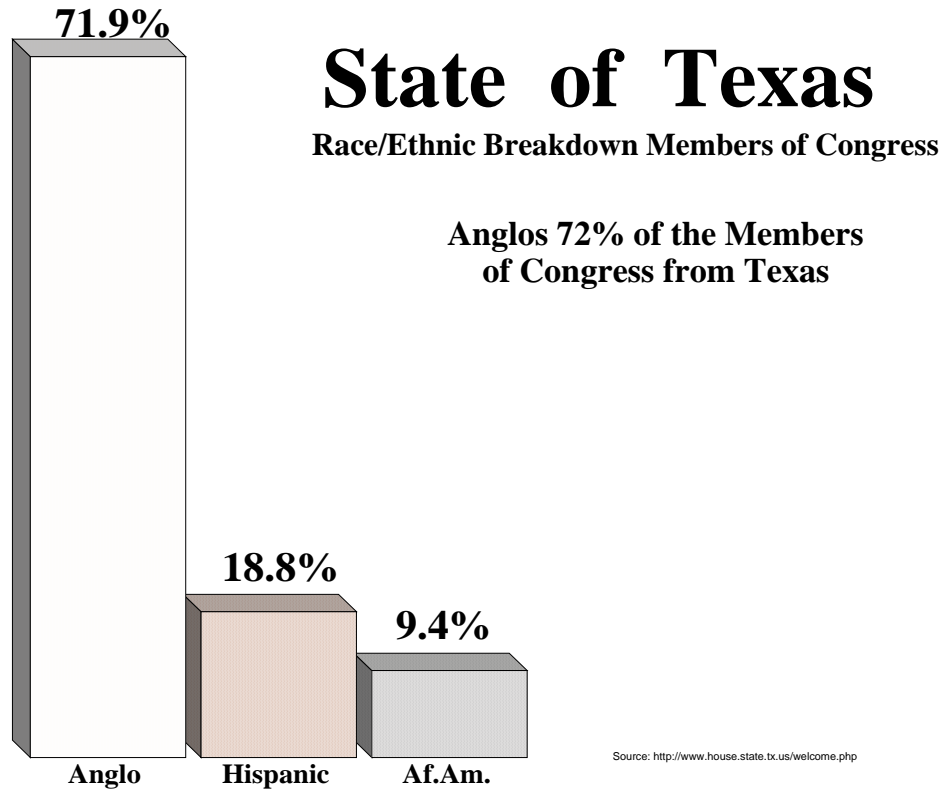
State of Texas

Race/Ethnic Breakdown of the State Senate

**Anglos Comprise Almost 75%
of the Texas State Senators**

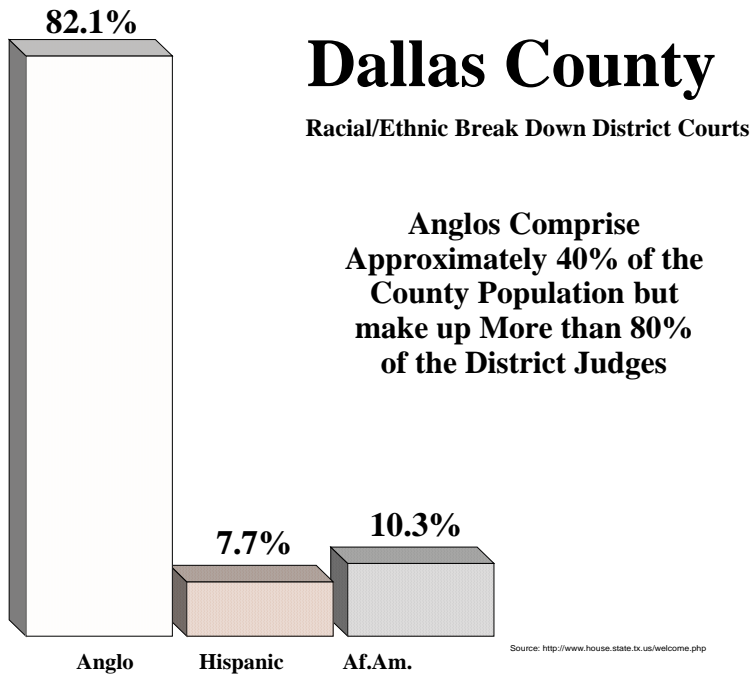
Source: <http://www.house.state.tx.us/welcome.php>

The same pattern of under-representation exists in the Texas Congressional Delegation.



Texas has a state board of election elected by district and the pattern remains the same.

On a county by county, the basic pattern is even more pronounced. Hispanics and African Americans make up well over half of the Dallas County population, but less than 20% of the District Judges.



Other Factors:

Mr. Garza pointed out that there are some additional factors that have been mentioned by Congress and various Courts in looking at the issue of discrimination in elections. The most obvious is the “performance” or output of elected bodies on issues of special minority concern.

Mr. Rios added:

The Texas legislature has a history extending to the founding of the Texas Republic of poor performance concerning issues of particular importance to Hispanics and African Americans. The Courts call this “poor performance.” If there ever was a proof of the pudding of the political power, it is the current treatment of these sorts of issues. Just a few months ago, the Legislature adjourned both a regular session and a special session without even a serious attempt to deal with the issue of school finance. I can’t stress this too much. A state court found the current system unconstitutional and directed the Legislature to take care of it. The leadership thumbed their noses at the courts on this important minority issue—yet again in 2005.

Then of course there was the debacle last year over the congressional apportionment in which the minority house and senate members had to flee the state in an attempt to prevent the loss of Congressional districts. And the year before that the effort by the state to reduce the number of Hispanic members in the Texas House of Representatives by three or four members including an obvious gerrymander of the West Texas district that elected the chairman of the Hispanic caucus. I could go on and on.

Mr. Korbel continued:

Our welfare system is a disaster and gets worse every time the legislature meets. Almost every day newspapers publish lists showing Texas and Mississippi and Alabama are the worst or the worst in dealing with poverty.

Joe May, a Hispanic School Board member for the Dallas ISD looked at things from a local vantage. He described in detail the give and take required to accomplish change. For example, he worked for months lining up votes to require that principals in elementary schools speak Spanish where a large percentage of the parents speak only Spanish and students are Spanish dominant. Current principals are grand fathered and allowed three years to learn the language. The school pays for the classes necessary to learn Spanish. Mr. May’s view was this was a “no brainer” because the most important factor in education is communication between educators, students, and parents. “What better way to aid communication than to insure that people in a conversation all speak the same language.” Mr. Rios pointed out that Mr. May was

criticized in local and national media and received threats a result of the initiative. To the credit of the Dallas ISD Board, the proposal passed.

Another one of those additional factors that Courts often look at is the size of the single member districts. Texas has Senate Districts in excess of 650,000 population and House Districts that are in the 130,000-person range. Professor Gambitta stated that he was aware of no state covered by the Special Provisions of the Voting Rights Act that had legislative districts that large. On the City Council front Houston, Dallas and San Antonio have city council districts of well over 100,000 in population. No city in a state entirely covered by the special provisions of the Federal Voting Rights Act has council districts this large. Ms. Castro pointed out that where litigation has led to access to the political process, this access is tempered by the enormous costs of running for office. “Shoe leather politics has long ago passed. Council candidates are forced to rely on mass media and Houston, Dallas, and San Antonio are among the most expensive media markets in the United States.” Mr. Korbel mentioned the difficulty in running a campaign in the suburban areas of Texas because of the presence of gated communities. “Going door to door in those areas, even if they let you in, often results in angry reactions on the part of the residents who live in the communities to avoid such intrusions.”

Dr. Rosales and Dr. Gambitta commented on the effect that term limits in city council elections in San Antonio and Houston have had on access. “In San Antonio, you get two two-year terms and then you are out for life.” Although Houston is slightly less restrictive, the effect is the same. Minority candidates virtually unknown outside their communities who could have used City Council as a way to become known in the larger community because of their sustained years of service have less of that option available due to the mandatory revolving door. For example, the legendary long term mayor of San Antonio, Henry Cisneros, served eight years on City Council before his initial run for Mayor-- gaining experience, displaying expertise, becoming sufficiently known and trusted, building coalitions and bridges, to generate the support

enabling him to wage a winning campaign citywide sufficient to become the first Hispanic mayor of San Antonio in 1981. No other Mexican American or Black was elected mayor for the next twenty years, including the initial ten under term limits. Although a recent counter example exists with the 2001 election Ed Garza as Mayor, who had served two terms on council, then two terms as Mayor, Garza was criticized with most resonance for his inexperienced handling of various city matters as Mayor. Then, council member Julian Castro lost the race for Mayor in the tight election with Phil Hardberger, described earlier.

One of the questions from an attendee at the hearing was where the term Anglo came from and why is it used to identify White persons in Texas. It was generally agreed by the witnesses that it is an attempt to distinguish Whites from Hispanics and African Americans. Mr. Korbel said that the earliest he had seen the term used was in the Texas Supreme Court decision Independent *School Dist. v. Salvatierra*, 33 S.W.2d 790, 791-792 (Tex. App. 1930). *Salvatierra* was one of the first attempts at desegregating the separate Mexican Schools that were common all over the state of Texas through the 40s and 50s.¹⁸ / The Superintendent attempted to explain away the use of a separate Mexican School:

¹⁸ / African Americans were placed in separate schools because of traditional Jim Crow laws. Hispanics were assigned to separate schools because of Board policies or school traditions. The courts found early on that enforced segregation was unconstitutional and a violation of *Brown*. viz:

This is a novel school desegregation case. A large number of Mexican-American children attend the public schools of Corpus Christi. Although they are now and have been historically separated in fact from Anglos in the schools of the city, this separation has never had a statutory origin. Therefore, unlike cases involving the traditional black-white dual systems, the question is whether the segregation of Mexican-American children who are not the victims of statutorily mandated segregation is constitutionally impermissible. We hold that it is, and affirm the district court's finding that the Mexican-American children of Corpus Christi are segregated in violation of the Constitution.

Cisneros v. Corpus Christi I.S.D. 467 F.2d 142, 144 (Fifth Cir. 1972) *en banc*

Although *Brown* arose in the context of segregation by state law, often termed "classical or historical de jure segregation," we think it clear today beyond peradventure that the contour of unlawful segregation extends beyond statutorily mandated segregation to include the actions and policies of school authorities which deny to students equal protection of the laws by separating them ethnically and racially in public schools. Citations omitted Such actions are "state action" for the purposes of the Fourteenth Amendment, and result in dual school systems that cannot be somehow less odious because they do not flow from a statutory source. The imprimatur of the

I was not actuated by any motive of segregation by reason of race or color in doing what I said I did. The whole proposition was from a standpoint of instruction and a fair opportunity of all children alike. That was the only consideration I had in the matter. There are decided peculiarities of children of Mexican or Spanish descent which can be better taken care of in those elementary grades by their being placed separately from the children of Anglo-Saxon parentage.... The truth is that most of these Spanish speaking children, by reason of the fact that they attend school only a part of the year, are more greatly retarded, and I find from a check up we made again just yesterday that the difference in age in the given grade between the Anglo-Saxon child and the Spanish or Mexican child is anywhere from two to four years.

The school official stated that the schools were segregated, but that the segregated treatment was for benevolent purposes, e.g. language training and different enrollment starts at the beginning of the school year, given that many children of Mexican heritage had to work the fields during harvest time and would not be able to catch up with the classes constituted by the Anglo children. Although the separation was on the basis of race or ethnic heritage, rather than the explained reasons, due to numerous counter examples of children who were still segregated, that is, directed to the “Mexican” school, the higher court sustained the separate and differing treatment in that case of “Anglo-Saxon child” and the “Spanish or Mexican child.”

Dr. Gambitta put it into context:

The decades have advanced, for sure, but the distinctions and the separation remain encrusted in the cultural politics of Texas, remaining since the time of the land grants to Stephen F. Austin for his colony of Anglo settlers in (Spanish and) Mexican Texas, through the through Texas independence, the U.S. Mexican War and the difficulties with the Treaty of Guadalupe Hidalgo, through *Savatierra*, through *Hernandez v. Texas*, *Hopwood v. Texas*, to the present.

state is no less visible. The continuing attempt to cast segregation that results from such action as de facto and beyond the power of the court to rectify is no longer entitled to serious consideration

Thus, we discard the anodyne dichotomy of classical de facto and de jure segregation. We can find no support for the view that the Constitution should be applied antithetically to children in the north and south, or to Mexican-Americans vis-à-vis Anglos, simply because of the adventitious circumstance of their origin or the happenstance of locality.

Id. at 147-148.

Where to Go From Here

All of the witnesses testified that it was important that Congress continue the special provisions of the Voting Rights Act. For the reasons mentioned in the earlier sections of this paper, it was agreed that there has been insufficient progress to justify the elimination of Section 5.

One of the most common complaints by jurisdictions is that it is extremely expensive to comply with all of the reporting requirements demanded by a Section 5 submission. Mr. Korbel and Mr. Rios pointed out that the burden on the jurisdictions is “really not very significant.” Mr. Garza continued:

All the voting Rights guidelines require is that the officials in the jurisdiction think about the effect a change is going to have on minority voting rights before making that change. If it is negative, then the change should not be made. If the change is positive or has no effect one way or the other then it can be made.

He concluded, “in the normal course of events this sort of consideration in the face of the history of discrimination in the state ought to be done anyway and if it is not being done, all the more reason to keep Section 5.” Mr. Korbel continued:

Several of us have assisted jurisdictions in Section 5 submissions. All that needs to be done is to fill out a document that explains how the change was considered and what effect it might have.” Another witness expanded on this thought. “Some jurisdictions have spent hundreds of thousands of dollars on submissions and litigation to preclear. Usually these are in redistricting cases and if that amount of money is necessary to preclear a change, it almost certainly discriminates in some way.

He concluded “jurisdictions that know that they have problems usually ‘lawyer up’ with certain firms who specialize in attempting to preclear questionable practices.” All witnesses agreed that if the location of a few lines in a redistricting plan will cost hundreds of thousands or even millions of dollars to preclear, a prudent, fiscally responsible jurisdiction would normally take a more conservative approach. “The plans that jurisdictions spend millions of dollars on preclearance are ones like the [Texas] redistricting in 2001 that was designed to defeat the

Chairman of the Hispanic caucus and would have eliminated three other districts that had been electing Hispanic members.”

One of the concerns of Ms. Castro and Mr. Garza was on the future of natural resources in South Texas and generally throughout the state. She pointed out that in the past few legislative sessions, multi-county jurisdictions were created to oversee the water needs in various areas of the State. In most cases, these new boards *are appointed and not elected*. Ms. Castro continued pointing out that in the late 90s, there was a law passed to replace the “Edwards Underground Water District” which had been forced by a Section 2 lawsuit brought by Mr. Rios to elect directors by single member district. The replacement “Edwards Aquifer Authority” was to have an appointed Board of Directors. The state justified the change because it claimed that the elected board was inefficient in dealing with the water issues. The single member district plan of the Edwards Underground elected several minority trustees and had the potential of producing a minority-controlled board. The first appointed board had only one Hispanic out of fourteen on it.

It took Section 5 litigation to prevent the new appointed board from taking over and displacing the single member district elected board members. After a couple of years of attempting to preclear the new process, the State finally relented and agreed that the Edwards Aquifer Authority would elect Trustees by single member districts. Mr. Korbel referred to this saga as “a triumph of reason over bullheadedness.” He continued

As far as appointed boards being efficient, they might be right. Jeffersonian Democracy may be inefficient but will insure that the precious water resources in an arid region will be used to balance the needs of the people against irrigation or other industrial uses. Isn't that why we have government in the first place?

It was agreed by all of the witnesses that if the protections in Section 5 were eliminated, this would be only the tip of the iceberg. Jurisdictions would begin to roll back advances made in hard fought Section 2 litigation. Mr. Korbel observed “we would be faced with dealing with all of these situations on a cases by case basis and because of limited resources we would be forced into a litigational triage.” Efforts would be centered on retention of advances in the more populous areas and those in the hamlets of rural Texas would be abandoned. He concluded, “that with more than 1,100 cities, more than 1,000 school districts, 254 Counties and several thousand special purpose districts, there will not be enough Civil Rights lawyers around.” Mr. Rios stressed that this is further complicated because “the standards used to win Section 2 cases have been increased in the past few years and the Federal Judiciary has become openly hostile to this sort of action.” Mr. Vera cited the fact that LULAC and regional civil rights organizations such as NAACP along with a very small number of members of the Bar have shouldered the burden. The Department of Justice and the National Civil Rights organizations such as the Lawyers Committee and the NAACP Legal Defense and Educational Fund seldom handle litigation in Texas, as mentioned earlier.

Mr. Rios had a different take of what would happen if Section 5 were eliminated. He said that probably the big cities where Hispanics and African Americans make up a majority of the population would be safe. It is not likely that advances such as single member districts would be rolled back. “It is the thousands of rural cities, school districts, and special purpose districts in Texas where Anglo electoral dominance continues that Section 5 would be missed. Section 5 is designed to help those that need it the most and have the least chance of getting help elsewhere.”

Finally, the discussion turned specifically to Section 2. All witnesses agreed that the current decisions in the Fifth Circuit have “gutted” the intent of the law. The first example

given was the so-called *Gingles I* test.^{19/} Mr. Korbelt said that you cannot survive a motion to dismiss unless you can demonstrate that it is possible to draw at least one district that is over 50% Hispanic citizen voting age population. In many parts of Texas, the Hispanic and the African American population live in center cities in the same or interspersed neighborhoods. You simply cannot get to a district that is more than half Hispanic- or African-American Citizen Voting Age population. Mr. Garza pointed out that the Pasadena and Alamo Heights School District cases were lost on the impossibility to create such a district. Several more cases have been dismissed or simply not filed at all because of the Fifth Circuit *Gingles I* standard.

In Pasadena, the judge found for us on everything, racial polarization, slating groups, discrimination— but we lost because we could not create the *Gingles I* district. This is in spite of the fact that in Pasadena ISD case, the plaintiffs had been able to show that combined minority single member districts worked in the City of Pasadena and in several other cities that had been forced to adopt single member districts.

Mr. Garza again:

We dismissed an at-large Section 2 case against a school district that had a minority student population of almost 50% but had never elected an African American or Hispanic to the board. The polarization was high but because the African Americans and Hispanics lived in the same neighborhoods with a small percentage of poor Anglos, we just could not draw that *Gingles I* district.

Mr. Rios stated that “it is possible to create *combined* minority *Gingles I* districts if you can make a showing that Hispanics and African Americans vote together for the same candidates.” However, the standards are very high. Mr. Korbelt described the situation as essentially hopeless:

In at-large election challenges, we now lose that issue every time where there is a history of Hispanics and African Americans running for the same large positions. The Courts find that there is no cohesion because in those situations most

^{19/} The Courts have said that attacks on at-large elections fail unless a proposed single member district can be drawn in which the minority group is over half of the citizen voting age population.

Hispanics vote for Hispanics and Blacks for Blacks. These Federal Judges want to see some sort of cohesive minority political machine or slating group that directs how Hispanics and Blacks vote. But that is not how city councils and school board elections play out. Minority political machines simply do not happen. And frankly, that is a good thing.

Mr. Rios put the same problem in a different light:

In partisan elections, the Fifth Circuit says that the apparent polarization is not real because it can be interpreted as political. Hispanics and African Americans almost always vote for Democrats because Republicans in Texas offer no alternatives. In non-partisan at-large elections, particularly those that have place requirements and staggered terms, it sometimes happens that Hispanic, African American and Anglo candidates run for the same place. In such elections, polarization is typically by racial group. That is to say, Hispanics vote overwhelmingly for the Hispanic candidate, African Americans for the African American candidate and Anglos for the Anglo candidate. Where this happens, even infrequently, the Courts have been saying that there is no way that a “combined minority district can be used” to satisfy *Gingles I*.

Mr. Rios pointed out that this hesitance to find justification for combined minority districts is directly contrary to the findings in the Davidson and Korbel article in the Journal of Politics cited several times in *Gingles*, which is the Supreme Court case in the area. [Davidson & Korbel, At-Large Elections and Minority Group Representation, in *Minority Vote Dilution* 65 cited in *Thornburg v. Gingles*, 478 U.S. 30, 48 (U.S. 1986)]

That included an analysis of the relationship between minority concentration and likelihood that a minority person would be elected in a single member district. Actually, the study indicated that combined minority districts are more efficient than those that are predominantly identified as Hispanic or African American. [Davidson & Korbel, At-Large Elections and Minority Group Representation, in *Minority Vote Dilution* 65 cited in *Thornburg v. Gingles*, 478 U.S. 30, 48 (U.S. 1986)]

It was agreed that Congress would help immeasurably if it clarified Section 2 to indicate that that the *Gingles I* standard is met if it is possible to create a district where it is likely that Hispanic and African Americans will be able to “participate in the political process and elect the candidate of their choice.”

A member of the audience asked a two-part question--why the number of Section 5 objections was dwindling and why so few objections were entered in South Texas. In particular, she thought that might mean that: “the need for the Voting Rights Act was not there any more.” It was generally agreed by all of the witnesses that the Voting Section of the Department of Justice has come under a lot of *partisan pressure*. Messer’s Rios, Garza and Korbel claimed that this partisan pressure was most apparent in the failure of the Department of Justice to object to the 2003 Congressional reapportionment. The

fix was in. The professional staff recommended an objection, but it was reversed at the political level. I have it on good authority, although second hand, that the letter preclearing the Congressional redistricting was written and signed in the office of the Attorney General. A representative of Majority Leader Tom Delay was present when the letter was signed.

At least part of this was confirmed by the Washington Post in December 2005. We lost two Districts that African Americans and Hispanic had the whip hand in--District 24 in Dallas and District 23 in South Texas. In 24, minority population went from “in excess of 60% to just over 40%.” Most striking was the fact that the Hispanic neighborhoods in and around Oak cliff and the City of Cockrell Hills were lumped in with Highland Park, University Park, Richardson and the affluent areas in North Dallas. Highland Park is one of the wealthiest cities in the country. It had virtually no African American and Hispanic population. This was the most irrational coupling that anyone could imagine.

Mr. Korbel put this district into context:

The Highland Park High School has a “ghetto day” and a “fiesta day” when some students don black face or dress like undocumented Hispanic laborers. Others dress like their maids and gardeners. Nothing is done to stop this sort of display. The Dallas Morning News reported this year that the only discipline involved a student who took a weed-whacker to school with him. He was required to put it in trunk of his car and not carry it from class to class.

Mr. Rios pointed out that in a bureaucracy the:

Employees take cues silent or otherwise from the management. This administration may not be openly hostile to election discrimination but it has a firm belief in local control. Section 5 is often a direct challenge to that localism

In response to the question as to why there have been so few objections or activity in South Texas, it was generally agreed that the Department of Justice is hesitant to act where the minority voters either are in charge or are a majority of the electorate.

The Voting Section's approach has always been tied to judicial decisions. There is a line of cases starting with the *Southwest Junior College* one where courts have cautioned about finding discrimination when minority voters were a slight majority of the registered voters and could be in charge even though they were not. I see nothing in the Voting Rights Act to justify this sort of decision by the Fifth Circuit. But that is what the law is.

One of the attendees said: "Section 5 is all about access. Where there is that access, probably the Department of Justice should not be involved." Mr. Korbel responded that such a view was shortsighted.

It is not uncommon to see cities and school boards with minority control taking action that is aimed at efficiency and has the perhaps unintended result of limiting or otherwise discouraging minority voting. Sometimes minority access is not considered.

At the end of the session one of the members of the audience asked what is the most outlandish political practice going on in Texas today.

Mr. Garza referred to a recent case lost in both the district court and the Fifth Circuit involving water district elections in South Texas.

This water district Rolando and I sued is an important government-- if not the most important governmental body in the county. It limits its voters to those who pay a sort of dues. Most of the voters were Anglo ranchers because they were the only ones to pay the dues. It was nothing more than a poll tax. The courts

ignored the fact that this was a legislatively created body and said that such a poll tax was all right.

Mr. Rios and Mr. Korbel cited the 2003 Congressional redistricting:

We lost seven or eight districts that were minority controlled or where minority voters were the swing votes— each was an “access” or “impact” district as defined by the Supreme Court and our three-judge court simply wrote around them. The loss of seven or eight minority-influenced votes in Congress is a very big deal....

The last witness said that the biggest overall problem is the “lack of effective oversight by of the Voting Section by Congress. Forty years later Section 5 is still an underused vehicle. Dr. Gambitta concluded the hearing with the observation that “maybe the political interference that apparently went on with the Texas Congressional submission will convince Congress that this is so very important.” He continued:

The mid-census Texas congressional re-redistricting case tests many components of the arguments set forth in this hearing, plus some new twists in Texas’ sustained enterprise of altering structure and procedure that results in diminished meaningful electoral access and equitable representation for Hispanics and African Americans in Texas.

[Su vota es su voz, as Willie Velasquez ²⁰/ would say. Pero ahora algunas voces tienen mas poder que otros, o sea hoy hay peligro que la voz de la gente no se oyera.](#)

Postnote:

The U.S. Supreme Court has set an expedited briefing and argument schedule in what is sometimes referred to as the Texas congressional Delay-mandering case. LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al v. RICK PERRY, et al.* 05-204. Oral arguments scheduled for early March with a decision hopefully in time for the 2006 elections.

²⁰ / Willie Velasquez was the founder of the Southwest Voter Registration and Educational Project (SWVREP). He was one of the early Mexican American political strategists and a friend to us all. Willie tirelessly organized Hispanic voters through out the Southwest. One of his signature approaches to turning Mexican American voters out was stressing elections are the same as voices. The only way that voices of the effectively disenfranchised can heard by elected officials is the act of casting a vote. Willie passed away in 1988 long before his time. His strong voice is missed when the very existence of the Voting Rights Act is at issue.