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U.S. DISTRICT COURT
N.D. OF ALABAMA

MILLIGAN V. ALLEN
Case No.: 2:21-cv-012921

THIRD EXPERT REPORT OF JOSEPH BAGLEY PHD.
May 17, 2024

I. PURPOSE, METHOLDOLOGY

Plaintiffs in this case have asked me to examine the Alabama State Legislature's drafting, passage, and enactment of "S.B. 5," the bill establishing a new 2023 Congressional redistricting plan. S.B. 5 was enacted following this Court and the U.S. Supreme Court's enjoining of "H.B. 1," the bill establishing the state's 2021 Congressional redistricting plan following the release of the 2020 U.S. Census Data, on the grounds that it violated Section 2 of the Voting Rights Act.

Plaintiffs asked me to offer my opinion as to whether S.B. 5's passage, including its appropriate historical and contemporaneous contexts, offers evidence of intentional discrimination against Black voters. They have also asked me to update the "Senate Factors" analysis submitted to this Court in my 2021 report, which I incorporate by reference here. I also adopt my other prior reports in this case. In my opinion, as reflected in this report, the record reveals evidence that would support this Court reaching a finding of discriminatory intent with respect to S.B. 5. A fresh look at the Senate Factors reinforces my opinion that the Senate Factors provide evidence that the S.B. 5 map reinforces historical and current discrimination and disparities that harm the ability of Black Alabamians to participate equally in the political process or elect candidates of their choosing on equal terms to white voters.

I am compensated at the rate of $150 per hour for my work preparing this report. This compensation is not dependent upon my findings, and my opinions stated in this report do not necessarily represent the sum of my opinions in this matter, which are subject to change upon further research or revelations. I am incorporating my prior reports, including their data and analysis, in this report by reference.

Experts in cases assessing the constitutionality of state action relative to discriminatory intent have followed guidelines set forth by the U.S. Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977). Direct, "smoking gun" evidence of intentional discrimination was difficult to find in 1977 and is even harder to find now. As I explain in my work, lawmakers have learned how to "colormask" their intentions and defend their prerogatives in courts of law without using the usual plain language that would open them up to legal failures. Cognizant of this even then, the Court in *Arlington Heights* called for lower courts to undertake a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available" by considering certain enumerated factors (*Id.* at 266). The Court in *Arlington Heights* found that there was no compelling evidence of discriminatory intent. Here, we can see otherwise, using the standards articulated there.

Among the factors considered under *Arlington Heights* are (1) "The impact of the official action – whether it bears more heavily on one race than another." The Court acknowledged, though, that rare were the times when, as in the historical cases of *Yick Wo v. Hopkins* or *Gomillion v. Lightfoot*, this initial inquiry alone might make it plainly obvious that there was discriminatory intent. Absent such circumstances, it directed inquiry towards (2) "The historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes"; (3) "The specific sequence of events leading up to the challenged decision . . . "; (4) "Departures from the normal procedural sequence . . . " and "Substantive departures . . . particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached"; (5) and "The legislative or administrative history . . . especially

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where there are contemporary statements by members of the decision-making body, minutes of its meetings, or reports." *Id.* at 265-266.

Historians use a similar methodological framework for determining whether a law or policy was enacted with discriminatory intent. As such, and as a historian, I analyze here the second, third, fourth, and fifth *Arlington Heights* factors. The historical background relevant to invidious discrimination in voting, the legislative sequence of events and the legislature's procedures, and the statements made in the legislative history examined herein are, in my opinion, relevant to the Court's assessment of whether the Alabama Legislature's actions in enacting S.B. 5 are part of a continuum of the State of Alabama's longstanding acts of discrimination in voting and redistricting, particularly against Black citizens.

In approaching this, I am guided by the standards of historiography. This report thus draws upon well-regarded historiographical works, including valuable secondary sources. I rely as well upon primary sources in the form of historical and contemporaneous press coverage; deposition and trial testimony; U.S. Justice Department documents; relevant caselaw; information made available to the public via the website for the Alabama Legislature's Permanent Legislative Committee on Reapportionment; video and transcripts of that committee's meetings, public hearings held by the committee; and floor debate in the Legislature. These works represent sources commonly relied upon by scholars in the humanities and the social sciences to reference, and I weigh them all against one another, as is common in the field. I begin by briefly examining the history of congressional redistricting in Alabama, looking at each cycle since the 1960s, when the State was forced to reapportion and redistrict for the first time since the enactment of its 1901 Constitution.

The 2023 events are an extension of the state's history of discrimination, especially as to redistricting. As Representative Chris England observed, the state's failure to obey this Court and the Supreme Court proved that Alabama was still the "make me" state when it came to affording Black citizens their rights under the Constitution and the law.[1] The 2023 legislative process is also fundamentally representative of procedural and substantive departures. Black legislators and members of the public repeatedly called for a second majority-Black congressional district. The reapportionment committee purported to be concerned with public comment, yet they ignored this input. This represents a serious substantive departure.

Furthermore, despite decades of calls for transparency, the process of drawing the maps that were seriously considered by white lawmakers was carried out not only behind the scenes, but either off-campus by partisan consultants or on-campus by the state's Solicitor General. The latter also introduced "legislative findings" into the legislation, a device that even committee leaders admitted was unprecedented and confusing, which is to say, a massive procedural departure. Statements by these legislative leaders and others indicate that this entire process was, to them, devoid of any effort to afford Black citizens the rights guaranteed to them by this Court, even before such process was overtaken by the Solicitor General.

II. A BRIEF HISTORY OF CONGRESSIONAL REDISTRICTING IN ALABAMA

a. Congressional Redistricting, 1960 - 1980

When the State of Alabama faced, for the first time since the adoption of its 1901 Constitution, the unavoidable necessities of reapportionment and redistricting, most Black Alabamians could not even register to vote. The efforts of the newly created Civil Rights Division in the U.S. Justice Department were focused squarely upon the state at that time because of that fact. While white men still held a stranglehold

[1] Zach Montellaro, "Alabama's redistricting brawl rehashes bitter fight over voting rights," *Politico*, July 21, 2023.

on electioneering and governance in the state, their inability to meet these new challenges with consensus revealed much about the outsize role that even the *prospect* of Black voting played, and has always played, in Alabama politics. The following decades reveal an ongoing effort to prevent Black citizens from electing a candidate of choice to Congress or, eventually, to limit that ability to one congressional district.

These white men recognized that the possibility of a significant increase – which is to say, anything much higher than total disenfranchisement – in Black voting and political participation, would come from the cities, though the Justice Department was in the process of building cases against a number of Black Belt counties as well. The urban areas of the state had the highest population of Black citizens. Some could envision a return of the state of play during Redemption, before total disenfranchisement, when Democrats and Populists vied for what remained of, or in this case reemerged as, the "Block" vote, aka the Black vote.

At the same time, Black Belt legislators did not want to reapportion the state legislature, because half the state's population then lived in Jefferson County or in north Alabama. And with the State losing a Congressional seat, Black Belt legislators believed that either there would be redistricting or the congressional elections would have to be run statewide and at-large. The latter terrified Black Belt legislators and delighted more urban-suburban forces. When the state legislature convened in 1961, then, Black Belt legislators were threatening to filibuster any effort to reapportion but were calling for redistricting, while Jefferson County and north Alabama legislators were threatening to filibuster any effort to redistrict without an effort to reapportion.[2]

Three plans were the focus of the effort to redistrict. One, proposed by Representative Bud Grouby of Autauga County, would place Congressman George Grant of Troy and George Andrews of Union Springs, representing CDs 2 and 3 respectively, into the same district. The Grouby plan had support from north Alabama. The competing plan put forth by Senator Walter Givhan combined north Alabama Congressmen Albert Raines of Gadsden and Kenneth Roberts of Anniston, representing CDs 4 and 5 respectively, into the same district. Givhan, a legendary segregationist, reportedly targeted Robert's district because of his support for President Kennedy's effort to remake the House Rules Committee in order to ease the passage of civil rights legislation. Black Belt legislators rallied behind Givhan, until a third plan emerged, put forth by Rep. John Guthrie of Cullman, that would split Jefferson County, previously contained whole in CD 9, among four Congressional Districts ("CDs"); this came to be known as the "slice" or "Chop-Up" plan. Jefferson County legislators staunchly opposed this of course, assisted at times by north Alabama legislators, who eventually refused to back any measure that did not involve a concomitant push for reapportionment.[3]

The "9-8 Plan," a modified version of an at-large plan described as a "leave it to the voters" compromise, soon emerged. According to this plan, Democratic and Republican candidates would be nominated from the existing nine Congressional districts to stand in an at-large general primary, and the low vote-getter would be left off the statewide general election ballot in the fall. Despite fierce efforts from the Jefferson County delegation and its allies to defeat it, the House passed Chop-Up in August 1961. Governor John Patterson, however, vowed not to sign the bill should it come out of the Senate and proposed instead an executive amendment in the form of the 9-8 Plan. The House voted down the amendment and voted to override the governor's veto. But a filibuster in the Senate outlasted the legislative session, which ended without a redistricting plan or a reapportionment plan. Governor Patterson subsequently called a

[2] Grafton and Anne Permaloff, *Political Power in Alabama*, pp. 121-23.

[3] *Sylacauga Advocate*, Aug. 10, 1961; *Birmingham News*, May 6, 1962; Grafton and Anne Permaloff, *Political Power in Alabama*, pp. 124-31.

special session, during which lawmakers agreed to pass the 9-8 plan on an interim basis only. A federal court approved the plan.[4]

Numbered place laws had been introduced to Alabama in the late 1950s by state senators E.O. Eddins of Marengo County and Sam Engelhardt of Macon County. Both were pioneers in the white Citizens' Council in the state and had introduced successful bills in the state legislature that established such schemes in order to prevent Black electoral success in the Black Belt, particularly in Demopolis and Tuskegee.[5] White Citizens' Councils, organized in the wake of the NAACP and NAACP Legal Defense Fund's campaign to enforce *Brown v. Board of Education*, sought to quash civil rights agitation by bringing harsh economic reprisal to bear on anyone who supported those efforts. Demopolis and Tuskegee were cities in which Black citizens were "receiving the pressure," as Council leaders put it and, in the latter case, where Engelhardt unveiled the first modern gerrymandering attempt in 1960, triggering the lawsuit that begat the Supreme court's landmark decision in *Gomillion v. Lightfoot*. Engelhardt was also chairing a state party meeting at which Frank Mizell suggested using numbered places for the Congressional delegation in 1962.[6]

Mizell drew a line between earlier "anti-single-shot" laws designed to protect local electoral bodies and the present danger facing the state's Congressional delegation. He explained, "We know that [Black voters] are easily manipulated by the connivors [sic] and that they would be manipulated into single shotting, and if they did, it could happen as it did up in Huntsville." There, he continued, "a couple of negroes" had run for the city council and "might near got elected," so the city's state legislative delegation "got the law changed" so that Black voters could not single-shot vote and so that everyone had to "run by place number so that you could spot them." Reasoning that there were "several thousand" "negro voters" in "a Congressional District," Mizell argued that they would "come in, single shot vote for that one man, and you will begin to see negroes on your State Committee, because with that single shot they can assure that one of them will get a majority to start with."[7]

The state Supreme Court temporarily resolved the matter by ruling that all ballots cast in the primary had to include eight choices, effectively adding an anti-single-shot provision to the election. When the election was held in May 1962, the low-vote-getter was Frank Boykin of Mobile. The remaining eight Democratic incumbents all returned to Congress in 1963.[8]

Beyond well-known high-profile instances of backlash around this time, the State of Alabama had, since the passage of the Civil Rights Act of 1957, "as a matter of deliberate policy on both the statewide and a local level," done "all in [its] power to keep [its] Negro citizens from acquiring the right to vote," according to a close study published in the *Virginia Law Review*.[9] Among the devices used in the effort to deny Black people the vote were a complicated application form that was universally administered in a discriminatory fashion; a literacy test requiring applicants to copy a section of the federal Constitution, also administered discriminatorily; an oral examination, often simply not required of white applicants, for which there were "no set questions, no method of determining which questions to ask which applicant, no

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[4] *Huntsville Times*, May 13, 1962; Grafton and Anne Permaloff, *Political Power in Alabama*, pp. 131-35.

[5] Alabama Acts No. 221, 1961 and No. 570, 1961.

[6] Lawrence Underwood McLemore, "The Second Reconstruction in Local Politics: Alabama Grassroots Activists Fulfilling the Promise of the Voting Rights Act, 1960-1990," PhD. diss., Auburn University, 2012, pp. 187-88.

[7] McLemore, "The Second Reconstruction in Local Politics," pp. 187-88.

[8] *Alabama Journal*, May 28, 1962; *Birmingham News*, May 30, Nov. 7, 1962.

[9] B.E.H., J.J.K. Jr, "Federal Protection of Negro Voting Rights," *Virginia Law Review*, Vol. 51, No. 6 (Oct. 1965): pp. 1051-1213, p. 110.

standards to evaluate the answers, and no records kept of the procedure;" a good character requirement, often evaluated using "secret evidence secretly considered" and with no opportunity for the applicant to refute said evidence; and an affirmation of identification by a supporting witness who was a registered voter, a requirement that essentially meant sponsorship by a white person. Beyond these, local registrars employed all manner of frustration, from the establishment of dilatory rules to evasion to outright closing the registrar's office if a Black person came to register.[10]

In 1964 a federal panel declared the 9-8 plan unconstitutional. Judges Gewin and Thomas joined in allowing the state to use the plan in elections that fall if the legislature failed to pass a new one but insisted that the court would have to intervene thereafter.[11] When lawmakers convened in special session to address the matter, "Chop-Up" Jefferson plans were again among the most seriously considered and most controversial. The leading proposals took the majority-Black "Bessemer Cutoff" section of the county out since it was already separated from the rest of Jefferson in the state's judicial circuit system, a relic of earlier efforts to create a separate county for Bessemer altogether.[12]

Republicans echoed Democrats' concerns about their own prospects under an at-large scheme. Congressman Bill Dickinson observed that the Democrats "know they are beaten." He and others accused Democratic lawmakers of turning to an at-large scheme in 1962, and in avoiding such a scheme in 1964, for the purpose of preventing a Republican, or as Mizell said a "scallowag," from getting elected. Among Democratic proposals for congressional redistricting was that put forth by E.O. Eddins. The Eddins Plan kept Jefferson County whole and maintained the configuration in south Alabama that paired Baldwin County with Montgomery, and Mobile with the western Black Belt. Another plan, the Lolley-Carter Plan, mirrored the Eddins Plan in South Alabama in CDs 1 and 2 but made what were described as "drastic changes" elsewhere. It split Jefferson by taking the Bessemer Cutoff and the City of Midfield and moving them into Armistead Selden's CD 5. Since the Cutoff and Midfield contained a large number of Black citizens, Selden agreed to take them only if he also gained largely-white Chilton County.[13]

The Lolley-Carter Plan ultimately passed both chambers and was signed into law by Governor Wallace on August 19, 1964. Republicans predicted that Democrats had "dug their own graves" by "nailing themselves to Johnson's coattails." Democrats who supported the Eddins Plan expressed alarm at moving so many potential Black voters out of Jefferson County and putting them into CD 5. One legislator called this a "very serious mistake" and observed, "All negros who want to vote will vote by 1966. Anybody who can't see that can't see." Wallace acolyte Hugh Locke agreed, calling it the "height of folly" and insisted that it would only "compound the race issue" in light of the large number of Black citizens already in CD 5.[14]

On the same day, the bill that the President would soon sign into law as the Civil Rights Act of 1964 passed the Senate. Johnson asked the American people rhetorically, "Are we of this generation of Americans to be remembered for allowing America's progress to run aground on the shoals of race?"

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[10] B.E.H., J.J.K. Jr, "Federal Protection of Negro Voting Rights," pp. 1093-1100; see also Bagley, Declaration on behalf of Plaintiffs in this case, Dec. 10, 2021, pp. 6-8; see also Brian Landsberg, *Free at Last to Vote: The Alabama Origins of the Voting Rights Act* (Lawrence: University of Kansas Press, 2007), passim.

[11] *Montgomery Advertiser*, Jan. 4, Feb. 20, 1964; *Birmingham Post-Herald*, March 14, 1964, May 13, 1965; *Anniston Star*, March 27, 1965.

[12] *Selma Times-Journal*, July 1, Aug. 4, 1964; *Montgomery Advertiser*, July 12, 28, 1964; *Birmingham Post-Herald*, July 28, 31, 1964.

[13] *Montgomery Advertiser*, Aug. 5, 6, 12, 15, 1964; *Tuskegee News*, Aug. 6, 1964; *Birmingham Post-Herald*, Aug. 14, 19, 1964.

[14] *Birmingham Post-Herald*, Aug. 19, 1964,

Representative Selden vehemently denied, in supporting the Lolley-Carter Plan, that he was "serving the interests" of Johnson, his own party's nominee, calling the accusation "so ridiculous as to not deserve a reply." In the general election, five Republicans, including Dickinson, defeated incumbent Democrats, with only three of the latter, including Selden, retaining their seats.[15]

In January of 1965, the voting rights campaign in Selma coordinated by the Southern Christian Leadership Conference, the Student Nonviolent Coordinating Committee, and others began. By late February, hundreds had been arrested for trying to register to vote at the Dallas County courthouse, though fewer than 100 had actually registered. When Jimmy Lee Jackson was shot to death at a related protest in nearby Marion, James Bevel conceived of a Selma-to-Montgomery march to lay the protestors' grief at the feet of Governor Wallace. The well-known events of "Bloody Sunday" occurred on March 7, and the "turnaround" march occasioned by Judge Johnson's restraining order occurred two days later. That evening, Klansmen beat three Unitarian ministers in town for their participation in the demonstration, murdering Rev. James Reeb in the process.[16]

As these sensational events unfolded in Selma, shocking much of the country and providing Cold War fodder for the U.S.S.R., plaintiffs amended their complaint against the 9-8 plan in order to challenge the new district plan, adopted the previous fall, as unconstitutional on one-person, one-vote grounds. The court ruled in plaintiffs' favor on April 17, 1965 but acceded to state Attorney General Richmond Flowers' request to allow the legislature a chance to pass a new plan during the regular session in May and June.[17]

That day a 3-judge court, comprised of District Judges Johnson and Thomas and Circuit Judge Richard Rives, enjoined Dallas County Sheriff Jim Clark and his infamous "posse" from interfering in civil rights demonstrations in Selma, while the bill that would become the Voting Rights Act was introduced in the U.S. Senate.[18] Later that day, Judge Johnson, having received assurances of protection from President Johnson for the marchers, including federalizing the Alabama National Guard, issued a ruling allowing the march to go forward under certain conditions. The march occurred between April 20 and 24. On the evening of the latter date, King delivered his famous "How Long, Not Long" speech at the state capitol, and Viola Liuzzo was murdered by Klansmen in Lowndes County.[19]

When the legislature convened two weeks later, lawmakers submitted numerous plans for congressional redistricting, most of which lopped some portion of Jefferson County off and put it elsewhere. Talladega's Sam Venable put forth a plan that would provide for four multi-member Congressional districts, including a "Coastal and Wiregrass" CD 1 that included Baldwin and Mobile. When Shelby County's Jimmy McDow proposed a plan that would split Jefferson between CDs 4, 5, and 6, Jefferson County's Larry Dumas threatened to filibuster. That filibuster finally came in July, following a short recess, but members of the Senate passed through a plan during a midnight session after Dumas had gone home for the

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[15] *Birmingham Post-Herald*, Aug. 19, 20, 1964. Selden won reelection in CD 5, along with George Andrews in CD 3 and Bob Jones in CD 8; the new Republicans were Jack Edwards in CD 1, Dickinson in CD 2, Glen Andrews in CD 4, John Buchanan in CD 6, and soon-to-be gubernatorial candidate Jim Martin in CD 7; *Alabama Journal*, Nov. 4, 1964.

[16] See, in general, Hasan Kwame Jeffries, *Bloody Lowndes: Civil Rights and Black Power in Alabama's Black Belt* (New York: New York University Press, 2009); Taylor Branch, *At Canaan's Edge: America in the King Years, 1965-1968* (New York: Simon and Schuster, 2006); David Garrow, *Protest at Selma: Martin Luther King and the Voting Rights Act of 1965* (New Haven: Yale University Press, 2015 reprint).

[17] *Birmingham Post-Herald*, April 17, 1965.

[18] *Id*.

[19] James Turner, *Selma and the Liuzzo Murders: The First Modern Civil Rights Convictions* (University of Michigan Press, 2018), pp. 1-14.

evening. The House similarly overcame obdurate resistance and a filibuster by way of a cloture vote taken when 2 Jefferson County members were absent from the floor. The House passed the bill just 6 days after President Johnson signed the Voting Rights Act into law.[20]

In elections that fall, Alabama Democrats regained 2 Congressional seats. Bill Nichols won in CD 4, and Tom Bevill took CD 7, where incumbent Jim Martin had chosen to run for governor (he lost to Lurleen Wallace, running as her husband's proxy since he was term limited). Nichols and Bevill had distanced themselves from Johnson during the campaign, calling Great Society "a flop" and joining in the chorus of those who insisted that school desegregation guidelines established by the Department of Health, Education, and Welfare went "beyond the law," or what the Civil Rights Act of 1964 required.[21]

When data from the 1970 Census was published, it revealed that the State of Alabama again lost a seat in the U.S. House. It would have to go from eight seats to seven when it attempted to redistrict its Congressional map. When the legislature convened in the summer of 1971, four were seriously considered, each of which targeted incumbent Republican congressman Bill Dickinson. Fred Gray, newly elected as one of the first two Black members of the state legislature since Reconstruction, proposed a plan that would give Black voters "a fighting chance" to elect someone "responsive to their needs" in two CDs by giving them roughly half the population of each. The legislature never seriously considered that plan and could not agree on any of the other four. It adjourned in September with no plan passed.[22]

Congressman George Andrews died unexpectedly on Christmas Day, 1971 at the age of 65, setting off jockeying for a replacement to serve the rest of his term and paving the way for passage of a plan. Federal law required Governor Wallace to call a special session to fill the half-year vacancy, and though he would delay such an election until April 1972, Wallace had a preferred candidate in mind immediately – Andrews' widow. It was widely believed that Wallace urged the Democratic Executive Committee to nominate Elizabeth Andrews in order to block Jimmy Clark, whose vacancy on the Senate Rules Committee would have allowed Lieutenant Governor Jere Beasley to replace Clark with Wallace-opponent Joe Fine of Russellville.[23]

On January 12, the House passed the "Cherner Plan" for congressional redistricting, the Senate having passed it two days prior. The biggest change in the plan was the combination of Dickinson's district with the late George Andrews's district. Elizabeth Andrews had indicated her desire not to run for reelection. In the process of drawing the Andrews' district in with Dickinson's, the legislature had, in an effort to strengthen Ben Reems' bid to unseat Dickinson, taken Baldwin County and Escambia County and put them in with Jack Edward's CD 1. The plan stripped Dickinson of two favorable counties and gave him unfavorable ones in the Wiregrass.[24]

Mobile and Baldwin counties had been split between CDs 1 and 2 since 1875. They were split in that year for the expressed purpose of unseating the only Black candidate ever elected to the U.S. Congress from Alabama, Jeremiah Haralson. When Alabama lost a seat in the late 1920s, The *Cleburn News* reflected

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[20] *Birmingham Post-Herald*, May 5, June 2, 16, July 23, 28, 1965; *Alabama Journal*, June 17, 29, 1965.

[21] *Birmingham Post-Herald*, Nov. 11, 1965.

[22] *Selma Times-Journal*, July 7, 8, 30, 1971; *Alabama Journal*, July 10, Sept. 17, 23, Nov. 15, 1971; *Anniston Star*, July 8, 15, 1971; *Birmingham Post-Herald*, July 21, 30, Aug. 4, Sept. 23, Oct. 1, 1971.

[23] *Montgomery Advertiser*, Dec. 26, 30, 1971; *Selma Times-Journal*, Dec. 26, 30, 1971; *Alabama Journal*, Dec. 27, 30, 1971.

[24] *Alabama Journal*, Jan. 22, 1972; *Montgomery Advertiser*, Jan. 6, 10, 20, 22, 23, 1972; *Selma Times-Journal*, April 3, 1972; *Birmingham Post-Herald*, Nov. 8, 1972.

on the 1875 split, explaining, "Reasons no longer exist which led to the creation of "shoe-string" districts, extending from the gulf through the black belt, as is the case with the second congressional district, of which Baldwin County in the southern extremity." The *News* concluded, "That gerimander [sic] seemed to be of paramount importance at a time when 'white' counties were given preponderance in each of the districts, to overcome the vote in the 'black counties.'"[25]

As I explain in my 2021 report in this case, this means that Mobile and Baldwin were, first, united in order to prevent the reelection of a Black incumbent and, 100 years later, reunited in for similar racial reasons. I write in the previous report:

> The posture, then, was something of a mirror image of the Populist moment in the late 19th century, when Black voters were losing, but had not yet fully lost, their ability to vote, and two white parties were trying to use Black voters to their advantage. In the 1970s, some Democrats had begun to accept that limited Black political power was a *fait accompli*, while at the same time, some in the GOP were coming to the understanding that the whiter the district, the better were their chance of carrying it. Specific to Dickinson, Baldwin was a white flight destination and was considered to lean Republican. So the legislature took it from Dickinson and gave him, instead, counties in the more old-line white Democrat Wiregrass. This is all to say that, when the Democratic state legislature repaired Mobile and Baldwin, it did so not out of an overarching concern for those counties as a Gulf Coast COI, but rather because the politics of race had returned to Alabama.[26]

That fall Dickinson nonetheless would ride "Southern Strategy" endorsements from President Nixon and Vice President Spiro Agnew to a narrow defeat of Raines and to reelection. Edwards would likewise win reelection in the reconfigured CD 1.[27]

b. Congressional Redistricting, 1980 – 2000

The state legislature passed a congressional redistricting plan in special session in August 1981. A legislative study committee, headed by Lister Hill Proctor of Sylacauga and Richard Manley of Demopolis, had published a plan earlier that summer and had held public hearings for feedback. White voters in Jefferson County expressed widespread disapproval, as did then-incumbent CD 6 Representative Albert

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[25] *Cleburn News*, July 11, 1929. Document 57-7, in the record in the case, erroneously identifies Baldwin County as part of CD 1 by the indicia "1" written inside the county. The map clearly shows the dividing line, however, between CDs 1 and 2 extending down through Mobile and Baldwin and into Mobile Bay. See also, regarding the "Lee-Brindley Bill," passed in 1915, continuing the split of Mobile and Baldwin, *Selma Times-Journal*, Oct. 14, 1915; *Marion Times-Standard*, Oct. 1, 1915; *The Southern Democrat*, Feb. 26, 1931 (1930s redistricting bill). The *Cleburn News* opined, "The idea of uniting the counties of Mobile and Baldwin viewed in the abstract, appears to be expedient and wide for the two coast counties have a community of interests that is strong and varied." Nonetheless, the legislature opted to keep the arrangement used to prevent the election of a Black candidate of choice, until racial motivation made this less expedient.

[26] *Alabama Journal*, Nov. 23, Dec. 9, 15, 1971, Jan 22, 1972; *Montgomery Advertiser*, Dec. 2, 1971, Jan. 6, 20, 22, 23, 1972; *Anniston Star*, Dec. 8, 1971; *Selma Times-Journal*, Dec. 10, 1971, April 3, 1972; *Birmingham Post-Herald*, Nov. 8, 1972; Merle Black and Earl Black, *The Rise of Southern Republicans* (New York: Belknap Press of Harvard, 2002), pp. 126-28.

[27] *Alabama Journal*, Jan. 22, 1972; *Montgomery Advertiser*, Jan. 6, 10, 20, 22, 23, 1972; *Selma Times-Journal*, April 3, 1972; *Birmingham Post-Herald*, Nov. 8, 1972.

Lee Smith of Mountain Brook. In the original plan, Jefferson would have gone from being split into two CDs to being split in three; in addition, that plan would have split Franklin, Lowndes, and nearby St. Clair.[28]

According to the Birmingham *Post-Herald*, Jefferson County and CD 6 were "crucial to the struggle" to get an alternative plan passed because Birmingham had lost significant population due to "mass flight," that is, white flight, from the city into suburbs in southern Jefferson, northern Shelby, and western St. Clair counties. The *Post-Herald* explained that Smith and his staff "attacked" the original plan "because it would have shifted a large number of blacks in Bessemer and its environs into his district." The original plan would have added to Smith's CD 6 the City of Bessemer, Hueytown, and Greenwood, along with Midfield, Fairfield, Brighton, Lipscomb, Wylam, and Roosevelt City in western metropolitan Birmingham and Leeds in the east. These were all areas with significant Black population, with several of those cities being predominantly Black at that time and others headed in that direction.[29]

The original plan also would have stripped Smith's district of whiter areas in the southern, northern, and eastern suburbs, including Hoover, Trussville, Warrior, Cahaba Heights, Rocky Ridge, and part of Homewood. The result would have been a CD 6 with nearly 40 percent Black population. Under a compromise plan drafted by Democratic Jefferson County state legislators, Smith kept the white suburbs east of Interstate 65 and added only Midfield, Fairfield, Brighton, Lipscomb, and Roosevelt City on the west side of the metro. As the *Post-Herald* observed, "While Smith is left with more black voters in his district than before, he will not see his district redrawn to include as many blacks as the committee first proposed." Richard Shelby's CD 7 kept the Bessemer Cutoff and the City of Bessemer and added Lowndes County from CD 3. St. Clair was split between CDs 7 and 4, with the latter maintaining Franklin County. Republicans Jack Edwards and Bill Dickinson saw no changes to their districts.[30]

Committee co-chair Manley derided the new plan as the "Republican – Moral Majority Plan," despite the fact it was introduced by Democrats. Birmingham's Earl Hilliard, one of a select few Black members of the legislature at that time, echoed that sentiment but went further, arguing that the lines separating CDs 6 and 7 cracked the Black population in western Jefferson and were, more specifically, deliberately drawn "to reduce the number of blacks" in CD 6. Hilliard cast the lone vote in opposition to the plan in the Senate Judiciary Committee. Another Black legislator, Thomas Reed, indicated that all the plans he had seen deliberately diluted the voting strength of Black citizens. The revised plan approved by the committee passed both houses of the legislature in August and was precleared by the Reagan Justice Department in March of 1982.[31]

After the 1990 Census, Joe Reed and other Black leaders in the state resumed the push for the creation of a majority Black congressional district. As the *Montgomery Advertiser* observed, the creation of such a district would probably mean combining parts of CDs 6 and 7 and costing either Ben Erdreich (6) or Claude Harris (7) their job. As Harris was the junior member of the delegation, having won the seat following Dick Shelby's election to the Senate, it looked to be him. The *Advertiser* also noted, concentrating Black voters in one district would, "of course increase white voting strength in other districts, increasing, in turn, the chance of electing another Republican congressman."[32] Auburn University political scientist Margaret Latimer likewise observed, "The Republicans are hoping that with the creation of a black district, there will be the creation of a Republican district. The hope is," Lattimer explained, "that enough black

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[28] *Birmingham Post-Herald*, Aug. 15, 1981.

[29] *Birmingham Post-Herald*, Aug. 13, 15, 1981; *Selma Times-Journal*, Aug. 14, 1981; *Birmingham Post-Herald*, Aug. 13, 1981.

[30] *Birmingham Post-Herald*, Aug. 15, 1981.

[31] *Montgomery Advertiser*, March 2, 1982; *Alabama Journal*, March 2, 1982; *Prattville Progress*, Oct. 1, 1981.

[32] *Montgomery Advertiser*, Jan. 2, 1991.

voters will be taken out of district, diluting the black vote in the district, which could lean votes towards the Republican Party." From the beginning, the GOP's insurgence in Alabama, in other words, has been tied to manipulating the Black vote. Black candidates and their supporters fought for inclusion in the only party and contest that had mattered in the state for decades, and when they won that, white voters and candidates left for the former pariah party.[33]

The *Alabama Journal* predicted, "One of the redrawn congressional districts is all but certain to have a majority black population." It continued, "Several of the state's most prominent black politicians are interested in running for the seat, and the way that district is drawn will determine who gets a chance." The "most likely" scenario, the *Journal* editors could see would include "primarily" the existing Seventh, as it included "most of the Black Belt counties," and that would bring Selma state Senator Hank Sanders into the race. Beyond that, they predicted two other possibilities – either the district would be drawn further east to include Macon County, bringing in Tuskegee mayor Johnny Ford, or it would "be dipped far enough south to include Mobile," bringing in state Senator Michael Figures.[34]

State Representative Jack Venable indicated that he had been in meetings with representatives of the Bush Justice Department and that it was his understanding that "unless states like Alabama have a majority black district, they can pretty much count on court action." Venable, co-chair of the Joint Legislative Committee on Reapportionment, explained, "Unless we make an effort to draw at least one [majority Black district], we won't get past the Justice Department, and even if we did there's no way to escape a challenge in federal court." Lieutenant Governor Jim Folsom Jr. made a similar observation, saying, "Either the legislature will draw [a majority black district] or the courts will dictate one." Venable laid out three possibilities for such a district in Alabama – one would stretch across the state and unite the Black Belt, one would include the western Black Belt with part of Jefferson County, and the other would tie "Black areas around Mobile" with "counties on the western side of the state."[35]

When the legislature convened in late February, Lt. Governor Folsom and House Speaker Jimmy Clark appointed a new Permanent Joint Legislative Committee on Reapportionment of 20 legislators to oversee the redistricting process for state legislative districts and for Congress. The committee included one Republican and five Black members. Governor Guy Hunt pledged to provide Republican "balance" to the redistricting process. Of the five Black members of the committee, two belonged to the ADC and three to ADC's newly created rival, the Alabama New South Coalition (ANSC).[36] The committee met the following month, with the intention of asking Governor Hunt for a special session in the fall to pass a congressional plan. It scheduled public hearings and meetings for the summer and early fall in expectation of such a session and began accepting proposed plans, with a September 4 deadline for submission.[37]

The committee indicated that it would likely not consider any plan that did not include a Black majority district. Submitted plans nonetheless differed substantially on what that district would look like. For example, some white Democratic leaders wanted a very narrow Black majority, in order to distribute

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[33] *Alabama Journal*, Jan. 2, 1991; *Selma Times-Journal*, April 18, 1991.

[34] *Alabama Journal*, Jan. 2, 1991.

[35] *Montgomery Advertiser*, Jan. 6, 1991; *Birmingham Post-Herald*, Jan. 7, 1991; *Anniston Star*, Jan. 6, 1991.

[36] ANSC was an umbrella organization, representing committees in the Black Belt, Mobile, and Birmingham, founded as an alternative to what was seen as Joe Reed's political approach and pugilistic nature. ADC retained strong support in Montgomery and in the Wiregrass. See Alan Tullos, *Alabama Getaway: The Political Imaginary and the Heart of Dixie* (Athens: University of Georgia Press, 2011), pp. 204-6.

[37] *Montgomery Advertiser*, Feb. 28, 1991; *Birmingham Post-Herald*, Aug. 19, 1991; *Alabama Journal*, Aug. 27, 1991.

Black population among Republican incumbent districts. Leaders at ANSC, however, insisted that 65 percent was the minimal number to guarantee the election of the state's first Black representative since Reconstruction. Likewise, some plans, like one of those presented by ANSC, would pair the western Black Belt with Black areas of Mobile and Birmingham, while others, like one submitted by Democrat Sam Bennett, would make minimal changes to incumbent Democratic districts and would create a slim majority Black district by combining parts of the western and eastern Black Belt with Montgomery, while connecting the existing CD 7, including the Bessemer Cutoff, with Mobile. Still others paired Black areas of metropolitan Mobile, including Prichard, with Black areas of Montgomery.[38]

Republican Larry Dixon submitted a plan that left CDs 1 and 2 largely unchanged while combining the Black population of Birmingham with the existing CD 7 and creating a potential GOP flip district in CD 6, which included suburban Birmingham, including northern Shelby County and Tuscaloosa; the Dixon plan also placed Democratic incumbents Erdreich and Harris together in CD 6. In condemning plans that placed incumbents Dickinson and Callahan together, Dixon said, "Minority status can be designated to a party as well as a race." Dixon similarly criticized ADC's plan, offered by Joe Reed. The ADC plan combined western Montgomery with western Jefferson along with the bulk of the Black Belt counties; it also split Mobile County, placing the northern half with Tuscaloosa and the southern half with East Alabama. Dixon argued that the plan 'discriminated' against the GOP and vowed, "We're going to take it to court if it adversely affects Republican incumbents." Similarly, James Thomas of Selma predicted, "There will be efforts made to bring forth suits alleging we didn't go far enough and try to draw these two [majority Black] districts."[39]

By the second week of September, the Bennett Plan, submitted on behalf of the Southern Area Democratic Club of Jefferson County, and the Reed Plan had emerged as top contenders. The Bennett Plan had become known as the "Save Erdreich Plan," since it left CD 6 largely as it had been. Both plans kept CDs 3, 4, and 5 the same (though renumbered in the Reed-ADC Plan), and both split Mobile and Baldwin Counties, placing the latter with the Wiregrass and placing some (Bennett) or all (Reed) of Mobile with Tuscaloosa. Bennett's plan created a majority Black district by combining most of the Black Belt with Montgomery. Reed's plan did so by combining some of the Black Belt and Montgomery with what the *Birmingham Post-Herald* described as "a finger [going] into Jefferson County to pick up enough Blacks to create the minority district."[40]

Congressman Dickinson blasted the Reed Plan as part of a wider criticism of sometime Reed ally and Alabama Education Association chairman Paul Hubbert. Dickinson told a business club, "It has been agreed – by whomever – that we've got to have a black district," before switching gears to teacher testing and insisting that Hubbert and AEA fought this because, "A large number of its teachers are not qualified to be teachers." Dickinson continued, using language that the white audience would have recognized referred specially to Black teachers, "If you have a teacher who can't pass the test that she or he is giving to students, then something is basically wrong." He concluded, "If the teacher can't speak it, can't read it, education is not going to improve."[41]

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[38] *Birmingham Post-Herald*, Aug. 19, 1991; *Alabama Journal*, Aug. 20, 1991.

[39] *Selma Times-Journal*, Sept. 4, 5, 1991; *Montgomery Advertiser*, Sept. 4, 1991; *Birmingham Post-Herald*, Sept. 5, 1991; *Anniston Star*, Sept. 5, 1991.

[40] *Birmingham Post-Herald*, Sept. 10, 1991.

[41] *Birmingham Post-Herald*, Sept. 10, 1991; *Union Springs Herald*, Sept. 11, 1991; *Montgomery Advertiser*, Sept. 14, 1991. Dickinson's remarks were echoed as recently as May of this year, 2023, by U.S. Senator Tommy Tuberville: "The Covid really brought it out how bad our schools are and how bad our teachers are — in the inner city. Most of them in the inner city, I don't know how they got degrees, to be honest with you. I don't know whether they can read and write. … They want a raise, they want less

On September 18, Governor Hunt publicly indicated that he had no intention of calling a special session for redistricting because, in his view, the legislature ought not to allow Joe Reed to redraw the district lines. A week later, on the last day of a special session called to handle the budget, Ray Campbell, a white Democrat from Decatur, offered a redistricting "unification" plan. It included the residences of most of the Black leaders said to be, or thought to be, considering a run for a new majority Black district seat. It included much of the Black Belt and Montgomery with a "finger" grabbing Black population in Birmingham and "another finger" grabbing Black population in Mobile. Hunt's press secretary announced that "The Governor is not thrilled about having a special session just to rubberstamp Joe Reed's plan."[42]

Hunt himself said he would not call a special session if it were to be "dominated by Joe Reed's plan." He added that he would be amenable to calling one if there was "consensus" on a plan and it was not Reed's. Larry Dixon echoed that sentiment, revealing in the process the connection between opposition to Reed's congressional plan and the one Reed had helped author a decade prior, Reed-Buskey, which led to a substantial increase in Black state legislators. Dixon said, "All we'll do [in a special session] is ratify the Joe Reed Plan, like we did in 1982. Then when it is appealed in court, the state will have to pay legal expenses to defend that plan. It's an awful plan," Dixon concluded. Perry Hooper, Jr. agreed, saying, "For the first time in my life, I feel more confident letting the judiciary make the decision rather than the legislature because of the support legislators have given to Joe Reed's plan."[43]

Hooper's level of comfort no doubt improved when, at the end of the special session on the budget, the chairman of the Mobile County Republican Party, Paul Charles Wesch, filed suit in the Southern District against the governor and others state officials, asking the court to impose a plan since the legislature did not pass one of its own and the existing plan failed the one-person, one-vote standard, specific to Callahan's CD 1. Callahan hedged for a while before admitting, through his spokesman Jo Bonner, that his team was behind the filing of the suit. News outlets confirmed that Wesch "acted at the suggestion of a GOP consultant," later revealed to be Randy Hinaman. Hinaman insisted that the suit was filed because the Reed Plan "tore up" Callahan's district and the lawmaker instructed Hinaman, his former chief of staff then acting as a consultant, to "Do what you can to keep the First District intact." In a deposition, Wesch admitted that the lawsuit was not his idea and that it was not on his radar at all until he received a call from Hinaman a week prior to its filing. Reed argued that his plan allowed Callahan to keep what he called his "strongest counties" in South Alabama and included Mobile in a new majority Black district because of its large Black population. Hinaman countered by noting that Callahan, though he lost Mobile County in 1984, had won it in 1988.[44]

A three-judge court consisting of Circuit Judge Emmett Cox, Senior District Judge Brevard Hand, and District Judge Harold Albritton was convened to hear *Wesch v. Hunt*. The committee continued in its work, narrowing the number of proposed plans the following day from 25 to 20. The five surviving plans were Reed's ADC plan; one offered by committee co-chair Ryan Degraffenried that would combine Black population in Birmingham, Montgomery, and Mobile; one of several offered by state Senator Wendell Mitchell of Luverne; one offered by Montgomery Representative Mike Box; and the Larry Dixon Plan. The committee also authorized its attorney to seek intervention in *Wesch* on behalf of the committee. Governor Hunt remained obdurate about a special session, but Reed insisted that the legislature could pass a plan out during the first week of the regular session the next year, as it had done a decade prior. A day later, the

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time to work, less time in school. We ruined work ethic in this country"; William Thornton, "Tuberville on inner city teachers: 'I don't know whether they can read and write,'" *Al.com*, May 26, 2023.

[42] *Selma Times-Journal*, Sept. 24, 1991.

[43] *Montgomery Advertiser*, Sept. 19, 1991; *Birmingham Post-Herald*, Sept. 24, 1991; *Selma Times-Journal*, Sept. 24, 1991.

[44] *Selma Times-Journal*, Jan. 5, 6, 1992; *Montgomery Advertiser*, Jan. 5, 6, 1992.

committee trimmed the list to only two – Reed and Dixon. Senator Fred Horn indicated that the committee passed the Dixon plan out favorably to prove to the governor that a "fair" plan would be before the legislature were he to call a special session. In his answer to the *Wesch* complaint, Hunt indicated that he would not call a special session to account for the "failure of the legislature to pass appropriate legislation."[45]

Democrats filed suit in state circuit court against Hunt, arguing that he had duped them with false promises of a special session under direction from the national Republican Party. The latter was said to be favoring a policy of allowing redistricting to fall into federal courts instead of Democratically controlled state legislatures. Barbour County Circuit Judge William Robertson ruled for the plaintiffs and took the remarkable step of ordering the governor to call a special session. Hunt appealed to the state Supreme Court and filed a motion in *Wesch* seeking to block the order. The deadline set by Robertson fell after the scheduled trial on the merits in *Wesch*, January 3. The court in that case retained Rochester University professor Harold Stanley to assist it in adjudicating the matter. It denied the Permanent Committee's bid to intervene but granted the same to Michael Figures and others as representative of a class of Black Alabamians. Figures submitted one of six plans that the court said that it would consider, including also one from Hank Sanders, one from Earl Hilliard with two majority Black districts, the "Unity" Plan, and the Reed and Dixon plans.[46] Days before the trial, Dixon argued that the Reed plan "puts Reed in the catbird seat to anoint the new Congressman" and added, "The fairest shake the Republicans are going to get is from the federal courts."[47]

When the trial began, lawyers for Wesch argued that Reed's plan was an effort to eliminate the two south Alabama GOP districts under the guise of drawing a majority Black district. Reed contended that the lawsuit itself and Hunt's refusal to call a special session were a ploy to "get a plan through the court that" they "couldn't get through the legislature." He suggested that filing the suit in the Southern District was an attempt to get a sympathetic court. Reed and Figures registered skepticism of Hilliard's plan – which would draw Black population from Mobile, Montgomery, Birmingham, and the Black Belt to draw two majority Black districts – because they believed that a district needed around 65 percent Black population to get a candidate of choice elected. Figures noted that the Wesch/GOP plan – the Dixon Plan adjusted for population and submitted on behalf of Lee County Commissioner Sam Pierce – was intended not just to protect Callahan and Dickinson, but to use the creation of a Black district to whitewash an 89 percent white, new suburban Birmingham district, with Erdreich and Harris together therein. A Georgia redistricting consultant, Jerry Wilson, testified that the Dixon-Peirce Plan had been formulated with no input from any Black person.[48] ANSC submitted plans that would combine Black population in Mobile, Montgomery, and Birmingham. Figures said that there was "no logic" in leaving Mobile out of a Black district, as it was the "second largest black population center" in the state.[49]

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[45] Wesch v. Hunt, 785 F. Supp. 1491 (S.D. Ala., 1992); *Birmingham Post-Herald*, Oct. 1, 2, 1991; *Montgomery Advertiser*, Oct. 1, 2, 1991; *Alabama Journal*, Oct. 2, 1991; *Selma Times-Journal*, Oct. 3, 1991; *Anniston Star*, Oct. 31, 1991.

[46] The plan submitted by the GOP to the court was a slightly modified version of the Dixon Plan labeled the (Lee County Commissioner) Sam Pierce Zero Plan. The Court described it thus: "The Pierce Plan, however, is a modification of a plan called the "Larry Dixon Plan" which was considered by the Reapportionment Committee. The Pierce Plan modified the Larry Dixon Plan to some extent, but the basic format is similar." Wesch v. Hunt, 785 F. Supp 1491 (S.D. Ala., 1992), 1495.

[47] *Montgomery Advertiser*, Dec. 28, 29, 1991; *Birmingham Post-Herald*, Dec. 28, 1991; *Selma Times-Journal*, Dec. 28, 1991, Jan. 3, 1992; *Alabama Journal*, Jan. 3, 1992; *Anniston Star*, Jan. 3, 1992.

[48] As the *Selma Times-Journal* reported, "Dixon's plan was revised slightly, and his Republican-drawn map was submitted to the three-judge panel"; Jan 6, 1992.

[49] *Birmingham Post-Herald*, Jan. 4, 6, 1992.

On January 27, the court set a deadline of March 27 for the legislature to pass a plan and have it precleared by the Justice Department. If it did not do so, the court insisted that it would order the state to use a plan drawn by Professor Stanley in elections that spring and fall. Stanley's plan was a slightly modified version of the Dixon-Pierce Plan.[50] Stanley explained that the judges asked him if there was any reason not to keep incumbent Claude Harris's residence in his district, leading Stanly to adjust the lines so that Harris would remain in CD 7. The order provided the legislature the opportunity to pass a plan when it convened the next month, but that plan would have to be precleared by the Justice Department in a very narrow window of time to be used in lieu of the court's plan in the June primaries; the court imposed a deadline of March 27 for obtaining preclearance. Democratic leaders charged the court with "judicial activism" and "conspiracy," arguing that Harris would lose to a Black candidate and Erdreich would lose because his district was too white since the Birmingham "finger" took out Black population that was replaced with white suburban Shelby County population. Larry Dixon was described in the press as "gleeful." Dixon noted the state would be able to avoid moving the primary elections, which he estimated would cost $3 million, and said this would be "just to see if they can pass a plan that Joe Reed wants." For his part, Reed insisted that, while that figure was probably greatly embellished, "$3 million is nothing for justice and fairness."[51]

In late February, the Alabama Senate passed a plan, despite a three-day Republican filibuster. The new plan would put Erdreich and Harris together in new CD 6 that included Tuscaloosa, the far western Black Belt, and part of suburban Birmingham. It would create a majority Black CD 7 with no incumbent that included urban Birmingham, part of Montgomery, and the central Black Belt. Senator Gerald Dial, then a Democrat, explained, "Most people thought that the court plan would eliminate" Erdreich and Harris," so, he said, "This was an effort to save one of them." Republicans filibustered the bill in the House, but at the urging of U.S. House Speaker Tom Foley, Alabama House Speaker Jimmy Clark gathered the votes to pass a slightly modified version of the plan on February 27. The final version split Jefferson County three ways, with the Birmingham suburb of Gardendale going into Bevill's CD 4 and the rest being split between CDs 6 and 7. Republican state Representative Jack Biddle of Gardendale vowed to "get even" with his colleague Mike Box, the sponsor of the bill. Biddle said, "One of these days, Mr. Box, I'm going to get even. It may not be today. It may not be this year or next year. But I'm going to get even."[52]

Governor Hunt vetoed the bill, but legislators in the House and Senate overrode him. The legislative plan was submitted, along with a bevy of supporting documentation, to the Justice Department for preclearance in early March. While that submission was pending, the *Wesch* court entered a final ruling. It noted that the court had not received any notification of preclearance and that it, therefore, did not consider the plan passed by the legislature. Secretary of State Billy Joe Camp filed a motion asking the court to adopt the legislature's plan outright, which it denied. It dismissed four of the six plans on grounds of insufficient population equality among districts, leaving only Dixon-Pierce and Reed. Citing the Reapportionment Committee's guidelines, the court compared these on grounds of compactness/contiguity, preservation of political subdivisions; maintenance of communities of interest; and preservation of the core areas of existing districts." (*Wesch v. Hunt*, 785 F.Supp. 1491, 1498, S.D. Ala., 1992, aff'd *sub nom* Camp v. Wesch, 507 U.S. 902, 1992). The court concluded that the Pierce Plan was superior on balance to the Reed Plan. Regarding the creation of the majority Black district, the court noted that all parties had stipulated to the need to create such a district, which, via "judicial restraint," allowed the court to "[avoid] the necessity of the court considering prolonged testimony regarding whether § 2 of the Voting Rights Act requires the

[50] The *Montgomery Advertiser* explained, "The plan adopted in federal court is nearly identical to one drafted by Sen. Dixon and other Republicans"; Jan. 28, 1992.

[51] *Selma Times-Journal*, Jan. 28, 1992; *Montgomery Advertiser*, Jan. 28, 1992.

[52] *Anniston Star*, Feb. 22, 28, 1992; *Birmingham Post-Herald*, Feb. 24, 28, 1992.

creation of such a district under the circumstances present in this case." (Id. 1498-99).[53] The court ruled that the plan passed by the legislature should be used in elections that year if it were to be precleared by the court-imposed deadline.[54]

On the date of that deadline, March 27, the Civil Rights Division's John Dunne, on behalf of the Attorney General, objected to the state's plan. Dunne insisted that "extreme time constraints" prevented the division from conducting a thorough review of the plan. He also noted that the deadline "limited the state's ability to meet its burden under Section 5" and "cure" the objection. The division nonetheless objected to the legislature's plan, noting, "A concern has been raised that an underlying principle of the Congressional redistricting was a predisposition on the part of the state political leadership to limit black voting potential to a single district." The same day, the U.S. Supreme Court declined to stay the trial court's order and declined to expedite argument on the state's appeal. The *Wesch* court's version of the Dixon Plan, then, would be used in elections that spring and fall.[55]

The objection letter to the state acknowledged that one such district had been created but observed that "the remainder of the state's concentrated black population, however, is fragmented . . . among a number of districts none of which has a black population of as much as 30 percent." Division lawyers concluded, "In light of the prevailing pattern of racially polarized voting throughout the state, it does not appear that black voters are likely to have a realistic opportunity to elect a candidate of choice in any of [those] districts." This "fragmentation" was "unnecessary," they concluded, noting that Earl Hilliard and others had presented at various times plans that provided for two majority Black districts. Some of those plans, the letter explained, paired Black population in Jefferson and Tuscaloosa to create one majority Black district and paired Black population in Mobile and Montgomery to create another, with each district taking in Black population in the Black Belt. The elimination of the fragmentation of those populations would, the CRD explained, "enhance the ability of black voters to elect representatives of their choice." It concluded that the reasons given for the fragmentation had not been "adequately explained," beyond incumbent protection or "parochial political concerns," which were, in and of themselves, "not inappropriate," and which could not "be accomplished at the expense of the rights of black voters."[56]

That fall four of the state's incumbent congressmen were reelected – Callahan, Browder, Bevill, and Cramer. Bill Dickinson retired, and his seat in the new CD 2 was won by fellow Republican, and millionaire, Terry Everett of Dothan. State Republican Party Chairman Elbert Peters explained that the three Republican appointed judges in *Wesch* had packed Black voters in the new CD 7 and that helped Everett defeat George Wallace Jr. for the seat. Everett said, "If you gather most of the blacks in one district, it has to help the other districts." Claude Harris chose not to run for reelection in the new CD 7. Earl Hilliard won there, becoming the first Black representative in Congress from Alabama since the Redemption. Ben Erdreich ran against Spencer Bachus, who had resigned as chairman of the state Republican Party to run in

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[53] The stipulation read: "According to 1990 data compiled and released by the United States Bureau of the Census, the African American population in the State of Alabama is sufficiently compact and contiguous to comprise a single member significant majority (65% or more) African American Congressional district. Consequently, all parties agree that a significant majority African American Congressional district should be created." (1498).

[54] *Birmingham Post-Herald*, March 5, 6, 1992; *Anniston Star*, March 5, 6, 1992; *Alabama Journal*, March 6, 1992; *Selma Times-Journal*, March 11, 1992; Wesch v. Hunt, 785 F.Supp. 1491, 1492-15-02 (S.D. Ala., 1992), aff'd *sub nom* Camp v. Wesch, 507 U.S. 902 (1992).

[55] John R. Dunne, Assistant Attorney General for Civil Rights, to Jimmy Evans, Attorney General of Alabama, March 27, 1992, CRD Section 5 Objection Letters online; *Birmingham Post-Herald*, March 28, 1992;

[56] Dunne to Evans, March 27, 1992, CRD Section 5 Objection Letters Online.

the new CD 6, and he lost. Joe Reed and ADC continued to advocate for a second majority Black congressional district.[57]

c. Congressional Redistricting, 2000 - 2020

As 2002 began, the focus in the legislature shifted to passing a new congressional plan. When the legislature convened in January, Democratic Senator Jeff Enfinger proposed a plan that passed out of the relevant Senate committee. The biggest changes in it were moving Black residents of western Montgomery out of Earl Hilliard's CD 7 and into CD 3, then represented by Bob Riley, who had announced a gubernatorial run. Other changes included moving St. Clair, Bibb, and Chilton out of CD 3 and into CD 6. These moves would lower the Black population in CD 7 from 70 percent to 62 percent and, presumably, give Democrats a better chance to take back CD 3 and, possibly, the U.S. House of Representatives. Support for the plan was not uniform among Democrats, with Black members of the legislature calling for a plan that featured two majority Black districts. The plan nonetheless passed on January 30 2002, with Republicans describing it as the product of "racial gerrymandering."[58]

By that time, three separate lawsuits had been filed targeting the legislature's failure, up to that point, to pass through a congressional plan – one in state court and two in federal. The state case was removed to federal court, and the three consolidated cases then came before a three-judge panel in the Middle District for trial, which was ongoing when the legislature passed the plan. The court deferred to the Justice Department, which precleared it in March. Sam Pierce testified as an expert for the plaintiffs in one of the federal case, and the court noted in its ruling that Pierce admitted that, when he drew the congressional plan ultimately adopted in *Wesch*, as well as a plan being proposed at that time, he "referred only to census data and attempted to minimize the number of black persons residing in districts he was designing to favor Republican candidates." *Montiel v. Davis*, 215 F. Supp. 2d 1279, S.D. Ala. 2002), at 1283. [59]

In elections that fall, Republican candidate Mike Rodgers narrowly defeated white Democrat Pete Turnham of Auburn in CD 3. Earl Hilliard lost a primary challenge to Birmingham's Artur Davis, who subsequently won in CD 7. The political and racial makeup of Alabama's delegation, then, remained the same as it had been before. Bob Riley very narrowly defeated Don Siegelman in the Governor's race. As the Emory University scholar Allan Tullos wrote in 2011, Riley and the GOP "pulled big numbers in the rapidly growing whitelands – the suburbs in counties such as Baldwin, Shelby, Autauga, and Bibb." Tullos quoted the University of Alabama geographer Gerald Webster, who explained in the immediate aftermath of the election, these were "Those outlying counties with freeway access to major areas of employment" that tended to be "fairly well off." These areas were, according to Webster, "In many cases substantially whiter than the state as a whole, and they are increasingly Republican." Tullos observed that Riley's victory "raised a democratic fear that the day would soon come when the party would be unable to capture any statewide office." Black Alabamians then found "themselves electorally corralled within particular areas of the state," Tullos explained. Riley's victory "owed nothing to the voting bloc he called 'Afro-Americans.'"[60]

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[57] *Selma Times-Journal*, Nov. 5, 1992; *Birmingham Post-Herald*, Nov. 5, 1992; re: Reed and ADC, see *Selma Times-Journal*, Jan. 31, 1994.

[58] *Birmingham Post-Herald*, Jan. 22, 31, 2002; *Selma Times-Journal*, Jan. 24, 2002.

[59] Douglas v. Alabama, No. 01-D-922-N (MD), order dismissing consolidated Congressional cases as moot, Apr. 29, 2002 - Montiel v. Davis, No. CV-01-D-1376-N (S.D. Ala.), and Barnett v. Alabama, No. 01-0434 (S.D. Ala.); *Montgomery Advertiser*, Jan. 29, 30, March 5, 2002; *Birmingham Post-Herald*, Feb. 7, 2002.

[60] Allan Tullos, *Alabama Getaway: The Political Imaginary and the Heart of Dixie* (Gainesville: University of Florida Press, 2011). Pp. 157-158.

When Barack Obama was inaugurated as the Forty Fourth President of the United States, the backlash to the election of the nation's first Black President manifested even before he took office. And it would continue to do so long after he was out of the White House. This backlash was among several factors that finally completed what had long been in motion in Alabama, and what had always been, in large measure, fueled by race discrimination. In the elections in 2010, the last white Democratic member of Congress, Bobby Bright, was defeated. Congressman Parker Griffith was reelected but had been among the last of the white Democrats known as "Blue Dogs" to flip to the Republicans. Griffith was the first Republican elected to represent Alabama's CD 5 since Reconstruction. Terri Sewell won the seat in CD 7 held previously by Artur Davis, making her the only Black member of the delegation, and the only Democrat. In 45 years, from 1965 – not coincidentally the year after the Civil Rights Act was passed and the year the Voting Rights Act was passed – to 2010, the Alabama delegation had undergone a complete metamorphosis.[61]

The Republicans also achieved a supermajority in the state legislature, by way of targeting white Democrats and whitewashing adjacent districts. This allowed the newly all-white GOP to dominate the redistricting process following the publication of the 2010 Census figures. Del Marsh had weathered backlash following his cloture vote, purportedly exercised in exchange for the whitening of his district in 2001; he explained after the 2010 elections, "We are in the majority and in a position, if we have to, to run over people."[62] There was no longer any incentive for GOP lawmakers, in other words, to bargain with Black members of the body, as they had done in some previous cycles in order to gain seats. White Democrats had of course done this in previous cycles as well in order to avoid repeated rejection of plans by the Justice Department or the courts, to beat back Republican gains, to comply with the non-retrogression standard of Section 5, or to save their own seats in desperation when the latter became an existential threat. Soon, Section 5 compliance would also fall by the wayside, when plaintiffs in Shelby County filed suit against the statute.

When the new membership of the Permanent Joint Legislative Committee on Redistricting was revealed, it featured 16 members, 10 white Republicans and 6 Black Democrats.[63] Black legislators protested this representation and favored instead a nonpartisan commission to oversee the process, but, as subsequent events would reveal, these protestations amounted to nothing. Cochaired by Senator Gerald Dial and then-Representative Jim McClendon, the committee held public hearings and took input prior to maps being produced. Those maps were drawn behind the scenes by familiar characters including attorney consultant Randy Hinaman, with input from "gerrymander whiz" Thomas Hofeller.[64]

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[61] See pp. 14-15 of my original report in this case. On Obama backlash, see Will Bunch, *The Backlash: Right-Wing Radicals, High-Def Hucksters, and Paranoid Politics in the Age of Obama* (New York: Harper Collins, 2011); Adia Harvey Wingfield and Joe R. Feagin, *Yes We Can? White Racial Framing and the Obama Presidency* (New York: Routledge, 2013); Terence Samuel, "The Racist Backlash Obama has Faced during his Presidency," *Washington Post*, April 22, 2016. On the 2010 elections and the last of the "Blue Dogs," see *Montgomery Advertiser*, Nov. 22, 2010.

[62] *Montgomery Advertiser*, May 1, 2011.

[63] *Montgomery Advertiser*, Nov. 3, 2010, May 1, 2011; *al.com* and *Mobile Press-Register* Staff, "Republicans claim majority in Alabama House and Senate for 1st time in 136 years," *al.com*, Nov. 3, 2010; Camille Corbett, "Hubbard reflects on GOP takeover," *The Crimson White*, Oct. 23, 2012; Tim Reeves, "Congressional Redistricting: Piece by Piece," *Selma Times-Journal*, May 10, 2011.

[64] Michael Wines, "Republican Gerrymander Whiz Had Wider Influence Than Was Known," *New York Times*, Sept. 10, 2019; Wines and Fausset, "North Carolina's Legislative Maps Are Thrown Out by State Court Panel," *New York Times*, Sept. 3, 2019; David Daley, "The Secrets of the Master of Modern Republican Gerrymandering," *The New Yorker*, Sept. 6, 2019; Eddie Burkhalter,

McClendon later explained the process undertaken by himself, Senator Dial, Walker, and Hinaman, "The strategy was very simple, and it was understood by everybody. It was pretty commonplace. We did this for congressional districts, and we did this for House districts. We drew minority districts first. That's how you guarantee they get to keep what they've got," with "they" being Black voters. McClendon also seemed to demonstrate his understanding at least of the Voting Rights Act when he said, "Black people accounted for about 25 percent of the state's population, and 25 percent of our legislators are blacks. Are you getting the picture here? Yeah. So. Okay. What do you want?" This was in reference to the state's legislative delegation, not the congressional delegation, which still contained only Congresswoman Sewell.[65]

The congressional plan that passed out of the Reapportionment Committee, introduced first by McClendon, then later by Mickey Hammond, was substantially similar to the plan adopted in *Wesch*, which is to say the Larry Dixon Plan as slightly modified, first in the Pierce Plan, then by way of the Enfinger Plan in 2002, and then by way of moving more Black sections of western Montgomery into CD 7. Feedback from Black legislators in both chambers was negative. Sen. Bobby Singleton said, "I think it's political packing," explaining that Black population was also cracked elsewhere. Black Democrat Senators Roger Bedford and Quinton Ross registered staunch opposition, saying, respectively, that the process represented a "back-room deal" and that "Nothing about [the Legislature's] plan was transparent." Representative James Buskey said, "That's stacking blacks in a congressional district [and] there's no need to do it." Buskey introduced a plan in committee that would have placed some Black voters from the 7th into the 2nd District, and would have given Black voters, then, an opportunity to elect two candidates of choice, but it failed along racial/party lines.[66]

The state's legislative plan was challenged by the Legislative Black Caucus and the ADC in federal court. Representative McClendon encouraged the Alabama Attorney General to seek instead a declaratory judgment in the District Court for the District of Columbia. In Joe Reed's opinion, this was an effort to bypass the Obama Administration and fast-track approval of the plan before Black voters could be fully heard in their desire for two majority Black congressional districts or one majority Black and another opportunity district. Officials in Shelby County had, by that time, filed suit in the D.C. District Court

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"Gerrymandering expert worked with Alabama Republicans on 2011 redistricting lines, documents show," *Alabama Political Reporter*, Sept. 24, 2019.

[65] As I note in my previous report, "State Senator McClendon and Hofeller corresponded, in Sen. McClendon's case via private email account, on redistricting matters. These included a draft, which Hofeller edited, of the reapportionment committee's guidelines and the relevant racial data needed to draw the maps to the maximum benefit of white Republicans. Sen. McClendon later critiqued longtime state Senator Jimmy Holley, saying in an email that Holley was 'bound and determined' to hold public hearings. Sen. McClendon also arranged a meeting between Hofeller, himself, and then Attorney General Luther Strange to discuss districts for the state board of education. Walker also communicated with Hofeller, commending his work in making changes to the committee guidelines document, under the email subject line 'Confidential and Privileged Alabama Guidelines'; Walker added his own changes and emailed those back to Hofeller, Hofeller's associate John Odlham, and John Ryder, who was at that time serving as general counsel for the Republican National Committee. None of the members of the reapportionment committee were included in any of this correspondence. When asked to comment on his correspondence with Hofeller, Sen. McClendon said, 'Knowing that everything is going to show up in court, then you have to be very thoughtful about what you say. For that reason. I don't say much.' Brian Lyman, "Report: GOP redistricting expert was in touch with Alabama legislator, attorney," *Montgomery Advertiser*, Sept. 24, 2019; David Daley, "GOP Racial Gerrymandering Mastermind Participated in Redistricting in More States Than Previously Known, Files Reveal," *The Intercept*, Sept. 23, 2019.

[66] *Montgomery Advertiser*, May 27, June 1, 3, 9, 2011.

seeking an injunction against the enforcement of Section 5. That fall, 2011, the trial court in the *Shelby* case ruled against the plaintiffs. At the same time, the Attorney General precleared the state's congressional plan, severing litigation aimed at the state's legislative redistricting plans. The D.C. appellate court upheld the trial court's ruling the following year, but the U.S. Supreme Court vacated it in 2013. Twelve of the districts drawn by Hinaman were subsequently found to be unconstitutional racial gerrymanders. The court in *Alabama Legislative Black Caucus v. Alabama* approved redrawn plans in 2017.[67]

The following year, Black plaintiffs, represented by law firm Perkins Coie, filed suit in federal court arguing that the 2011 Congressional redistricting plan for Alabama, considering the totality of the circumstances, violated Section 2 of the VRA by packing Black voters into CD 7 and cracking them elsewhere, when a second majority Black district could have been created by adhering to the Reapportionment Committee's guidelines and traditional redistricting principles. The court held a bench trial and heard expert testimony. But it ultimately concluded, in *Chestnut v. Merrill* in March 2020, that the issue was moot, largely because the new Census figures would soon be published and, under the separation of powers, it was the legislature's duty, first, to carry out redistricting. Dorman Walker met during this time with the newly appointed chairmen of the 2020 version of the Reapportionment Committee – Senator Jim McClendon and Representative Chris Pringle – keeping them abreast of the progress of the lawsuit and offering counsel.[68] With the court's ruling in March, the committee awaited the publication of the 2020 Census figures, amid the evolving Covid-19 crisis.[69]

d. Congressional Redistricting, 2020 - 2022

In September 2021, prior to the release of the 2020 Census data, the Reapportionment Committee held public hearings across the state. The committee held 28 hearings, all but one of them during the working hours of 9:00 am and 5:00 pm, sometimes as many as four hearings in one day. During the previous cycle, by comparison, seven hearings were held after normal working hours, at 6:30 pm. Most of the in-person sites in 2021 were state community colleges. Black members of the Joint Reapportionment Committee indicated to staff that they felt the locations selected for the hearings did not give Black citizens an equal and adequate opportunity to attend.[70]

All of the hearings were simulcast on Zoom, with members of the public having the option to attend on-site and offer testimony in that way. At the in-person sites, staff handed out copies of the existing district maps since, at that time, there were no legislative proposals to examine. Cochairmen Pringle and McClendon attended all the meetings via Zoom, along with Mr. Walker. Mr. Walker presided over the hearings as a "constitutional hearing officer." Occasionally, one or more members of the committee besides the chairs would attend as would, sometimes, other members of the legislature. Staff established an email

[67] State of Alabama v. Holder, No. 1:11-cv-01628, Complaint filed (DC CCA), September 9, 2011; *Anniston Star*, Sept. 20, Dec. 21, 2011; *CNN*, "Justice Department approves congressional redistricting for Alabama," Nov. 21, 2011; Alabama Legislative Black Caucus v. Alabama, 989 F.Supp.2d 1227 (MD, 2013), vac. 135 S. Ct. 1257 (2015); Alabama Legislative Black Caucus v. Alabama, 231 F.Supp.3d 1026 (MD, 2017).

[68] Pringle quit the House to run for state Senate in 2002 but lost. He subsequently bid for the U.S. House seat in CD 1 in 2006 but lost to Jerry Carl. He regained a state House seat in 2014. McClendon was elected to the state Senate in 2014.

[69] Chestnut v. Merrill, 446 F.Supp.3d 908 (2020); Minutes of Meetings of the Permanent Joint Committee on Reapportionment, April 10, 2019, Feb. 19, 2020.

[70] Declaration of Laura Hall, Dec. 13, 2021.

address where members of the public could submit input. The public was also welcome to submit maps or plans of their own, provided they were complete and in the correct format.[71]

These hearings, in general, were not well attended. Some involved no testimony at all and were merely online recitations of a prepared script read by the co-chairs and Mr. Walker. Of those that did feature testimony, themes that would emerge were a belief that Black population should be unpacked from Congressional District 7 and that packing Black population into that district had allowed the legislature, in the past, to crack Black population elsewhere; concerns about Black vote dilution in general; concerns about a lack of competitiveness in districts; and local concerns like a belief that Montgomery ought not to be split along racial lines in three separate CDs or that Macon County ought to be with Bullock and not Tallapoosa.

Leadership told members of the public that the committee valued the public interest and input and held these hearings in order to utilize that information. The public expectation was no doubt that at least some of their concerns would be addressed or their input in some way utilized in the drawing of the congressional map. If not, this would represent a substantive departure in that the "factors usually considered important by the decisionmaker," in this case factors expressly described as important, "strongly favor a decision contrary to the one reached." *Arlington Heights*, at 266.

In his 2021 deposition, Representative Pringle testified that he could not say how the public hearings influenced the drawing of the congressional map in any way since that process was undertaken solely by Mr. Hinaman in consultation with members of Congress. Rep. Pringle indicated that his own personal takeaway from the hearings was that people in the state were "happy with their representation." He testified that he did not talk to Mr. Hinaman about the public hearings beyond telling him that representatives of the League of Women Voters came to meetings to "read talking points." He dismissed these as opinions "written on a piece of paper by an attorney." He said that he valued that input less than input from people who came to the meetings "of their own free will." Asked if he recalled anyone speaking at the hearings about their desire for two majority Black congressional districts, Rep. Pringle said yes, he had heard that at "a few" hearings but "not every [one]." Asked if he gave any instructions to Mr. Hinaman, or to anyone else, regarding drawing the congressional map based on the public hearings, he said, "No. Not that I recall."[72]

At the subsequent meeting of the House State Government Committee, on October 29, 2021, Chairman Pringle again faced questions regarding RPV analysis and why it was not performed on CD 7. He was also asked about the significance of 54 percent BVAP in CD 7. Despite having had three days to investigate the concerns of members of the Joint Reapportionment Committee in these matters, Rep. Pringle appears to have made no effort to do so. Rep. Pringle told a Black committee member, "It's this horrific time crunch that we're under." Rep. Pringle was asked if he had seen plans submitted by the NAACP, ACLU, and other nonpartisan advocacy groups. He replied, "We're looking at everything." He indicated that he had not seen any plans that would create 2 majority-minority districts.[73]

When H.B. 1 came before the full House floor, Representative Pringle continued to project the fiction that he had anything to do with the drawing and approval of the lines for the Congressional districts. He told Representative Boyd, "If I look at a district that's 85% white," then I do not need to conduct RPV analysis on that district based on that fact alone. Rep. Pringle subsequently admitted that he was not involved in drawing the map. He nonetheless asserted that "we" had met with Rep. Boyd, a Black Democrat who denied any such meeting as it related to the Congressional map. Rep. Boyd and others also note that

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[71] Alabama State Legislature, Joint Legislative Committee on Reapportionment website; see "Meetings and Notices."

[72] 2021 Pringle Deposition transcript, pp. 70, 90.

[73] Transcript of House State Government Committee Meeting, Oct. 29, 2021, p. 7.

Rep. Pringle was bringing a substitute bill that they had not seen or heard about before. Rep. Boyd indicated that she had met with Mr. Hinaman but only regarding her district. Rep. Pringle admitted that he had no idea who hired Mr. Hinaman nor who paid his salary. Members of Rep. Pringle's party also expressed "confusion and frustration," regarding the process.[74]

Despite asserting that he was put in charge of the committee on the House side because of his expertise in redistricting, Rep. Pringle later admitted that, in this house floor session, he was simply reading from talking points provided by Mr. Walker. When Rep. England argued that the new map packed Black voters into CD 7 and cracked them elsewhere, Rep. Pringle countered that the Birmingham "finger" was created by Black legislators – again confusing Reed-Buskey with Dixon-Pierce – and he asserted that it had only been maintained because of Section 5. Finally, Rep. Pringle, despite having a week to do so, evidently did not find out who "the gentleman from Georgia" was who had allegedly performed RPV analysis on some portions of some maps. Contradictorily, Rep. Pringle asserted that this person (Trey Hood) had performed some kind of analysis, but he continued to tell Rep. England and other Black members that "we're working on it" regarding getting information gleaned from that work to those members.[75]

When H.B. 1 went before the Senate General Fund and Appropriations Committee, Republican Senator Gerald Allen, the past chairman of the Reapportionment Committee, spoke at length in consternation regarding the lack of input sought from legislators on the Congressional plan. He indicated that the process had been a shift from previous cycles, saying, "This is not the way we do business" in the Senate. Senator Jabo Waggoner took up the cause of Congressman Gary Palmer, previously advanced by Rep. Faulkner. He argued, without mentioning the obvious racial components, that the Center Point precincts should remain with Congresswoman Sewell in CD 7 and the white precincts in Homewood with Congressman Palmer. Sen. McClendon relayed Mr. Walker's assertion that this would be a violation of the VRA. Senator Coleman Madison asked, if this was so, then why was the previous plan approved by the Justice Department. Sen. McClendon said that he did not know and insisted that Mr. Walker had called this a "double red flag." Sen. Coleman Madison said that Sen. Allen was right – the Senate needed more time to consider how it handled these matters.[76]

On the Senate floor, Black lawmakers continued to criticize the process as secretive and rushed and devoid of any response to input, public or legislative. Some white lawmakers made similar claims and introduced amendments that again would make what all involved understood to be race-based changes. Senator McClendon rapidly dismissed Black legislators' proposals, prompting accusations of procedural departure. In dismissing white legislators' proposals to swap Black and white population in Jefferson County, revealed that, whether or not race was "turned off" when Mr. Hinaman was drawing, everyone knew what the lines were doing in terms of race. Sen. McClendon's comments on the floor – including that gerrymandering was "in the eye of the beholder" and that 'the guy from Georgia' conducted some kind of analysis on plans but he had "never met him," underscore that the 2021 process, much like the 2023 process, was carried out behind the scenes with even the committee chairs lacking a full understanding of said process.[77]

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[74] Transcript of House Floor Debate, Nov. 1, 2021, pp. 1-5 (exchange with Boyd), 5-6 ("confusion and frustration" from GOP members).

[75] Transcript of House Floor Debate, Nov. 1, 2021, pp. 20-21 ("working on it"), 31 (exchange with Coleman re: the "finger"); 2021 Pringle Deposition, pp. 116-118 ("talking points").

[76] Transcript of Senate General Fund and Appropriations Committee Meeting, Nov. 2, 2021, pp. 5 (Allen unhappy with process), 6-8 (Center Point and Homewood and Coleman-Madison).

[77] Transcript of Senate Floor Debate, Nov. 3, 2021, pp. 24-5 (Smitherman protests 'pulling the trigger' too quickly, cutting off debate), 44-45 (moving Center Point and Homewood population, obviously racial), 15 ("eye of the beholder"), 17 ("I never met him; his first name is Trey.").

III. THE SEQUENCE OF EVENTS – 2022 – 2023

The Court in these proceedings unanimously found in January 2022 that the state's Congressional map as enacted by H.B. 1 had been shown to violate §2 of the Voting Rights Act. The U.S. Supreme Court granted a stay of that ruling at the defendants' request but upheld the Panel's ruling in June of that year. Governor Kay Ivey called a special extraordinary session of the legislature to address the Court's imperative that, pursuant to §2, the state's Congressional map should include a second majority Black Congressional district or "something quite close to it." The sequence of events that followed and ended with the Legislature's enactment of a new Congressional plan, by way of Senate Bill 5 (2023) ["S.B. 5"], further illuminates the lengths to which state officials continue to go to limit the political power of Black Alabamians.

The evidence suggests that, while some members of the legislature may have been willing to pass a plan that *might* have satisfied the Voting Rights Act (and that *might* comes with serious qualification), members of the Senate, at the direction or on the advice of Solicitor General Edmund LaCour and Attorney General Steve Marshall, agreed to defy this Court and the U.S. Supreme Court – deliberately drafting and ensuring passage of a plan with the purpose of not creating a second majority Black district or anything "close to" an opportunity district. This was apparently in the hopes of "flipping" Justice Kavanaugh, who concurred in *Allen v. Milligan*, and perhaps even in the hopes of invalidating §2 altogether (in the same way plaintiffs in *Shelby County v. Holder* were able to invalidate §5 by way of §4). Deliberately defying federal court orders aimed at awarding Black plaintiffs what the Court had held they were due under federal law places this process squarely within the state's long, ongoing, and well-documented tradition of race discrimination and "massive resistance."

After the Supreme Court rendered its decision in *Allen v. Milligan*, the legislature's Permanent Committee on Reapportionment held 2 public hearings, during which a majority of those testifying called upon lawmakers to take up this Court's directive and draw a second majority Black district. At the June 27, 2023, hearing, Black legislators moved, in consideration of the preceding litigation and to no avail, to nominate a Black co-chair and to revise the guidelines. Representative Pringle was reelected co-chair of the committee, and Senator Steve Livingston was elected to replace Sen. McClendon. Members of the public spoke broadly in support of the plan proposed on behalf of the *Milligan* plaintiffs, the VRA Remedial Plan. Plaintiff Evan Milligan noted that the plan met this Court's mandate while splitting only 7 counties and 10 precincts, keeping the 18 Black Belt counties in 2 CDs, and avoiding any changes to the northern half of the state. He also noted that the plan's configuration in the southern part of the state mirrored that of the State Board of Education map, approved by the reapportionment committee and legislature in 2021.[78]

Several members of the public explained their support for the VRA Remedial Plan before Dr. Joe Reed argued that a performing Black district needed a clear Black majority, and Jim Blacksher presented his argument on behalf of the plaintiffs in the ongoing *Singleton* litigation. A few of the remaining public commentators agreed with Dr. Reed, while others spoke in support of the VRA plan. Mike Bunn of Blakely State Park, per a request from Chairman Pringle, attended and made a case for the unity of Mobile and Baldwin Counties based on colonial history and historical ferries.[79]

At the July 13, 2023, hearing, Chairman Pringle instructed members of the public not to "default to the arguments of the *Milligan* plaintiffs" and insisted that the judges' rulings in that case "were preliminary findings based on limited records compiled in an expedited hearing," and were "not a final

[78] Transcript of Legislative Committee on Reapportionment, June 27, 2023, Public Hearing, pp. 5-6 (Black chairmanship rejected), 33-36 (Evan Milligan).

[79] *Id*., pp. 38-48 (VRA Remedial Plan), 56-62, (Dr. Reed), 80-82 (Mr. Bunn).

judicial determination."[80] Also at the July 13 hearing, Black legislators questioned the utility of holding a public hearing when there were no maps at that point to consider, despite Rep. Pringle indicating that the committee had received over 100 submissions from members of the public. Senator Vivian Figures asked, "So how do we have a public hearing on the plans that were submitted if we don't have the plans before us." She added, "I'm not complaining, I'm just saying it doesn't make sense if we're having a public hearing on plans submitted. We need the plans." Rep. Pringle explained that he and others in leadership were "just overwhelmed" and were "doing the best" they could. The only maps available at the hearing were the VRA map submitted by the *Milligan* and *Caster* plaintiffs and two proposed by Black legislators from the *Singleton* case.[81]

Representative Chris England reasserted his concern that the process continued to take place behind closed doors, arguing that, especially in light of the decisions of the trial court and Supreme Court in *Milligan*, that this should be happening "in the light of day." Rep. England also proposed an amendment to the guidelines that would have addressed the Court's directive in *Milligan* by indicating that the 14th Amendment and the VRA required that Alabama draw either 2 majority Black districts or, as the Court indicated, "something quite close to it." The white members rejected the amendment. Rep. Pringle explained, "The proposed amendment would enable the guidelines, embedded in the guidelines, arguments by the counsel for *Milligan* and *Caster* plaintiffs about the U.S. Supreme Court recent decision in *Allen vs. Milligan* and for that reason alone should be rejected." Rep. Pringle, in other words, indicated that the Courts' findings and instruction in the relevant litigation at issue should not color or effect the committee's guidelines. And the other white members of the committee evidently agreed.[82]

At the same hearing, Mr. Walker read into the record a letter from Attorney General Marshall. General Marshall revealed therein the state's intention to relitigate the case at the Supreme Court, noting especially that Justice Kavanaugh had refused to join in the portion of Chief Justice Roberts' *Milligan* opinion that held that race had not predominated in the drawing of the *Caster* plaintiffs' maps, which, Marshall argued, citing Justice Thomas's dissent, were "indistinguishable" from the *Milligan* plaintiffs' maps. General Marshall further revealed the state's hand when he closed the letter citing to the Supreme Court's recent decision in *Students for Fair Admissions v. President & Fellows of Harvard Coll*ege (No. 20-1199, U.S., June 29, 2023), wherein the Court held that the Equal Protection Clause demanded "doing away with all governmentally imposed discrimination based on race." He argued that in the *Milligan* plaintiffs' plans, "Voters in Mobile County are divided from voters in Mobile City because of their race and because of stereotypes about how voters of certain races will vote."[83]

Though Rep. Pringle later testified that "the public hearings made perfectly clear that people wanted a district they thought that Blacks could elect a candidate of their choosing," it appears that the public hearings continued to have no bearing on the behind-the-scenes process of drafting a map that would ultimately pass the legislature. Indeed, in his 2023 deposition, Senator Livingston indicated that the information gleaned in the hearings in no way changed the instruction that was given to Mr. Hinaman or anyone else drawing maps.[84]

When the legislature convened in special session on July 17, Rep. Pringle and Sen. Livingston knew that the directive from the *Milligan* Court was to pass a map that included a second majority-Black congressional district or "something quite close to it." Rep. Pringle recalled that language verbatim in his August 9, 2023 deposition. Sen. Livingston, in his August 9, 2023 deposition, upon being read that directive

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[80] *Alabama Daily News*, July 14, 2023.
[81] *Alabama Daily News*, July 14, 2023.
[82] Id. see also *Alabama Reflector*, July 17, 2023.
[83] Attorney General Steve Marshall to Dorman Walker, July 13, 2023.
[84] Livingston Deposition, p. 36.

from the Court replied, "That's actually the first time that someone's pointed that out to me in a paragraph." He later admitted he understood that "Courts" wanted to see two opportunity districts, while Black legislators had called for two majority-Black districts.[85]

Despite all of this, white Republican leaders were clear before, during, and after the session about their intentions – they would not draw a second majority-Black district nor a true opportunity district. Crucially, leadership understood that if a district was not majority-Black, it could quite easily elect a white candidate and not Black voters' preferred candidate. Rep. Pringle said on a radio program in the fall of 2021, in reference to one of the *Singleton* plaintiffs' proposed whole county plans that had no majority-Black districts, "I call it the Republican opportunity plan. Without being a majority-minority district, you can see where Republicans might be able to win all seven congressional districts."[86]

Representative Matt Simpson, speaking to the Eastern Shore Republican Women's group at the Fairhope Yacht Club the day before the special session began, said, "This is one of those 'be careful what you wish for because you just might get it.' There were Democrat plaintiffs, that's what we'll call it, that sued," he explained. Rep. Simpson seems to be saying that the plaintiffs were Black, without saying so expressly. The language is colormasked and careful, since these are public comments. The audience in that venue would have understood the representative's insinuation. He continued:

> They said … two of those districts should be minority-majority districts, competitive for minorities, meaning instead of the one district they have now, they would have two districts. My anticipation is we will see about drawing two new districts that have a close — when I say close, we're talking 52-48, somewhere in that ballpark, districts. The Democrats think they are going to be able to get two congressional seats out of it. [But] It would not surprise me if I looked at you guys, and I'm standing here in December 2024 – instead of having six Republicans and one Democrat in our congressional districts, it would not surprise me if we have seven Republican congressmen.[87]

Adam Kincaid at the Republican National Redistricting Trust sent a letter to GOP lawmakers prior to the special session telling them that the Supreme Court's ruling in *Milligan* did not really mean that they had to adopt a map with 2 majority-Black or opportunity districts. "First, it appears that neither remedy proposed by the district court or the plaintiffs' proposal is available absent legislative consent," Mr. Kincaid wrote. "Both potential remedies (two majority-minority districts or one majority – minority district and a second opportunity district) contradict established precedent for remedial proceedings under the Voting Rights Act."[88]

Rep. Pringle sponsored a plan in the House that came to be known as the Community of Interest Plan ("the COI Plan"), drafted by Mr. Hinaman. That plan would have created a new Congressional district with a 42.4 percent BVAP. Analysis performed by Dr. Hood indicated to Rep. Pringle and other legislators that Black candidates of choice would have won in two out of four elections under survey in his report. The contests under survey, moreover, involved only white candidates, and analysis performed by plaintiffs' experts indicated that Black candidates would have lost every race in the new "COI" CD 2.[89] At the same

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[85] 2023 Pringle Deposition, pp. 18-19; Livingston Deposition, p. 51.

[86] Jeff Poor, "State Rep. Pringle: Proposal to create second Democrat congressional district could help GOP — 'I call it the Republican opportunity plan,'" *Yellowhammer News*, Oct. 31, 2021.

[87] Jeff Poor, "State Rep. Simpson on redistricting: 'It would not surprise me if we have seven Republican congressmen' after 2024 election," *1819 News*, July 16, 2023.

[88] Zach Montellaro, "Alabama's redistricting brawl rehashes bitter fight over voting rights," *Politico*, July 21, 2023.

[89] These include the 2020 Presidential and Senate elections and 2018 elections for Governor and Attorney General; 2023 Pringle Deposition, p. 70.

time, the Senate began working on its own plan, the "Livingston 1 Plan," or the "Opportunity Plan," which we now know was drawn by Red State Strategies consultant Chris Brown, who was in discussions with several white lawmakers about the 2023 redistricting process, including, Senators Roberts, Scofield, and Barfoot, and Representative Carns, Kiel, Butler, Mooney, Yarbrough, and Rehm, all white. Senator Roberts delivered the plan Reapportionment Office on a thumb drive, according to Rep. Pringle.[90] The Senate ultimately passed, on July 20, a slightly modified version of this plan that became known as "Livingston 2" drafted by Senators Roberts and Barfoot. CD 2 in this new plan was virtually unchanged. The House passed the COI plan that same day.[91]

Chairman Livingston explained that he and other Senate Republicans then "got some information" convincing them to prioritize "compactness and communities of interest" as "being as important as the Black Voting Age Population." The BVAP in Livingston 2 was 38 percent. Sen. Livingston told the press, "I think everybody has a different interpretation of what opportunity is." He also claimed, "It was a change in how that brought in additional compactness. When we ran the numbers, they were substantially better than any of the other numbers that we had included in the previous Livingston Two map." This information came from Mr. LaCour and formed the basis of the "legislative findings" later adopted by white lawmakers. Senator Smitherman explained his belief, "There is no opportunity there for anybody other than a white Republican to win that district," referring to CD 2.[92]

Talking points prepared by Mr. LaCour and provided to Sen. Livingston further revealed that legislators were banking on the fact that:

> Plaintiffs could note that just a few weeks ago, the Supreme Court declared Harvard's race-based admissions policy unconstitutional because 'the core purpose of the Equal Protection Clause' is 'doing away with all governmentally imposed discrimination based on race.' The Court was clear: 'Eliminating racial discrimination means eliminating all of it.' The Court held that 'race may never be used as a 'negative' and that it may not operate as a stereotype.' But in Plaintiffs' Proposed Plans, voters in Mobile County are divided from voters in Mobile City because of their race and because of stereotypes about how voters of certain races will vote.[93]

The talking points assert, "The Livingston Plan is a Compact, Communities of Interest Plan that applies the State's traditional districting principles fairly across the State. The 2023 Plan is a historic map that gives equal treatment to important communities of interest in the State, including three that have been the subject of litigation over the last several year – the Black Belt, the Gulf, and the Wiregrass." They add that, "No map in the State's history, and no map proposed by any of the Plaintiffs who challenged the 2021 Plan, does better in promoting any one of these communities of interest, much less all three."[94] As noted above, the pairing (and splitting) of Mobile and Baldwin is a relic of the Redemption and the backlash to the classical phase of the civil rights movement. The touting of only splitting the Black Belt into two CDs is likewise disingenuous in that Black voters did not appear, according to the analyses available to legislators, to have the ability to elect a candidate of choice in any CD other than 7.

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[90] Red State Strategies, LLC's Response and Partial Objection to, and Motion to Quash, Subpoena, April 26, 2024. Doc. 347; Defendant Sen. Steve Livingston's Response to Plaintiffs' Third Set of Interrogatories, pp. 3-6; 2023 Pringle Deposition, p. 72.

[91] *Montgomery Advertiser*, July 22, 24, 2023.

[92] *Birmingham Watch*, July 20, 23; *Alabama Reflector*, July 21, 2023; Defendant Sen. Steve Livingston's Response to Plaintiffs' Third Set of Interrogatories, pp. 5-6.

[93] Talking Points Submitted by Sen. Livingston, RC 049608-049616, p. 3; Livingston Deposition, pp. 102-3.

[94] Talking Points Submitted by Sen. Livingston, pp. 1-2.

Representative Pringle indicated that, during this time, Mr. LaCour was with Senator Livingston and members of the Senate drawing the maps that ultimately would become "Livingston 3," a.k.a. S.B. 5 – a purported compromise between Livingston 2 and the COI Plan. Pringle testified that this compromise was foisted upon the committee by forces working with the Senate. Indeed, the two sides were quite far apart in their approach at that time. Mr. Brown from RedState Strategies texted Sen. Livingston just before the special session an article in which Rep. Pringle is quoted at length making misogynistic and racially tinged remarks about Rep. Givan[95] and said, "another reason [Rep. Pringle] needs reigning in."[96] Mr. Brown later insisted that Rep. Pringle was "not a team player." In these same communications, Sen. Livingston uses a racist pejorative for Montgomery, "Monkey Town."[97]

Sen. Livingston was also no longer working with Mr. Hinaman during this time. Mr. Hinaman indicated in his latest deposition that he had been in contact with Mr. LaCour but that he did not have a role in drafting any of the Senate maps. Rep. Pringle testified to seeing Mr. LaCour in the map room during this time drawing maps. Mr. Hinaman said that the "Opportunity" and "Livingston 2" maps were displayed on a computer in the Map Room at one point and that he looked at, but did not "review," them. He indicated that he had no idea who had drawn them. He explained, however, that he had served as a "computer operator," that is, not a map drawer, on Livingston 3. This was occasioned, he testified, because Donna Overton had COVID. Mr. Hinaman said that he made changes to the map at Sen. Livingston's direction.[98]

Mr. Hinaman also testified that he was at no point was he instructed to draw a map with a second Black majority district, that he did not consider BVAP relevant as compared to performance, and he was not asked to evaluate any maps other than his own. Mr. Hinaman did indicate, contrary to Rep. Pringle's testimony, that Pringle instructed him to keep the "Gulf Coast" COI of Baldwin and Mobile Counties together, despite this Court's finding that this was not an inseparable COI in light of the §2 violation. Having mentioned "conversations" with Mr. LaCour, and meetings with him totaling perhaps six times, Mr. Hinaman also indicated that he was instructed, by someone, to also avoid splitting the Wiregrass and to avoid splitting the Black Belt into more than two CDs. He later testified that no one had given him the instruction to limit county splits to six and that he was unaware of the revised guidelines in S.B. 5 that were based on the "legislative findings."[99]

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[95] Rep. Pringle explained, No one in the legislature "really listen[s]" when she speaks, referring to Rep. Givan. He elaborated, "Miss Givan, I mean, she comes up and talks, all day long, every day, about every issue, and we just don't really listen. I mean, I hate to be like that, but, you know, those who speak most are listened to the least." He added, "She's very happy right now because she's gotten all kinds of media attention, she's been on the T.V., and she's just, you know, up in everybody's face. She wants us to call her down." He further explained, noting his belief that the representative was mentally ill, "I sat next to her for eight years, and some days, her medication is not quite working, and you can tell. I don't know what was going on that day, but she would stand there at the microphone, and it's almost like she was nodding off. She has those very long eyelashes, and you'd see her eyes kind of roll back, and they'd start fluttering, and she'd lose her train of thought." Chris Monger, "House Pro-Tem Pringle on Givan's racist Jay-Z tirade: 'Some days, her medication is not quite working,'" *1819 News*, May 9, 2023. Pringle was asked about comments Givan made to Rep. Paschal and her use of the 'N-word.'

[96] Text messages between Mr. Brown and Sen. Livingston, turned over to counsel and provided at my request.

[97] *Id*.

[98] Hinaman Deposition, pp. 21, 38-41, 71, 89.

[99] 2023 Hinaman Deposition, pp. 79-81 (Gulf Coast, Pringle), 99 ("conversations" with Mr. LaCour), 93-5 (Legislative "findings" and county splits).

Rep. Pringle testified that Sen. Livingston approached him at the end of the legislative session and insisted that the Legislature would pass the Livingston 3 map (Mr. LaCour's map) under Rep. Pringle's legislative title, a House designation. Rep. Pringle refused, later testifying, "Senator Livingston came to me, towards the end and said, we're going to take your plan and substitute my bill and pass your plan with my map in it." He explained, "I said, no we're not. If you want to pass a Senate plan, you're going to pass the Senate on the Senate bill number, and you're not going to put my name on it." Rep. Pringle indicated in testimony that he thought his COI Plan was a better remedy for the Section 2 violation found by the Court in *Milligan*.[100] The chairs of the redistricting committee, Rep. Pringle and Sen. Livingston, as well as Mr. Hinaman, all admitted that they had never seen anything like the "legislative findings" adopted by the legislature at Mr. LaCour's behest.[101]

When asked in his deposition about the CD 2 BVAP in the "compromise" final bill (40 percent), Rep. Pringle said, "You're going to have to talk to Senator Livingston and Eddie LaCour." Analysis from Dr. Trey Hood indicated that seven out of seven Black preferred candidates would lose in elections in CD 2 in the "compromise" plan, a fact that Rep. Pringle and other members of the conference committee were aware of. It nonetheless passed both chambers with all Black members voting 'No' except the sole Black Republican House member, Rep. Paschal. Rep. Pringle testified later, "I could not get [the COI Plan] passed at the Senate. The Senate made it perfectly clear," he said, "they were not going to pass my plan, they were going to pass their plan. And we made the decision that it was more important – we had to pass something and not just go to Montgomery and completely fail and not pass a plan."[102]

After the session was over, Black legislators expressed frustration, indicating their belief that it was never the intention of Republicans to pass a map that had a second majority-Black district or an opportunity district. Rep. England said, "There was never any intent in this building to comply with their court order. There was never any intent in this building to comply with the Voting Rights Act." Representative Juandalynn Givan said, "I'm ashamed of what we did here this week. We've chosen to outright, blatantly disobey the law and to further attempt and vote to bury the Voting Rights Act."[103] Senator Rodger Smitherman said, "I think the process on the other side was set up so that you could make sure an African-American would not win it. I think it was intentionally set that way."[104] House Speaker Nathaniel Ledbetter revealed the strategy and intention for Republican lawmakers just as clearly, saying, "If you think about where we were, the Supreme Court ruling was 5-4, so there's just one judge that needed to see something different. And I think the movement that we have and what we've come to compromise on today gives us a good shot."[105]

Mr. LaCour revealed the same in his arguments at the remedial hearing in August. Judge Marcus asked, pointedly, "Are we in the first inning of the first game of this proceeding as you see it? It's a simple question." Mr. LaCour answered:

Your Honor, I think we are – I think this is essentially a preliminary injunction motion being filed

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[100] 2023 Pringle Deposition, pp. 101-2.

[101] 2023 Pringle Deposition, pp. 20-21; Livingston Deposition, pp. 101-2; Hinaman deposition, pp. 94-5.

[102] 2023 Pringle Deposition, pp. 41-3 (Dr. Hood), 100-1 (Senate made it "perfectly clear").

[103] Jane B. Trimm, "Alabama Republicans refuse to draw a second Black congressional district in defiance of Supreme Court," NBC News, July 21, 2023.

[104] Mike Cason, "GOP lawmakers pass Alabama congressional map; Democrats say it defies Supreme Court," *Al.com*, July 22, 2023.

[105] Jeff Amy and Kim Chandler, AP News, "Alabama lawmakers refuse to create 2nd majority-Black congressional district," July 21, 2023.

> by two sets of plaintiffs to challenge the 2023 law with a lot of evidence they already have admitted into the record from the earlier proceedings, and then the new evidence that they've come forward with, as well as the new evidence that we have come forward with. And then it basically boils down to how do you read reasonably configured and how do you read *Allen vs. Milligan*.[106]

Mr. LaCour, in other words, was attempting to relitigate the entire matter with an eye towards some other "reading" of the Supreme Court's ruling in *Milligan*, a not-so-subtle nod to the 'flip Kavanaugh' strategy. Mr. LaCour further revealed the state's strategy, *ex post facto*, when he attempted to explain his "legislative findings" that he inserted into the special session. He told the Court:

> What was really relevant in 2021 was how the principles were embedded or embodied in the '21 plan. The same thing is true for 2023, is you have to look at the map itself, and one does. If it says don't split any more than six counties but splits nine, then it doesn't matter what they said before. It matters what they did. And what they did here was prioritize the Black Belt while still maintaining the Gulf and the Wiregrass to the extent the Wiregrass could be maintained without sacrificing the Black Belt and then create far more compact districts across the state, as well.[107]

Of course, what "they" said and did was actually what Mr. LaCour said and did in the "legislative findings" that he wrote and inserted into the bill.

The map adopted by the legislature was rejected by this Court, and the U.S. Supreme Court declined to stay that decision. This Court appointed a special master to draw maps, underscoring Rep. England's observation that Alabama was the "make me" state and had a long history of needing the federal courts to "save us from ourselves."[108] This Court approved one of those maps in October 2023.

When primaries were held in the spring of 2024, the Democratic contest drew nine Black candidates and one South Asian candidate. Senator Vivian Figures' son Shomari Figures advanced to the Democratic primary runoff, defeating Representative Anthony Daniels of Huntsville, the House Minority Leader. In the Republican primary, the top three vote-getters were white: Dick Brewbaker won 39.6 percent of the vote; eventual winner Caroleene Dobson, 26.5; and Greg Albritton, 25.3. The next-highest vote-getter was Hampton Harris, a white 2023 graduate of Auburn University with no political experience. Below Mr. Harris were four Black candidates, all of whom garnered less than 2 percent of the vote. One of those, Belinda Thomas, served on the Mighty Alabama Strike Force (a Republican organization), was co-director of the ALGOP Outreach Coalition, and served on her state local and county local Republican Party committees. Another, Karla DuPriest, served on the Mobile County Republican Party Executive Committee.[109]

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[106] Transcript of Motion Hearing, Aug. 14, 2023, pp. 61-2.

[107] Id., pp. 78-9.

[108] Zach Montellaro, "Alabama's redistricting brawl rehashes bitter fight over voting rights," *Politico*, July 21, 2023.

[109] Alabama 2nd Congressional District Primary Election Results," *New York Times*, April 16, 2024; Ralph Chapoco, et al., "A voter's guide to the Alabama 2nd Congressional District primaries," *Alabama Reflector*, March 1, 2024; Jemma Stephenson, "2nd Congressional District race: Belinda Thomas says economics 'affects everything,'" *Alabama Reflector*, Dec. 22, 2023; Jon Sharp, "Karla DuPriest, a Republican who supports redistricting, eyes 2nd District congressional race," *Al.com*, Dec. 24, 2023.

IV. STATEMENTS MADE BY DECISION MAKERS

Though they were aware of the directives of this Court and the U.S. Supreme Court, Rep. Pringle and Sen. Livingston testified that they did not instruct Mr. Hinaman to draw a second majority-minority district. Both indicated that Mr. LaCour was the source who brought "legislative findings" into the process, in Mr. LaCour's own words "describing" the map that was established by S.B. 5, and that he indeed helped to draw the map itself. They also indicated that they imparted some of these imperatives to Mr. Hinaman, namely protecting the "Gulf Coast" COI that this Court indicated was not more important than remedying the 2 violation it found in the 2021 plan. As noted above, House Speaker Ledbetter revealed the strategy behind Mr. LaCour's intervention when he said, "If you think about where we were, the Supreme Court ruling was 5-4, so there's just one judge that needed to see something different. And I think the movement that we have and what we've come to compromise on today gives us a good shot."[110]

Senator Livingston has made a number of contradictory statements since he assumed the chairmanship of the Reapportionment Committee. During his deposition, he indicated that he was a "single member" on the committee in support of the COI Plan and "going to be left behind" when others switched focus to other plans. When asked about a news article in which he was quoted as saying that "senate republicans began working on their own map because the committee 'got some information' that led them to prioritize 'compactness and communities of interest being as important as the black voting age population,'" Senator Livingston claimed not to know who provided the committee members with that information. He testified that he found the information credible because he was the "single member left." Senator Livingston said that it "was a committee conversation" in which this information came up, though he testified that he did not know which member brought it up or where it came from. He later admitted that, in his response to plaintiffs' interrogatories, he had indicated that the "legislative findings" that were included in S.B. 5 came from Eddie LaCour and that his own talking points in support of the bill came from Gen. LaCour as well.[111]

V. UPDATED SENATE FACTORS

As I noted above, I have taken a fresh look at the Senate Factors and stand by the conclusions I reached in my 2021 report, which I incorporate by reference here. The State of Alabama's history of official voting-related discrimination now includes this Court's finding that the 2021 and 2023 plans violated §2. Consistent with my findings, this Court also found that S.B. 5's passage is a glaring example of a lack of responsiveness to the needs of the minority community, under Senate Factor 8, insofar as Black citizens and their representatives were clamoring for a second majority-Black congressional district. The above-described justifications offered by legislators for S.B. 5's passage could also be described as tenuous, under Senate Factor 9, in that the members of the legislature who passed it undoubtedly understood that it would fail to pass muster with § 2 and this Court.

In 2024, the legislature also enacted S.B. 1, targeting the absentee voting process. S.B. 1 criminalizes "ballot harvesting" and makes certain forms of voter assistances Class B felonies. Black lawmakers described the law as "voter intimidation" and a solution in search of a problem. They and members of the public likened it to the state's previous targeting of Black advocacy groups using absentee voting in the 1980s and 1990s and to its voter questionnaire that Black citizens sued to enjoin in the late 1960s.[112]

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[110] See fn. 121, *supra*.

[111] Livingston Deposition, pp. 65-8, 100-01.

[112] *Dothan Eagle*, Feb. 22, April 8, 2024; *Montgomery Advertiser*, March 21, 2024; *Alabama Reflector*, March 8, 2024; *Alabama Political Reporter*, March 20, 2024.

With respect to racial appeals, under Senate Factor 6, since this Court invalidated the legislature's maps and adopted one of the Special Master's maps, white candidates have also used racial appeals while running for the newly redrawn Second Congressional District. Caroleene Dobson, for example, has described the situation at the U.S. border with Mexico as a "full-on invasion." She added, "It's not just the crime and the drugs, the terrorist cells, the diseases that are coming across the border … just the sheer number of non-taxpayers who are coming here relying on our social services."[113] In a post on social media, Dobson claimed, "Enterprise is under attack. This is more than fentanyl," she added, "it's the surge of crime and enemy agents flooding our border and infiltrating our nation." Those comments were posted along with a news article about an undocumented immigrant, whose mugshot was featured, allegedly raping an "incapacitated teen" (that charge was later dropped).[114]

One of her opponents, former state senator Dick Brewbaker said, "If people knew that they got to the United States, they were going to end up on the first plane back to wherever they came from, I think you'd have fewer people trying to enter."[115] Brewbaker has also said, "The first thing you've got to do if you have a rain storm and water's pouring through your roof, the first thing you do is plug the hole. You don't try to get the water out first; you stop the leak." He explained, "People that have broken our laws and entered this country illegally need to go home before we can even consider trying to find them a way to become American citizens."[116] In another campaign ad, Brewbaker features video of former Harvard president Claudine Gay, a Black woman, juxtaposed with images of young relatives brandishing firearms, while he intones that "the media and woke corporations and liberal politicians sow division for their own profit."[117]

Mr. Brewbaker stated on a radio talk show recently that he got into politics "about the time Obama got in office," which dovetails with literature showing that white backlash to Obama's election had a dramatic political effect, concentrated among white people who vote Republican.[118] Brewbaker in that same interview decried "entitlement spending," coded language that suggests, as Newt Gingrich and others did in the 1990s and 2000s, that federal spending on social programs was wasted on unworthy minorities.[119] Mr. Brewbaker has also been a staunch supporter of "school choice," having sponsored the bill that became The CHOOSE Act, passed this year, which allots each student in the state $7,000 for education expenses, including private school tuition. The law has been criticized by Black educators and lawmakers. Melvin Brown, the Superintendent of Montgomery Public Schools described the program as a "money pit." Senator Bobby Singleton has argued, "School choice is really not about having a choice to go somewhere. It's about having the money to go down to make the choice, and then there are limitations on that choice, depending on the school districts." He told his colleagues, "Y'all just hate public schools. We're not giving our babies choices. We're giving our babies fanfare."[120]

Brewbaker has also advocated for the dissolution of the U.S. Department of Education, which provides critical funding to school systems educating children in underserved communities, and enforces civil rights laws. Ms. Dobson also supports "school choice" because, in her own words, students "may be

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[113] *Alabama Political Reporter*, Feb. 26, 2024.

[114] Dobson For Congress, Facebook profile, March 28, 2024, featuring Richard Everett, "Enterprise man accused of raping 'mentally incapacitated' teen," WDHN, March 26, 2024.

[115] Id.

[116] Brewbaker for Congress, "Border" Ad, YouTube.

[117] Brewbaker for Congress Introductory Ad, YouTube.

[118] "Dick Brewbaker on the Jeff Poor Show," March 19, 2024.

[119] Id.

[120] Hadley Hitson, Victor Hagan, "Alabama legislature passes Ivey's school choice bill, creating education savings accounts," *Montgomery Advertiser*, March 6, 2024.

learning critical race theory."[121] She has said that she is dedicated to "fighting against the destructive, biased ideologies that hinder growth and development of our children. The goal of education," she explained, "is to unlock a student's potential, not destroy it at the altar of indoctrination." Referring to indoctrination echoes white lawmakers targeting "DEI," or diversity, equity, and inclusion programs, which it has banned in state agencies and universities, and the assault on "critical race theory."[122]

These candidates' use of racial appeals demonstrates that, even in a district drawn by a special master, with the intention of complying with the law, white candidates do not reach across racial lines. They can rely, as Mr. Brewbaker indicated, on turnout disparities, and appeal only to white voters in the district. This is relevant to an intent claim in that, even as white lawmakers understood during the drafting and passage of S.B. 5 that the "legislative findings" introduced by Mr. LaCour would give white voters a safe majority in the district, candidates nonetheless fell back into racial appeals in the campaign, knowing that this is what carries weight with Alabama's white voters and that, given the percentages, a victory was still possible without any kind of appeal to Black voters.

VI. CONCLUSION

Perhaps the most damning aspect of the processes under review in this report is the legislature's refusal to obey the directives of this Court affirmed by the U.S. Supreme Court. Those directives mirrored the objectives, and vindicated the rights of, Alabama's Black citizens. The State was willing to flout them to pursue its goal of reversing the Court's decision and even invalidating §2 in the face of its own Black citizens' chorus to the contrary.

Moreover, as this report has shown, the historical background of the decisions in question includes a pattern of white lawmakers using redistricting to the detriment of Black citizens' ability to participate equitably in the political process, and the sequence of events leading up to the challenged decision involves more of the same, including the aforementioned flouting of the law and the courts. The process also involved both substantive and procedural departures, including the feedback from public hearings being ignored, votes being held without the benefit of RPV analysis or even maps, and Solicitor General LaCour inserting "findings" into the legislative record to the surprise of even the chairs of the reapportionment committee and its chosen expert, Mr. Hinaman. The "legislative [and] administrative history" is also filled with contradictory and significant "statements by members of the decision-making body" and others, including racial appeals.

Finally, I stand by my analysis of the Senate Factors in my prior expert report. Events and elections that have taken place in the interceding years only confirm my prior conclusion that the totality of the circumstances demonstrates that Black Alabamians lack an equal opportunity to participate in the political process and elect candidates of their choice.

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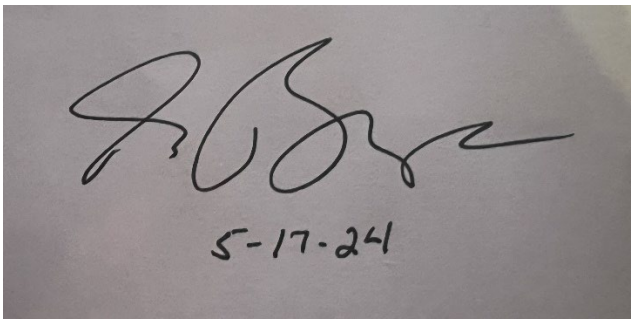
[121] John Sharp, "Dobson attacks Brewbaker's legislative record during Alabama GOP congressional debate," *Al.com*, April 8, 2024.

[122] Brandon Mosely, "Jackie Zeigler endorses Caroleene Dobson for Congress to fight for education – not indoctrination," *Yellowhammer News*, April 15, 2024. Dobson's campaign website readds, "Our country is being invaded. Illegals are pouring across our southern border. Between the crime, the drugs, the terrorist cells, and just the sheer weight of so many non-taxpayers on our social services, our country is going to collapse. To address these critical issues, I am committed to supporting President Trump's agenda. This includes securing our border to prevent further illegal entry, completing the wall, and strictly enforcing the 'stay in Mexico' policy."

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 17th day of May, 2024.



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Curriculum Vitae

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Education

PhD, History, 2013, Georgia State University
"School Desegregation, Law and Order, and Litigating Social Justice in Alabama, 1954-1974"
- Winner of the John M. Matthews Distinguished Dissertation Award, 2013

MA, History, 2007, Auburn University
BA, History, 2004, Auburn University

Major Publications and Grants

The Politics of White Rights: Race, Justice, and Integrating Alabama's Schools (University of Georgia Press, 2018)

Select Reviews:
- *History of Education Quarterly* 59, No. 4 (November 2019): 528 – 530,
- *Alabama Review* 75, No. 3 (Fall, 2022): 267-270

Held in nearly 1,000 libraries worldwide: WorldCat

Georgia Humanities Grant: "Terminus 1973? Atlanta Fifty Years Later" (2022): Awarded $2500 for a public humanities lecture and town hall at historic Ebenezer Baptist Church discussing the pivotal year 1973 and its implication for voting rights, equal educational opportunity, and more.

Expert Witness in Voting Rights Litigation

Recognized as a 'University Expert' by Georgia State University. Retained by plaintiffs' counsel in the following:

Georgia State Conference of the NAACP v. State of Georgia (N.D. Ga., 2023): challenge to the Georgia General Assembly's state legislative and congressional redistricting plans as violative of Section 2 of the Voting Rights Act and the Constitution. Submitted a report and testified in a deposition.

South Carolina State Conference of the NAACP v. Alexander (D.S.C., 2023): challenge to South Carolina General Assembly's congressional redistricting plan as a racial gerrymander and as intentionally discriminatory. Submitted an expert report and rebuttal report; certified as an expert; testified in deposition and at trial. Unanimous three-judge court found in favor of plaintiffs with respect to S.C.'s First Congressional District. Court cited to my report in its Finding of Facts and Conclusions of Law.

South Carolina State Conference of the NAACP v. McMaster (D.S.C., 2022): challenge to South Carolina General Assembly's redistricting plan for state House of Representatives. Submitted an expert report and rebuttal report; certified as an expert; testified in deposition; (Case settled).

Milligan v. Merrill (N.D., Ala. 2021): challenge to Alabama legislature's congressional redistricting plan as a violation of Section 2 of the Voting Rights Act. Submitted an expert report and rebuttal report; certified as an expert; testified in deposition and at hearing for preliminary injunction; findings adopted by the court in ruling granting preliminary injunction; (U.S. Supreme Court ruling on injunction and trial on the merits pending).

Joseph Bagley, PhD
Curriculum Vitae

Expert Witness in Voting Rights Litigation Cont.

People First of Alabama v. Merrill (N.D., Ala. 2020): challenge to Covid-related restrictions. Submitted an expert report; certified as expert; testified in deposition/at trial; findings adopted by Court (479 F.Supp. 3d 1200).

Teaching and Administrative Experience

Honors Program Coordinator, Perimeter College, Georgia State University, 2019 – Present

Assistant Professor, Perimeter College, Georgia State University, 2017 – Present (5/4/2 Load)
AAS 1142, African American History since 1865; AAS 2010, Introduction to Africana Studies;
HIST 1111, Survey of World History to 1500; HIST 1112, Survey of World History since 1500;
HIST 2110, Survey of United States History; HON 1000, Honors Seminar

Lecturer, Georgia Perimeter College, 2015 – 2017 (6/6/2 Load)
HIST 1112, Survey of World History since 1500; HIST 2111, Survey of U.S. History to 1865;
HIST 2112, Survey of U.S. History since 1865HIST 2110, Survey of U.S. History

Visiting Lecturer, Georgia State University, 2013 – 2015 (4/4/2 Load):
HIST 2110, Survey of United States History

Graduate Instructor of Record, Georgia State University, 2009 – 2013 (1/1/1 Load)
HIST 1112, Survey of World History since 1500; HIST 2110, Survey of United States History

Graduate Teaching Assistant,
Georgia State University, 2008-2009, 2013
HIST 1112, Survey of World History since 1500; HIST 2110, Survey of United States History
HIST 3000, Introduction to Historical Studies; HIST 4990, Historical Research (co-taught)
Auburn University, 2004-2008
HIST 1010, Survey of World History to 1789; HIST 1020,Survey of World History since 1789

Invited Talks

Kiwanis Club of Covington, Georgia, March 16, 2023, "The Voting Rights Act – Then and Now."
Rotary Club of Covington, Georgia, April 25, 2023, "The Voting Rights Act – Then and Now"
Symposium on the Struggle for Black Freedom, Georgia State University, Perimeter College, Keynote Address, February 11, 2020, "The Struggle for Black Voting Rights: from Reconstruction to *Right Now*."
Georgia State University Constitution Day Event, September 18, 2019, "'To Abridge and Deny': Vote Dilution, Section 5 Preclearance, and Undermining the 15th Amendment."
Auburn University Critical Studies Working Group, College of Education, April 12, 2019, "*Teach Us All*, The LittleRock Nine, and Contemporary School Segregation."
League of Women Voters of Greater Jefferson County, February 21, 2019, "School Desegregation in Alabama."
Auburn University Caroline Marshall Draughon Center for the Arts and Humanities, January 29, 2019, Book Talk.
Alabama Department of Archives and History, *Alabama in the Age of Aquarius* Symposium, August 19, 2016, "Desegregating Alabama's Schools: the Montgomery Experience." With Federal Magistrate Judge Delores Boyd and Peggy Wallace (daughter of George Wallace)
Alabama Department of Archives and History, Monthly Lecture Series, May 15, 2014, "Now a Single Shot Can Do It': *Lee v. Macon County Board of Education* and School Desegregation in Alabama."

Joseph Bagley, PhD
Curriculum Vitae

Notable Citations

Nikole Hannah-Jones, "The Resegregation of Jefferson County," *The New York Times Magazine*, Sept. 6, 2017.
Wendy Parker, "Why Alabama School Desegregation Succeeded (And Failed)," 67 *Case Western Law Review*, 1091 (2017).
Rebecca Retzlaff, "Desegregation of City Parks and the Civil Rights Movement: The Case of Oak Park in Montgomery, Alabama," *Journal of Urban History* 47.4, 715 (2019).
Erika Frankenberg, "The Impact and Limits of Implementing *Brown*: Reflections from Sixty-Five Years of School Segregation and Desegregation in Alabama's Largest School District," 11 *Alabama Civil Rights and Civil Liberties Law Review*, 33 (2019).
Bryan Mann, "Segregation Now, Segregation Tomorrow, Segregation Forever? Racial and Economic Isolation and Dissimilarity in Rural Black Belt Schools in Alabama," *Rural Sociology* 86.3, 523 (2021).

Service

Search Committee, Two Tenure-track Positions in History, 2024
Scholarship Review Committee, 2023
Faculty Advisor for Phi Theta Kappa, Beta Eta Chapter-present
Faculty Advisor for Newton Honors Society Club, 2023-present
Newton Campus Honors Program Coordinator, 2019-present
History and Political Science Honors and Awards Committee, 2023
Newton Campus Mario Bennekin Symposium Committee, 2019-present
Presented at Faculty Development Day, "Building a Research Community," Spring 2022
Newton Academic Community Engagement (ACE) Committee, 2019-23
Chair, Search Committee, Lecturer in History, Fall 2019
Perimeter College Scholarship Selection Committee, 2019
Search Committee, Adjunct Faculty in African American Studies, Summer 2019
Search Committee, Faculty Associates to Center for Excellence in Teaching and Learning, Summer 2018
Search Committee, Lecturers in History, Spring 2018
Panthers Vote Presidential Election Panel, Fall 2016
History 2110 Assessment Committee for the Georgia State-Georgia Perimeter Consolidation, 2016 - 2017

Conference Presentations

"'We Have Had a Dream, Too': School Desegregation Litigation, Racial Innocence, and Politics in Alabama," Organization of American Historians Annual Conference, St. Louis, Missouri, April 16, 2015.

"'Life, Liberty, and the Pursuit of Alabama's Happiness': School Desegregation, the 'Law and Order' Narrative, and Litigating Social Change in Alabama, 1954-75," Midwest Political Science Association Annual Conference, Chicago, Illinois, April 12, 2013.

"Black Alabamians' Efforts to Desegregate Schools, 1954-1963: Civil Rights, Litigation, and the Road to *Lee. v. Macon,*" presented at the University of Alabama History Department's Graduate Conference on Power and Struggle, March 3, 2012.

Joseph Bagley, PhD
Curriculum Vitae

Solicited Manuscript and Book Reviews

Outside Reader for Book Manuscript, Brian K. Landsberg, *Revolution by Law: The Federal Government and the Desegregation of Alabama Schools*, University of Kansas Press (Spring 2021). Blurb on jacket.

Camille Walsh, *Racial Taxation: Schools, Segregation, and Taxpayer Citizenship, 1869-1973* (UNC Press, 2018), *The Alabama Review* (Pending, Spring 2021)

Outside Reader for Essay Manuscript for *Urban History* (Fall, 2019), Anonymous

Stephanie R. Rolph, *Resisting Equality: The Citizens' Council, 1954-1989* (LSU Press, 2018), in *The Journal of Mississippi History* (Fall, 2019)

Wayne A. Weigand and Shirley A. Weigand, *The Desegregation of Public Libraries in Jim Crow South: Civil Rights and Local Activism* (LSU Press, 2018), in *Georgia Historical Quarterly* (Summer, 2019)

Leeann G. Reynolds, *Maintaining Segregation: Children and Racial Instruction in the South, 1920-1955* (LSU Press, 2018), in *The Alabama Review* (Summer, 2019)

Outside Reader for Essay Manuscript for *History of Education Quarterly* (Fall, 2018), Anonymous

James Turner, *Selma and the Liuzzo Murders: The First Modern Civil Rights Convictions* (University of Michigan Press, 2018), in *Law and History Review*, *The Docket*, Vol. 1, Issue 2 (August, 2018)

Tracy E. K'Meyer, *From* Brown *to* Meredith*: The Long Struggle for School Desegregation in Louisville, Kentucky, 1955—2007* (University of North Carolina Press, 2013), in *The Journal of Southern History* 80, No. 4 (Nov, 2014): pp. 1019-20

Frank Sikora, *The Judge: The Life and Opinions of Alabama's Frank M. Johnson, Jr.* (New South Books, 2007), in *The Alabama Review* 61, No. 2 (April, 2008): 153-4

Examination Fields

- 19th-20th Century United States History
- United States Legal/Constitutional Hist.
- History of South Africa

Professional Organizations

- Organization of American Historians
- American Historical Association
- American Society for Legal History
- Southern Historical Association
- Alabama Historical Association

Languages

- Spanish: Reading, Good
- French: Reading, Good