From the SelectedWorks of Brandon F Douglass

October 20, 2010

The Kinston Ruling: Black Preferred Candidates and the Meaning of the 15th Amendment

Brandon F Douglass
The Kinston Ruling: Black Preferred Candidates and the Meaning of the 15th Amendment

I. Introduction

The assumption that all African-American voters think alike politically lies at the heart of the United States Justice Department’s (Department) enforcement of the Voting Rights Act (VRA or Act). Because the Department has accepted the premise that black voters are reliable straight-ticket Democrats, it now supports enforcement in circumstances where it determines that black preferred candidates will not be elected without the Democratic Party attached to their names. This is just another step towards the political apartheid described by Justice Thomas in his concurrence in Holder v. Hall.¹

In Hall, Justice Thomas argued that the worst part about the Court’s “willingness to accept the one underlying premise that must inform every minority vote dilution claim” was that it was based on the “the assumption that the group asserting dilution is not merely a racial or ethnic group, but a group having distinct political interests as well.”² Justice Thomas wrote that this assumption, “[o]f necessity” lead to the Court giving “credence to the view that race defines political interest when resolving vote dilution action.”³ Thus, according to Justice Thomas, the Court has “acted on the implicit assumption that members of racial and ethnic groups must all think alike on important matters of public policy and must have their own ‘minority preferred representatives’ holding seats in elected bodies if they are to be considered represented at all.”⁴

This paper presents an analysis and critique of the Justice Department’s ruling on Kinston, North Carolina’s attempt at removing partisan labels from its municipal election ballots. Section two provides some background on the VRA and how it has been implemented over the years. Section three provides an analysis of the Department’s conduct in Kinston in light of the philosophical concerns expressed by Justice Thomas and shared by others. Finally, the paper concludes with a brief discussion of the current state of affairs in Kinston.

II. Background:

This section will first explain the legislative and jurisprudential underpinnings of the Voting Rights Act, and the Department’s enforcement of section five. It will conclude with a discussion of the Kinston and the justice department’s response to it.

A. The Voting Rights Act:

After the Civil War, Congress enacted the “Reconstruction Amendments.” Among these is the Fifteenth Amendment, which provides that: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”⁵ Similar to the other Reconstruction Amendments, the Fifteenth Amendment includes a provision that allows for Congress to enforce the

---

² Hall, 512 U.S. at 892.
³ Id. at 892.
⁴ Id.
⁵ U.S. CONST., Amendment 15, § 1.
Amendment through “appropriate legislation.” This provision proved fortuitous because, for nearly a century, the Fifteenth Amendment’s demands rang hollow, until congress once again took action.

In 1965, Congress adopted 42 U.S.C. § 1973, commonly referred to as the Voting Rights Act (VRA or Act). As has been noted by Professor Pamela Karlan, the Act “is rightly celebrated as the cornerstone of the ‘Second Reconstruction.’” One commenter recently remarked that the VRA “was to the pre-1965 electoral system what the Reconstruction Amendments were to the institution of slavery.” Section one of the Act provides that:

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

By inserting this language, the Act’s drafters sought to “to ensure that the right of all citizens to vote, including the right to register to vote and cast meaningful votes, is preserved and protected as guaranteed by the Constitution.” This objective has since been pursued through various enforcement mechanisms.

Section two provides that:

A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

Meanwhile, section five “prohibits the enforcement of any change in voting procedures used by certain states or their subdivisions until the change has been approved by the Attorney General of the United States,” through a system known as preclearance. Section five’s nature and scope are defined by a two part framework: “[T]he statutory provisions enacted by Congress, as construed by the courts; and the administrative provisions adopted by the agency designated by

---

6 Id. at § 2 (stating that “Congress shall have power to enforce this article by appropriate legislation”).
7 See Mark A. Posner, The Real Story Behind the Justice Department’s Implementation of Section 5 of the VRA: Vigorous Enforcement, as Intended by Congress, 1 DUKE J. CONST. L. & PUB. POL’Y 79, 88 (2006) (citing South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966)). Relying on Katzenbach, Posner wrote: “Congress determined that after ‘nearly a century of systematic resistance to the Fifteenth Amendment,’ it was necessary to ‘shift the advantage of time and inertia’ from those seeking to engage in discrimination to its victims.” Id.
11 VRA, supra note 13, at § (a).
12 Id. at “Congressional Purpose and Findings.”
13 Id. at § (a).
14 Hale County v. United States, 496 F.Supp 1206 (D.C. Cir. 1980) (citing VRA, supra note 13, at § (c)(b)).
15 Id. at § (c).
Congress to enforce the remedy, the United States Department of Justice.”¹⁶ Section five is intended to “to protect the ability of such citizens to elect their preferred candidates of choice.”¹⁷

Section five’s coverage is determined by a nondiscrimination formula.¹⁸ This formula selects “those states, as well as those jurisdictions (typically, counties) that utilized discriminatory voting tests or devices at the time of the 1964, 1968, or 1972 elections, and consequently, had a comparatively low voter registration or turnout rate at that election.”¹⁹ The system covers states that, on November 1, 1964, “employed any of several enumerated tests or devices as a prerequisite to voting, and in which less than 50% of eligible voters were registered to vote or actually voted in the November 1964 presidential election . . . ,” as well as “[s]tates that meet identical criteria with respect to the 1968 presidential election are also covered under the Amended Act.”²⁰

Along with these original provisions, the 1982 Amendments to the Act added so-called “bail-out” and “bail-in” provisions.²¹ The bailout provision “provides for lifting section 5 coverage from jurisdictions where it is no longer appropriate.”²² Alternatively, the bail in provision applies when a court finds a violation of the Fourteenth or Fifteenth Amendment and “order[s] coverage of a jurisdiction not already subject to preclearance.”²³ Currently, “through the application of the coverage formula and the resolution of bail-out lawsuits,”²⁴ section five covers all of Alaska, Alabama, Arizona, Louisiana, Mississippi, South Carolina, and Texas.²⁵ It also covers counties in California, Florida, New York, North Carolina, and South Dakota, as well as townships in Michigan and New Hampshire.²⁶

The Act has been amended every time Congress has decided whether “to extend the preclearance period.”²⁷ In 1970, Congress extended preclearance for five years.²⁸ There, Congress also “extended the ban on literacy tests nationwide.”²⁹ In 1975, Congress extended preclearance for another seven years and voted to make the nationwide ban on literacy tests permanent.³⁰ In 1982, Congress extended preclearance for twenty-five more years, and “amended section 2 of the Act to bar, nationwide, the use of any voting practices or procedures

¹⁶ Posner, supra note 8, at 86.
¹⁷ VRA, supra note 13, at § (c)(d).
¹⁸ Id. at 92–93 (citing 42 U.S.C. § 1973(b) (2000)).
¹⁹ Id.
²² Id.; Karlan, supra note 10, at 26 n.124.
²⁴ Posner, supra note 8, at 93.
²⁶ Id.
²⁷ Karlan, supra note 10, at 27.
²⁹ Id.
that had a racially discriminatory result, regardless of the purpose behind them."^{31} Finally, in 2006, Congress extended preclearance for another twenty-five years and “explicitly provided that in section 5 cases, the term ‘purpose’ includes ‘any discriminatory purpose’”; not “merely a retrogressive purpose.”^{32}

Generally, section five covers the following voting provisions: redistricting; the alteration of election methods, changes in the number of elected officials; “annexations and other boundary line changes that alter the voting constituency of a jurisdiction”; changes to election registration, polling place, early voting, and absentee procedures; changes in precinct and polling place location; changes concerning the languages that election materials are made available in; “election day changes and the holding of special elections; and changes in candidate qualifications and standards.”^{33}

Section five decision-making authority rests with the Assistant Attorney General for Civil Rights and the Chief of the Civil Rights Voting Section (Voting Section),^{34} who is “empowered to make all section five decisions except objections and decisions whether to withdraw an objection.”^{35} Pursuant to section five, the submitting authority bears the burden of showing that a submitted change has neither a discriminatory effect nor purpose.^{36}

Section five establishes a “set of procedures for conducting administrative preclearance reviews.”^{37} Covered jurisdictions initiate review by submitting a letter to the Voting Section, identifying the voting change and providing background information and documentation.^{38} Once it receives the information, the Justice Department “conducts a factual investigation and either preclears, objects or states that a substantive determination is inappropriate . . . .”^{39} The proposed change is automatically approved if the jurisdiction does not receive a rejection notice within the sixty-day statutory requirement.^{40}

The covered jurisdiction may also seek preclearance from the district court.^{41} If a covered state seeks to implement “any change in a ‘voting qualification or prerequisite to voting, or standard, practice, or procedure to voting, or standard, practice, or procedure with respect to voting,’ ” it must first obtain a declaratory judgment from the United States District Court for the District of Columbia stating that the proposed change “does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color . . . .”^{42}

---

^{33} Posner supra note 8, at 96 (citing Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. § 51.13–18 (2005)).
^{35} Id.
^{37} Posner, supra note 8 at 100.
^{38} Id. (citing Procedures, supra note 31, at §§ 51.27–28).
^{39} Id.
^{40} Id.
^{41} Posner, supra note 8, at 100.
^{42} Georgia, 411 U.S. at 529 (citing 42 U.S.C. § 1973(c)).
According to Professor Posner, “[t]he administrative review procedure is fundamentally different from the procedures that apply when preclearance is sought from the district court.”

Both processes involve the same legal standards and burden of proof, but “the administrative procedure includes no hearing where witnesses may be examined and cross examined, no depositions, no authority to subpoena documents, and no formal rules of evidence regarding the information that may be considered by the Department.” Professor Posner wrote that these differences “are the direct and inevitable results of the extreme time pressure created by the statutory sixty-day review requirement and the tremendous number of submissions that must be resolved on a daily basis by the Department.” He said the statutory time provision is “probably largely responsible for the summary nature of the Justice Department’s objections letters.” He went on to say there “is no time for the preparation of detailed justification statements, nor sufficient time to “explain the reasons for Department decisions to preclears submitted changes.”

i. The Justice Department’s Enforcement of the Act.

Professor Karlan has argued that section five’s implementation has occurred in two generations. The first generation concerned issues involving the right to “register and to vote.” There, section five was used to “block a variety of restrictive changes, such as voter ID requirements, voter purges and registration requirements, and changes in polling places that render them less accessible to minority voters.” The second generation, on the other hand, faces problems concerning minority voting strength, and has been used to prevent practices “such as discriminatory annexations and adoptions of at-large elections.” At around the time section five was enacted, the Supreme Court imposed a “one person, one vote” requirement on “virtually all elections conducted from districts.”

The Constitution requires “covered jurisdictions to implement changes every ten years in their congressional, state-legislative, county-commission, city-council, and school-board districts; section five prevents them from implementing those changes unless the jurisdiction can show that the changes have neither a discriminatory purpose nor a discriminatory effect.” As a
result, we require “decennial readjustment of district lines to account for population changes revealed by the census.”

Over the years, the Justice Department has concentrated much of its section five enforcement efforts on changes that lead to so-called retrogression. The Department has relied on the Supreme Court, as well as certain lower appellate courts’ section five jurisprudence as it has gradually grappled with the various how proposed changes coalesce with the VRA’s demand that no jurisdiction impose any change to its election system that has the purpose or effect of depriving minorities of the right to vote. This has led to the adoption of the Supreme Court’s approach in Beer v. United States. There, the party seeking declaratory judgment to show that the change will not “lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.”

ii. The Judicial Approach:

In Hale County v. United States, the United States District Court for the District of Columbia determined whether a numerical majority that does not turn out as the majority through consecutive election cycles, can be considered a “minority” for the purposes of section five preclearance determinations. The Hale County Court held that, “Although numerically a ‘majority,’ Hale County’s black population ‘is an identifiable and specially disadvantaged group’ suffering from all the problems associated with minority status and must be considered a ‘minority’ for purposes of this litigation.” It reasoned that where there “is a history of ‘sweeping and pervasive’ past discrimination and a present disproportion in minority electoral participation, the plaintiffs have the burden of showing that the past discrimination no longer affects present voting patterns.”

The Hale County Court said the evidence linked low black turnout “to the many years of social, economic, and political discrimination,” and “showing both lower black participation attributable to past discrimination and overwhelming white racial bloc voting, plaintiffs cannot maintain their theory that the at-large system enhances the position of the black electorate.”

Located in central Alabama, Hale County rests near the Alabama-Mississippi state line. The court described it as “predominately rural and its residents predominately black.” Hale County is part of the so-called “Black Belt,” an area embracing “‘a group of counties in eastern Virginia and North Carolina; a belt of counties extending from the South Carolina coast through South Carolina, central Georgia, and Alabama; and a detached area embracing a portion of the lower Mississippi River Valley.’” According to the Hale County Court, a black belt is “an area

\[\text{55 Id.} \]
\[\text{56 See generally, Posner, supra note 8, at 128–136.} \]
\[\text{57 See generally id. at 128.} \]
\[\text{58 Beer v. United States, 425 U.S. 130 (1980).} \]
\[\text{59 Beer, 425 U.S. at 141.} \]
\[\text{60 Hale County v. United States, 496 F. Supp. 1206, (D.D.C. 1980).} \]
\[\text{61 Id. at 37 (citing Graves v. Barnes, 343 F. Supp. 704, 730–31 (W.D. Tex. 1972)).} \]
\[\text{62 Hale County, 496 F. Supp at 37 (citing NAACP v. City of Darien, 605 F. 2d 753, 759 (5th Cir. 1979)).} \]
\[\text{63 Hale County, 496 F. Supp at 37–38.} \]
\[\text{64 Id. at 3. The county covered approximately 662 square miles. Id.} \]
\[\text{65 Id.} \]
\[\text{66 Id. at 3–4.} \]
of relatively high density Negro population, specifically those counties in which the proportion of Negroes in the total population was 50 percent or more.”

In 1970, the Census reported that Hale County had a total population of 15,888. Sixty-six percent of Hale County was black, but the Census also reported that “of the total voting age population of 9,277, slightly more than 59 percent or 5,460 were black.” Registration statistics from 1978, show that “there were 8,443 registered voters in the County, and of this total 4,496 or 50.8 percent were black and 4,150 were white.” At the time of the litigation, a Board of Commissioners, “formerly known as the Board of Revenue,” governed Hale County. The Board of Commissioners was comprised of “four elected commissioners and the county probate judge.” Their “chief functions” were raising and allocating revue, and supervising the county’s public works. The commissioners also played a “significant” role in the county’s election process.

The commissioners were elected for four-year terms and their terms were staggered so that every two years, two incumbents’ terms expired. Meanwhile, the probate judge was elected to a six-year term “on an at-large basis.” The record indicated that the entire board was white.

In 1953, pursuant to an act of the Alabama Legislature, Hale County was divided into four districts, each of which was represented by one commissioner. Commissioners “were elected county-wide by the voters of the entire county, although candidates were required to reside in the district they sought to represent.” In 1959, the legislature “enacted a statute which modified the district boundaries and required candidates for commissioner to reside in the district they desired to represent and to be elected only by the voters of that particular district.” Six years later, the legislature went further; it provided that “commissioners be chosen by ‘qualified electors of the entire County or at-large.’” Then, in 1971, the legislature did away with the district residency requirement, and began requiring only that the candidate be a county resident.

The district residency requirement was imposed again in 1973 when the legislature “redrew the boundaries of the prior existing districts to provide for equal populations in each
district.” 83 The “at-large voting requirement was not altered,” and became the subject of underlying lawsuit in this matter. 84

Hale County’s Board of Commissioners failed to comply with the demands of section five preclearance; the county held at-large general elections and elections for commission posts through the May, 1976 primary elections. 85 Immediately after those elections, the Justice Department sought to “enjoin the 1976 general election scheduled under the at-large plan.” 86 The department filed suit in the in the United States District Court for the Southern District of Alabama. 87 The court determined that the “changes in the manner of electing commissioners were subject to” section five preclearance. 88 Hale County was then ordered to revert back to a district-wide election system. 89

On February 16, 1977 Hale County filed suit, seeking declaratory relief under section five. 90 At issue in the suit was the 1965 Act, “which changed the matter of electing commissioners from a district to an at-large system . . . .” 91 The 1965 Act was passed after supporters put forth that the “change ‘would be for the best interest of the County,’ ” 92 but the county failed to present any evidence of what it used to determine what exactly “best interest” meant. 93

Representative Richard Avery, the legislation’s sponsor, testified that his support was a response to his “awareness ‘of the needs of the people in the community, both black and white’ and that ‘the majority of the people wanted to have a county-wide election.’ ” 94 Avery explained that countywide system would lead to the election of commissioners who acted upon the needs of the entire citizenry. 95 He testified that the general population was disaffected with the commissioners and their performance, and argued that the at-large system was “viewed as a way of assuring a more equitable and efficient means of distributing road maintenance and services, a matter of some consequence to the community.” 96 Avery said the proposal was not calculated to bar the black community from participating in the political process. 97

A month after the introduction of the 1965 Act, on March 23, 1965, the Congress of the United States began conducting hearings related to proposed legislation that “eventually was enacted as the 1965 Voting Rights Act.” 98 The day before, on March 22, “the Alabama legislature adopted a resolution condemning ‘outside agitators, communist sympathizers, and

---

83 Id.
84 Id. at 8–9.
85 Id. at 9.
86 Hale County, 496 F.Supp at 9.
87 Id.
88 Id.
89 Id. at 10.
90 Id.
91 Id. at 11.
92 Hale County, 496 F.Supp at 11.
93 See id.
94 Id. at 12–13.
95 Id.
96 Id. at 14.
97 Id.
98 Hale County, 496 F.Supp at 14.
well meaning, but socially ignorant crusaders (who have) skillfully laid the ground work for such a vicious piece of legislation by stirring the strife and dissention in this area in particular and throughout this country generally.’”99 The resolution urged Alabama’s congressional delegation “to use every effort and all means available to prevent this vicious proposal from being presented to Congress, and to redouble their efforts to defeat it if it is so introduced.”100

Like many other municipalities before the enactment of the VRA, black voters in Hale County “faced virtually insurmountable obstacles to registration.”101 Literacy tests and poll taxes were deployed throughout Alabama “to exclude black citizens from the political process.”102 Blacks who tried to register to vote found their efforts frustrated by white officials who harassed them through various means.103

One woman described attempting to register in the 1950s.104 She described the scene as she arrived to register, and found a table of men sitting around playing dominoes.105 After being asked “what is it gal?” she told the men that she wanted to register.106 They passed her a form and told her to fill it out.107 She said: “[W]e would attempt to fill it out. And, down on the bottom it says, ‘write the second line of second paragraph or the first line of the Constitution,’ something of that sort, along with ‘your name, your address, your age and why do you want to vote.’”108 Another Hale County citizen testified that after he passed the literacy test, he was advised to secure a letter of recommendation from a white voter.109 He said the letter served as his “passport.”110

According to the Hale County Court, “these exclusionary practices proved highly successful.”111 Between January 1955 and January 1962, Hale County’s Board of Registrars registered only eighteen black voters, out of a black population of 10,000.112 By May 1964, “the United States Commission on Civil Rights found that there were only 236 ‘non-white’ voters in Hale County, approximately 3.9 percent of the black voting age population recorded in the 1960 Census.”113

Sixteen months after the adoption of the VRA, there were over 3,000 black voters registered in Hale County.114 Meanwhile, the first black candidate since reconstruction ran for county office.115 Reverend Henry McCaskill ran as a Democrat for sheriff, but lost in the

99 Id.
100 Id. at 15–16.
101 Id. at 17.
102 Id. at 17.
103 Id.
104 Hale County, 496 F.Supp at 18.
105 Id.
106 Id.
107 Id.
108 Id.
109 Id. at 19.
110 Hale County, 496 F.Supp at 19.
111 Id.
112 Id.
113 Id.
114 Id. at 20.
115 Id.
primary following a campaign “marred with demonstrations of racial hostility towards his
candidacy.” During the campaign, McCaskill “received threatening telephone calls and
letters, rocks were thrown windows of his campaign headquarters, his campaign posters were
torn down and replaced by those of white candidates, and threats were made to his campaign
workers while they were engaged in voter canvassing.”

Two years later, in 1968, white opponents defeated two other candidates. The court
noted that “while overt hostility to black candidates and black voters has subsided in recent
years, since 1965, black candidates have been unsuccessful in all thirty attempts to win county-
wide office, including eleven to win a seat on the County Commission.”

Hale County argued that this low rate of success for its black candidates could be
attributed to two things. First, that white candidates sought support from both black and white
voters, while black candidates only sought support from black voters. Second, that the white
candidates were “responsive” to the their constituents. The court rejected both of these
arguments, and concluded that ‘race, rather than ‘responsiveness,’ still remains the dominant
factor in explaining voting patters in Hale County.”

The court defined racial block voting as “the propensity of voters, when presented with
candidates of different races, to vote for the candidate of their own race.” According to the
court, the “best evidence of racial bloc voting is produced by analyzing the results of elections
involving black and white candidates for the same office.” The court cited to one expert
witness’s testimony, which concluded that after analyzing eight consecutive elections,
“[i]nvariably over 90 percent of the white voters voted for white candidates, and usually between
80 and 90 percent of black voters voted for black candidates.” The witness said these were
among the highest that he had ever encountered.

Though the majority of Hale County’s voting population was black, and there was clear
evidence of racial block voting, black candidates remained unsuccessful. According to the
Hale County Court, this was attributable to the fact that black education levels in the county were
“far below those of the white population,” thus contributing to a disparity in the type of
employment that the county’s black residents engaged in. Naturally, this then led to a

116 Hale County, 496 F.Supp at 20.
117 Id.
118 Id. at 21.
119 Id.
120 See id. at 22.
121 Id.
122 Hale County, 496 F.Supp at 22.
123 Id. at 23–24.
124 Id. at 24.
125 Id.
126 Id.
127 Id.
128 Hale County, 496 F.Supp at 24.
129 Id. at 26.
130 Id. at 26–27.
disparity in median income, which, in 1970, was $7000 for whites and $2756 for blacks.\textsuperscript{131} The court said this socioeconomic reality effected Hale County’s black voters in a number of ways.\textsuperscript{132}

First, poorly educated people have “comparatively more difficulty in filling out forms and complying with other formalities accompanying the registration process.”\textsuperscript{133} Second, blue-collar workers generally have less flexible work schedules and find it more difficult take time to register or to vote.\textsuperscript{134} Finally, “low income hinders political participation by restricting access to information and by increasing the inconvenience of registering and voting.”\textsuperscript{135}

The court also cited to evidence that “would-be-black voters in Hale County still face subtle forms of discrimination and economic intimidation.”\textsuperscript{136} According to the court, “[t]he legacy of many years of discrimination and harassment has not completely disappeared in the fifteen years since” the adoption of the VRA.\textsuperscript{137} This was evidenced by black poll watchers’ attempts at monitoring being hindered and black voters refraining “from voting for fear of angering employers.”\textsuperscript{138} Because black voters continued to show out in low numbers and there were clear racial block voting trends, the court determined that the only way black voters could elect their candidate of choice was through a district rather than an at-large election system.\textsuperscript{139} The court concluded that the 1965, 1971 and 1973 enactments thus had purpose and effect of “abridging the rights of blacks to vote in Hale County.”\textsuperscript{140}

Several years later, the Supreme Court of the United States, in \textit{Easley v. Cromartie}, discussed the relationship between race and political party as it relates to use of predominant factor analysis to determine whether a legislature has improperly considered race as a criterion when making a change to its election system.\textsuperscript{141} Though \textit{Easley} is not entirely on point here, it is illustrative of how the Court has recently dealt with the relationship of race and party preference. The Court looked to whether the lower court erred in determining that the change at issue was made with predominately racial, not political motives.\textsuperscript{142} Interestingly, the Court determined that, though “registration figures do not accurately predict preferences at the polls,” the fact that African-Americans register and vote Democratic between 95\% and 97\% of the time meant the legislature may have been perfectly within the bounds of the constitution when it moved part of the “Black Community” into a district with the purported goal of creating a safe Democratic seat.\textsuperscript{143} The Court held that “where the racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that
are comparably consistent with traditional districting principles.” Under this approach, the “party must also show that those districting alternatives would have brought about significantly greater racial balance.”

B. Kinston’s Proposal and the Justice Department’s response.

Kinston is a small city located in Lenoir County, North Carolina. The city has a majority African American population, and is “overwhelmingly Democratic.” The president of the Kinston/Lenoir County branch of the National Association for the Advancement of Colored People has described the electoral environment in Kinston as one in which partisan labels are of little significance: “[N]onpartisan elections’ is a misconceived and deceiving statement because even though no party affiliation shows up on a ballot form, candidates still adhere to certain ideologies and people understand that, and are going to identify with who they feel has their best interest at heart . . . .”

Only nine out of North Carolina’s 551 cites and towns conduct partisan local elections. In 2008, Kinston voted 2-1 to do away with partisan elections, and to add a plurality-vote requirement. The proposition was supported in both white and black districts; it “won a majority in seven out of nine black-majority voting precincts, and both of its white-majority precincts.” Pursuant to section five, Kinston had to submit this change for preclearance. Dated August 19, 2009, the Justice Department’s ruling was authored by Assistant Attorney General for Civil Rights, Loretta King. In a predictably brief manner, the department found that Kinston did not carry its burden of proof, and failed to show that the submitted change had “neither a discriminatory purpose nor a discriminatory effect.”

The ruling began by discussing Kinston’s demographics. As of 2000, Kinston had a total population of 23,688, sixty-two point six percent of which were African American. Almost fifty-nine percent of Kinston’s voting age population is African-American. As of October 2008, Kinston had 14,799 registered voters; almost sixty-five percent of those voters are African American. The ruling, states that “[a]lthough black persons comprise a majority of the city’s registered voters, in three of the past four general municipal elections, African Americans comprised a minority of the electorate on election day; in the fourth, they may have been a slight

---

144 Id. at 258.
145 Id.
147 Conery, supra note 146.
148 Id.
149 Id.
150 Id.
151 Id.
152 Id.
153 Id.
154 Id.
155 Id.
Because of this, the Justice Department views Kinston as a minority district, and subjected it to section five’s retrogressivity analysis.\textsuperscript{157}

According to the ruling, “[b]lack voters have had limited success in electing candidates of choice during recent municipal elections.”\textsuperscript{158} Moreover, the “success that they have achieved has resulted from cohesive support for candidates during the Democratic primary (where black voters represent a larger percentage of the electorate), combined with crossover voting by whites in the general election.”\textsuperscript{159} The general electorate’s partisan makeup “results in enough white cross-over to allow the black community to elect a candidate of choice.”\textsuperscript{160}

The Justice Department believes this “small, but critical, amount of white crossover vote results from the party affiliation of black-preferred candidates, most if not all of whom have been black.”\textsuperscript{161} The ruling states that elected and municipal officials confirm the Justice Department’s statistical findings: “[T]hat a majority of white Democrats support white Republicans over black Democrats in Kinston city elections.”\textsuperscript{162} Meanwhile, these same officials also acknowledged that “a small group of white Democrats maintain a strong party allegiance and will continue to vote along party lines, regardless of the race of the candidate.”\textsuperscript{163} Essentially, these voters vote along party lines, and do not take the candidate’s race into account so much as their party affiliation.\textsuperscript{164} Thus, “while the racial identity of the candidate greatly diminishes the supportive effect of the partisan cue, it does not totally eliminate it.”\textsuperscript{165}

The ruling states that Kinston’s elimination of party affiliation for municipal elections would therefore have the likely effect of reducing the black voters’ ability to elect their candidates of choice.\textsuperscript{166} This will occur because black candidates will “likely lose a significant amount of crossover votes due to the high degree of racial polarization present in city elections.”\textsuperscript{167} Without “party loyalty available to counter-balance the consistent trend of racial block voting,” the Justice Department believes “blacks will face greater difficulty winning general elections.”\textsuperscript{168}

The ruling referred to the Department’s analysis of election returns, which it says indicate that crossover voting occurs more often in partisan general elections than in closed primaries.\textsuperscript{169} With this, “statistical analysis supports the conclusion that given a change to non-partisan elections, black preferred candidates will receive fewer white cross-over votes.”\textsuperscript{170}

\begin{flushleft}
\textsuperscript{156} \textit{Id.} One member of the Kinston City Council who supports partisan elections argued that “the best way to help black voters in Kinston is to change the council’s structure from citywide voting to representation by district.” Conery, \textit{supra} note 146.
\textsuperscript{157} \textit{Id.}
\textsuperscript{158} \textit{Id.}
\textsuperscript{159} \textit{Id.}
\textsuperscript{160} \textit{Id.}
\textsuperscript{161} \textit{Id.}
\textsuperscript{162} \textit{Id.}
\textsuperscript{163} \textit{Id.}
\textsuperscript{164} \textit{Id.}
\textsuperscript{165} \textit{Id.}
\textsuperscript{166} \textit{Id.}
\textsuperscript{167} \textit{Id.}
\textsuperscript{168} \textit{Id.}
\textsuperscript{169} \textit{Id.}
\textsuperscript{170} \textit{Id.}
\end{flushleft}
The ruling states that nonpartisan elections “would also likely eliminate the party’s campaign support and other assistance that is provided to black candidates because it eliminates the party’s role in the election.”\textsuperscript{171} The Democratic Party “provides forums for black candidates to meet with voters who may otherwise be unreachable without the party’s assistance” and “provides campaign funds to candidates, without which minority candidates may lag behind their white counterparts in campaign funding.”\textsuperscript{172}

According to the Department, “removing the partisan cue in municipal elections” will likely “eliminate the single factor that allows black candidates to be elected to office.”\textsuperscript{173} This is so because Kinston voters “base their choice more on the race of the candidate rather than his or her political affiliation, and without either the appeal to party loyalty or the ability to vote a straight ticket, the limited remaining support from white voters’s for a black Democratic candidate will diminish even more.”\textsuperscript{174} The department argued that that because Kinston’s electorate is “overwhelmingly Democratic,” the motivating factor for the move to eliminate partisan election may have been partisan, but “the effect will be strictly racial.”\textsuperscript{175}

The department informed Kinston of its right under section five to seek a declaratory judgment from the United States District Court for the District of Columbia that submitted change “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language group.”\textsuperscript{176} Additionally, the city can “request that the Attorney General reconsider the objection.”\textsuperscript{177} Pending one of these options coming to fruition, Kinston’s proposed change is not legally enforceable.\textsuperscript{178} Following the ruling, Kinston officials met privately with the Justice Department.\textsuperscript{179} Soon after, Kinston’s city council voted not to challenge the ruling.\textsuperscript{180}

Regardless of Kinston’s decision not to take further action, this matter does not appear to be over. Recently, the Center for Individual Rights filed a lawsuit in the Federal District Court in Washington D.C. on behalf of five Kinston residents.\textsuperscript{181} The lead plaintiff in the matter is Stephan LaRoque.\textsuperscript{182} Mr. LaRoque, a Republican, is a former North Carolina state lawmaker who claimed that the department’s decision was “racial as well as partisan.”\textsuperscript{183} The suit raises a constitutional challenge to Section five.\textsuperscript{184}

II. Analysis
The Kinston ruling rests on three major premises. First, the Department moored much of its argument to the notion that relatively low black turnout in a majority black jurisdiction can help establish the existence of diminished minority voting strength for the purposes of section five. Second, the Department argued that without the partisan cue, in a racially polarized political environment, Kinston’s African-American electorate will be deprived of the ability to select its candidate of choice. Finally, it argued that black voters will suffer under the proposed system because black candidates will no longer be able to draw money and support from the Democratic Party. True to Professor Posner’s critique, the department’s ruling is brief to a fault, and fails to illuminate substantial insight into how the department reached its conclusion in several critical areas.

A. Is Hale on Point?

Relying on Hale County, the department wrote that “minority turnout is relevant to determining whether a change under Section 5 is retrogressive.” There is no question that this remains good law; but one must place Hale County in contrast to the situation in Kinston. Hale County, which is now nearly thirty years old, contained a lengthy factual analysis of the record, and established a history of explicit acts of political oppression at the hands of local officials. Here, the Justice Department provided no such record. Indeed, the Justice Department’s ruling does not discuss any cause for this disparate voting pattern; instead, it simply declared that, based simply on election trends, Hale County applies.

This conclusion is intriguing because, while the department did not include any mention of specific conduct on the part of Kinston officials, one Kinston official argued that a current of apathy runs through among Kinston’s black voters. This is further complicated by the fact that, according to news accounts and a vague mention by the Justice Department, black voters cast a majority of the ballots in Kinston in 2008, a year when record numbers of black voters turned out to the polls to help elect the first ever African-American President of the United States. The fact that when motivated, Kinston’s black population was capable of casting a majority of the city’s ballots in a general election makes it difficult to accept that somehow, Kinston’s racial dynamic in regard to voter participation is similar to Hale County’s prior to the D.C. Circuit’s decision.

Similar to the Department’s scant explanation of how it determined that Kinston’s black voters turned out in relatively low numbers relates directly to a current or past discriminatory practice, the Department did little to explain the data that it relied upon in deciding how to better deal with the issues posed by racially polarized voting.

B. Partisan cue and racially polarized voting

The Department concluded that “the elimination of party affiliation on the ballot will likely reduce the ability of blacks to elect candidates of choice.” According to the Department, this conclusion was supported by evidence showing that a “majority of white

---

185 See Justice Ruling, supra note 146.
186 See generally Hale County, 496 F.Supp 1206.
187 Conery, supra note 145.
188 See id.; see also Justice Ruling, supra note 146.
189 See Justice Ruling, supra note 146.
Democrats support white Republicans over black Democrats in Kinston city elections.”¹⁹⁰ Meanwhile, a small group of white Democrats who, because of “strong party allegiance,” vote along party lines, “regardless of the race of the candidate.”¹⁹¹ The Department argued that “while the racial identity of the candidate greatly diminishes the supportive effect of the partisan cue, it does not totally eliminate it—without the small group of white Democrats who vote straight-ticket, Kinston’s black candidates will lose the “single factor that allows black candidates to be elected to office.”¹⁹²

Though these conclusions are likely supported by sound evidence, the Department did not go into any sort of in depth analysis of racially polarized voting and the pervasive role that it plays in elections across the nation. Regardless, the Department apparently views the role that white Democrats who cast straight-ticket ballots each play election as a positive one. Some in the academy share this view as well.

Professor Kareem Crayton, for instance, conducted a large scale empirical study of majority-minority congressional districts to determine whether racially polarized voting remains a problem.¹⁹³ Using Representative James Clyburn’s (D-SC) electoral success in the 1990s as an example, Professor Crayton discussed how “[w]hite support for Representative Clyburn was moderate throughout the this decade, and (with the exception of 1994) it closely tracked white support for the Democratic Party in statewide races.”¹⁹⁴ According to Crayton, “whites account for a reliable and important part of the electoral coalition that keeps Representative Clyburn in office. This level of support, while not huge, demonstrates that race does not sharply divide the electorate in the district.”¹⁹⁵ Therefore, Crayton concluded that a “black-preferred candidate in a racially polarized electorate would not have been able to win even half the percentage of white voters that Clyburn has managed to attract.”¹⁹⁶

Similar to the view that was embraced by the Easley Court, Crayton’s analysis here falls short of addressing the underlying policy issue posed by this understanding: whether it locks African-American candidates into a single political identity, and makes it impossible in some places for African-American candidates to run for office without having a D by their name. There is no question that in Kinston, just as in Representative Clyburn’s congressional district, white Democrats play a large part in the electoral support of African-American candidates. This trend, however, only goes as far as black candidates are affiliated with the Democratic Party, which creates two concerns: first, that black candidates must then be entirely reliant on the Democratic party, and second, that the federal government, through Section five, is now making official this bond between the party and the black electorate.

While section five has typically been deployed in cases of government intrusion on the right of minorities to effectively participate in the electoral process, the Justice Department’s ruling goes a step farther, and says the it is Kinston’s reasonability to facilitate this dependence and provide the crossover voting necessary to elect black Democratic candidates in a jurisdiction that is predominately African-American and Democrat. This makes little sense.

¹⁹⁰ See id.
¹⁹¹ See id.
¹⁹² Id.
¹⁹⁴ Crayton, supra note 193, at 571–72.
¹⁹⁵ Id.
¹⁹⁶ Id.
According to Professor Michael Kang, this “representational guarantee” approach thus threatens to undermine “political resolution through electoral competition and interest group pluralsism.” As Kang puts it, “democratic contestation is a basic value to be pursued in the law of democracy and the foundation for a theory that helps sort through and reconcile approaches to race, representation, and political competition under the VRA.” Thus, “[e]lectoral competition should be judged with reference to the ultimate ends it is intended to produce—more democratic debate, greater civic engagement and participation, and richer political discourse—all of which are implicated by a deeper notion of political competition among political leaders . . . .”

Kang wrote in the context of racial polarization. The political polarization that the Department has embraced, however, is likely to have the same pernicious effect as the approach he described—one that results in groups cordoned off from one another and true political progress being stifled.

C. The Department’s conclusions regarding African-American Candidates and Democratic Support

There is nothing in the record indicating that by precluding partisan labels from its local ballots, Kinston sought to prevent political parties from actively participating in Kinston’s elections. Notwithstanding, the Justice Department concluded that “the change to nonpartisan elections would likely eliminate the party’s campaign support and other assistance that is provided to black candidates because it eliminates the party’s role in the election.”

It is true that the role of political parties shifts when the partisan cue is stripped from the ballot; but political parties exist in large part to facilitate the imposition of a political philosophy and further the political goals of constituent groups, so regardless of whether political parties have their names on the ballots alongside the candidates’, they have an interest in who those candidates are. That said, it is unlikely that the Democratic Party, in a city that is predominantly Democratic, will cease to participate in Kinston’s elections. On the contrary, the party will likely increase its influence and capitalize on the huge advantage its candidates will now have over candidates who do not embrace their politics.

Finally, considering that the city is predominantly Democratic, removing the partisan cue from the ballot will likely result in more African-American’s being able to run for political office because they will not risk being defeated in the primary and thus precluded from participating the general election.

III. Conclusion

The belief that all members of a racial group should think alike politically is pernicious—it casts whole groups as one monolithic voting block, based strictly on the color of their skin. And yet, neither the Justice Department nor the courts are willing to recognize that while African-American’s have made progress in electing “their candidate of choice,” the African-American community’s ability to develop beyond the identity provided to it by the Democratic Party has been often times been stifled by the underlying assumption that all African-Americans

---

198 Kang, supra note 198, at 738.
199 Id.
200 Justice Ruling, supra note 146.
think alike politically. While it is assumed that within the white electorate there are numerous political philosophies, the common assumption concerning African-Americans is that they act as a whole politically.

This has in many ways hindered the development of the African-American electorate’s political identity, and has led to the African-Community at times being neglected by the Democratic Party. Interestingly though, however, this has evolved into a mutual dependence between the African-American electorate and the Democratic Party. Thus, on issues such as gay marriage, where the African-American electorate has a significant block of voters who are far to the right of the Democratic Party on the issue, the Party is often left walking the line between its many base constituencies. There should be another way.

In Justice Thomas’s eyes, “whenever similarities in political preferences along racial lines exist, we proclaim that the cause of the correlation is irrelevant, but we effectively rely on the fact of the correlation to assume that racial groups have unique political interests.” This “requirement of proof of political cohesiveness” has thus “proved little different from a working assumption that racial groups can be conceived of largely as political interest groups. And operating under that assumption, we have assigned federal courts the task of ensuring that minorities are assured their ‘just’ share of seats in elected bodies throughout the Nation.” Here, this has been taken a step further by the Department’s ruling in Kinston. Now, because of that ruling, a legal challenge has been launched against the entire system.

What is most unfortunate about the pending litigation is the timing. The entire preclearance regime is under attack, and the Supreme Court has indicated that it is, at a minimum, open to hearing arguments concerning its constitutionality. With this in the air, an all-out assault, launched by the likes of Mr. LaRoque and a cabal of attorneys who seek to dissolve one of the VRA’s most critical mechanisms at a time when new census data is bound to result in a series of legislative actions that are likely to raise a variety of preclearance concerns. The only question that remains is whether, when one of these cases arrives before the Court, the department’s Kinston Ruling does not prove to be an overreaction that cost the rest of the nation a crucial means of countering discriminatory conduct on the part of jurisdictions at a time when several will begin undergoing a massive overhaul spawned by recent changes in population and demographics.

---

201 Hall, 812 U.S. at 905.
202 Id.