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Forty Years Later: Chronicling the Voting Rights Act of 1965 and its Impact on Louisiana's Judiciary

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It is something to be able to paint a particular picture, or to carve a statue, and so to make a few objects beautiful; but it is far more glorious to carve and paint the very atmosphere and medium through which we look... to affect the quality of the day, that is the highest of the arts. 1

I. INTRODUCTION

March 7, 1965 was an infamous day in United States history. 2 The Civil Rights Movement was well under way. Activists attempted to draw

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2. In what would become known as "Bloody Sunday," civil rights activists Hosea Williams and Student Nonviolent Coordinating Committee Chairman, John Lewis led a group of about 525 silent marchers across the Edmund Pettus Bridge in Selma, Alabama where they were attacked by police. The subsequent beatings, widely publicized across the United States, greatly helped strengthen the activists' position in support of a federal law to protect minority citizens'
attention to the political disparities and inequalities blacks were forced to endure because African-Americans were so frequently denied the right to vote.\(^3\) Shortly after Bloody Sunday, Congress acted pursuant to its constitutional authority\(^4\) and passed the Voting Rights Act of 1965.\(^5\)

Although Congress passed the Act in 1965, its real significance in Louisiana's judiciary arguably was not realized for more than twenty years.\(^6\) Moreover, this realization of African-Americans' power to elect judicial representatives of their own choosing did not come through Congress—it came through litigious victories in the courts.\(^7\) This article commemorates the Act's fortieth anniversary and celebrates its impact on Louisiana's judiciary. In addition to providing a chronicle of courtroom victories it enabled, this article appropriately highlights Louisiana Supreme Court constitutional right to vote. Two days later, Dr. Martin Luther King and Rev. Ralph David Abernathy organized a new march during which the marchers knelt and prayed on the site of "Bloody Sunday."

3. African-Americans were originally granted the right to vote during Reconstruction, with Amendment XV to the United States Constitution ("the Fifteenth Amendment"). In relevant part, the Fifteenth Amendment provides "[t]he 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." U.S. Const. amend. XV, § 1 (1870) (emphasis added).

4. The Fifteenth Amendment expressly provides "[t]he Congress shall have the power to enforce this article by appropriate legislation." *Id.* at § 2.


6. As noted in *Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988), as of 1988, "no black attorney ha[d] been elected to the Louisiana Supreme Court. A black attorney, Jessie Stone, was appointed to a vacancy on the Louisiana Supreme Court for a period of seventeen days, from November 2, 1979 through November 19, 1979." *Id.* at 290. Furthermore, outside of Orleans Parish and as recent as 1988, there were only four black attorneys elected to district court judgeships in Louisiana: (1) Paul Lynch, elected in District 1 in 1978; (2) Lionel Collins, elected in District 24 in 1978; (3) Carl Stewart, elected in District 1 in 1985; and (4) Freddie Pitcher, Jr., elected in District 19 in 1986. *Id.* at 291.

7. See generally *Clark v. Roemer*, 500 U.S. 646, 111 S. Ct. 2096 (1991) (enjoining the state of Louisiana from conducting judicial elections without the requisite preclearance from the United States Department of Justice, as necessitated by the Act); *see also* *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir. 1988) (the *Chisom* and *Clark* cases are arguably the reason so many black jurists have been elected in the Louisiana judiciary).
Associate Justice Bernette Joshua Johnson. Justice Johnson is a proud beneficiary of the Act who labored in the courts after its initial enactment and worked with some of the pioneers in Louisiana's black legal community. This article's publication is also in celebration of Justice Johnson's eleventh anniversary as a member of the Louisiana Supreme Court and the thirteenth anniversary celebration of the election of Justice Revious O. Ortique, Jr., the first black justice elected to serve on Louisiana's highest tribunal.

II. THE VOTING RIGHTS ACT OF 1965

A. The Need for Congress to Pass the Act

8. After earning her law degree in 1969 and becoming one of the first two African-American women to graduate from Louisiana State University Law School (her classmate was Gammiel Gray Poindexter, now a trial judge in Virginia), then-Bernette Joshua worked with famed civil rights attorneys A.P. Tureaud and Ernest N. "Dutch" Morial. Tureaud, affectionately known as "Dean of Negro Lawyers," was a cooperating attorney with the National Association for the Advancement of Colored People. He also frequently worked with then-lawyer Thurgood Marshall, who became the United States Supreme Court's first African-American associate justice. See Lisa Aldred, Thurgood Marshall: Supreme Court Justice 72 (1990). As of the date of this article's publication, Bernette Joshua Johnson is the only African-American justice on the Louisiana Supreme Court. She was initially elected to the Court in 1994 to fill the unexpired term of the Hon. Revious O. Ortique, Jr. in the so-called "Chisom seat," discussed infra. In 2000, Justice Johnson was elected to a 10-year term to represent the Court's reconfigured 7th Judicial District. See The Louisiana Supreme Court Justices: Justice Bernette Joshua Johnson, http://www.lasc.org/justices/johnson.asp.

9. Very early in her career, Justice Johnson worked for Dutch Morial, A.P. Tureaud's protégé. Morial was the first black to graduate from Louisiana State University Law School in 1954. See, e.g., Clark, 725 F. Supp. at 292 (citing Morial as the first black graduate of Louisiana State University's law school after a three-judge panel in Wilson v. Board of Supervisors of Louisiana State University, 92 F. Supp. 986 (E.D. La. 1950), summarily aff'd, 340 U.S. 909, 71 S. Ct. 294 (1951), ordered the school to stop refusing to admit black students on the basis of race). Morial went on to become the first black to serve in numerous legal and political roles in Louisiana. Among them, he was the first black: Assistant U.S. Attorney in the Eastern District of Louisiana; judge of the Orleans Parish Juvenile Court; judge of the Louisiana Fourth Circuit Court of Appeals; and mayor of New Orleans. See Herman Mason, Jr., The Talented Tenth: the Founders and Presidents of Alpha 335-38 (2d. ed. 1999); see also Louisiana District Judges Association, Biographies of Louisiana Judges (1971).
Although the Civil Right Amendments ended involuntary servitude, granted blacks full citizenship, and theoretically granted the right to vote, the Amendments' practical effect was far less functional. "Louisiana [for example] has a long history of de jure and de facto restrictions on the right of black citizens to register, to vote, and to otherwise participate in the democratic process." The Act, therefore, "set its sights on the most visible barriers to black legal equality. These barriers were defined primarily as direct, formal discriminatory practices intended to exclude black participation in the central political and economic institutions of American life."

From its inception, the United States has had a bitterly long history of racial divisiveness. Consequently, even though blacks were "free" to vote after adoption of the Fifteenth Amendment, states continued to deny minority citizens this fundamental right.
Moreover, as other commentators have noted in addressing the necessity of federal legislation to protect minority citizens' right to vote:

Litigation of voting rights claims on a case-by-case basis under the Civil Rights Acts of 1957, 1960, and 1964 attempted to remedy unconstitutional voting practices but had only negligible success, resulting in only piecemeal gains and was thwarted by the development of new voting practices abridging or denying the minority right to vote.

It was therefore essential that Congress pass federal legislation to prevent discrimination at the polling place. In *Lane v. Wilson*, U.S. Supreme Court Justice Felix Frankfurter observed that the Fifteenth Amendment "nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise . . . ." Despite the broad intentions of the amendment, however, "white [s]outherners in charge of registration and voting readily circumvented the Fifteenth Amendment. They had an arsenal of discriminatory schemes."

Notwithstanding flagrant attempts to limit minority citizens' power of the franchise,

* [t]he Voting Rights Act is one of the most successful civil rights statutes ever passed by Congress. The [A]ct accomplished what the Fifteenth Amendment to the U.S. Constitution and numerous federal statutes had failed to accomplish—it provided minority voters an opportunity to

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19. *Id.* at 275, 59 S. Ct. at 876.

participate in the electoral process and elect candidates of their choice, generally free of discrimination.21

Accordingly, Congress was uniquely situated to act pursuant to its constitutional authority to enact legislation to protect minority citizens in their attempts to fully participate in the political process and elect representatives of their own choosing.

B. A Practical Analysis: What the Act Sought to Accomplish

The Act essentially shifted the responsibility for ensuring that the right to vote was not abridged from the courts to the United States Department of Justice.22 Sections 2 and 5 of the Act eliminated qualifications as prerequisites to voting.23

Section 2 was originally a restatement of the Fifteenth Amendment and applies to all jurisdictions. It prohibits any state or political subdivision from imposing a "voting qualification or prerequisite to voting or standard, practice or procedure . . . in a manner which results in the denial or abridgment of the right to vote on account of race or color."24

Stated in summation,

[t]he Act was viewed by many southern African-Americans and civil rights activists as the resurrection of the [Fifteenth] Amendment, a provision rendered impotent prior to the passage of the Act by discrimination. For more than a half century, white-controlled governments in the South had suppressed the minority right to vote through the use of violence, intimidation, and devices such as literacy tests, poll taxes, and primaries restricted on the basis of race and wealth.25

22. See Augustine, supra note 15 at 164.
23. Martinez, supra note 16 at 1337.
24. NCSL, supra note 21, at 48 (quoting 42 U.S.C. § 1973 (a)).
Furthermore, Section 5 of the Act also requires Department of Justice approval before a "covered jurisdiction" can change voting practices. "A jurisdiction covered by Section 5 is required to preclear any changes in its electoral laws, practices or procedures with either the U.S. Department of Justice or the U.S. District Court for the District of Columbia." Congress, therefore, passed the Act to ensure states adhered to the Fifteenth Amendment's mandates in attempting to "rid the country of racial discrimination in voting."

1. Section 2 of the Original Act and its Subsequent Amendments

Section 2 of the Act as originally passed in 1965 provided as follows:

No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny 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.

In 1982, Congress amended the Act to infuse it with new life. More importantly, Congress specifically amended Section 2 in response to the Supreme Court's ruling in City of Mobile v. Bolden.

26. See 42 U.S.C. § 1973(b) for the criteria defining a "covered jurisdiction" under the Act.
28. See Corwin & Peltason, supra note 20 at 151; see also Martinez, supra note 16, at 1337.
30. Since its initial enactment in 1965, the Act has been amended three times: 1970, 1975 and 1982. See NCSL, supra note 21, at 48.
32. See Dulaney, supra note 25, at 1225.
In *Bolden*, a group of black citizens alleged Mobile's practice of electing commissioners at-large illegally diluted minority voting strength, thus violating the Fourteenth and Fifteenth Amendments and Section 2 of the Act.\(^{34}\) The Court's plurality opinion provided that "racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation."\(^{35}\) Moreover, the Court concluded the plaintiffs failed to prove a violation under Section 2 of the Act because Congress did not intend Section 2 to have any different effect from that of the Fifteenth Amendment.\(^{36}\)

The *Bolden* Court reasoned that Section 2 only operated to prohibit intentionally discriminatory acts by state officials. Subsequent analysis has noted:

> [T]he Court required proof of discriminatory intent for claims brought under [S]ection 2 of the . . . Act, as well as those brought under the [F]ourteenth and [F]ifteenth [A]mendments. Under this new, onerous burden of proof, plaintiffs could no longer rely on proof of discriminatory effect to raise an inference of intent; they now had to prove discriminatory purpose by "direct, smoking gun evidence."\(^{37}\)

Accordingly, under the Court's holding, "[a]bsent direct evidence of invidious purpose, no multimember electoral systems could be challenged under either the Constitution or the Voting Rights Act."\(^{38}\)

Congress amended Section 2 so proof of intent would not be required to establish violation of the statute.\(^{39}\) In doing so, "Congress adopted the 'results' test, whereby plaintiffs may prevail under [S]ection 2 by demonstrating that, under the totality of the circumstances, a challenged election law or procedure has the effect of denying or abridging the right to vote on the basis of race."\(^{40}\) It is therefore clear that Congress "amended the Voting

34. 446 U.S. 55, 100 S. Ct. 1490.
35. *Id.* at 62, 100 S. Ct. 1497.
36. *See id.* at 60–61, 100 S. Ct. 1495–96.
40. Chisom v. Edwards, 839 F.2d 1056, 1059. Congress' final adoption of the "results test" included recommendations from the Senate Judiciary
Rights Act expressly to repudiate *Bolden* and to outlaw electoral practices that 'result in' the denial of equal political opportunity to minority groups.

The Senate Judiciary Committee found the *Bolden* Court "had broken with precedent and substantially increased the burden on plaintiffs in voting discrimination cases by requiring proof of discriminatory intent." As such, the committee's report concluded "[t]his intent test places an unacceptably difficult burden on plaintiffs. It divests the judicial injury [sic] from the crucial question of whether minorities have equal access to the electoral process to a historical question of individual motives.

The committee's report also took from *Zimmer v. McKeithen* a non-exhaustive list of factors for courts to consider as part of Section 2's legislative history. The seven *Zimmer* factors were

Committee, encompassing relevant language from *White v. Regester*, 412 U.S. 755, 93 S. Ct. 2332 (1973), a case involving multimember state legislative districts in Texas. See NCSL, supra note 21, at 52.

41. Issacharoff, supra note 13, at 1846 (citations omitted).
42. NCSL, supra note 21, at 53.
45. The list of factors included the following:

(1) the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process; (2) the extent to which voting in the election of the state or political subdivision is racially polarized; (3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practice or procedure that may enhance the opportunity for discrimination against the minority group; (4) if there is a candidate slating process, whether the members of the minority group have been denied access to that process; (5) the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process; (6) whether political campaigns have been characterized by overt or subtle racial appeals; and (7) the extent to which members of the minority group have been elected to public office in the jurisdiction.

critically important in Clark v. Edwards because they set the foundation for a significant numbers of black lawyers to be elected to Louisiana's judiciary.

As a result of Congress' most recent amendment to the Act, Section 2 now provides as follows:

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 abridgment 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 1973(f)(2) of this title, as provided in subsection (b) of this section.

A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political process 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. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

2. Judicial Interpretation of the Act's 1982 Amendments to Section 2

In 1984, the first case challenging at-large judicial elections under Section 2 of the Act was filed in the United States District Court for the District of Southern Mississippi. Between 1982 and 1986, several lower court decisions upheld the constitutionality of the Act's 1982 amendments. However, the
Supreme Court first considered the Act’s 1982 amendments in the 1986 case *Thornburg v. Gingles.*

In *Gingles*, the plaintiffs challenged North Carolina’s 1982 redistricting plans for one multimember state senate district, one multimember, one single-member state senate district, and five multimember state house districts. Pursuant to Section 5 of the Act, the Department of Justice precleared the districts. The plaintiffs, however, alleged the precleared districts impaired black citizens’ ability to elect representatives of their choice, in violation of the Fourteenth and Fifteenth Amendments and Section 2 of the Act.

In writing for the Court, Justice Brennan analyzed the legislative history of Section 2. He also rejected the earlier test of intent to discriminate and instead noted that in determining if a Section 2 violation has occurred, the courts should evaluate whether “as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice.” Brennan further indicated that a court “must assess the impact of the contested structure or practice on minority electoral opportunities ‘on the basis of objective factors.’”

Furthermore, in addition to the “objective factor” analysis, the *Gingles* Court developed a new three-part test that a minority group must meet to establish a vote dilution claim under Section 2 of the Act. The test requires that a minority group prove: (1) it is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) it is politically cohesive; and (3) in the absence of special circumstances, block voting by

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51. See id. at 35, 106 S. Ct. 2758.
52. See id., 106 S. Ct. 2758.
53. Id., 106 S. Ct. 2758.
55. Id. at 44, 106 S. Ct. at 2762–63 (citing S. Rep. No. 417, 97th Cong. 2nd Sess. at 28)
56. Id., 106 S. Ct. at 2762–63; see also McDuff supra note 27, at 972 (“The statement in *Gingles* regarding size and compactness of the minority population illustrates one of the requirements in section 2 cases—plaintiffs must demonstrate the potential of creating some other remedial electoral configuration that will improve minority opportunities to elect candidates of choice.”).
3. The Original Section 5 of the Act, its Preclearance Requirement for Covered Jurisdictions, and its Subsequent Amendments

When the Act was originally passed, "Section 5 was considered one of the primary enforcement mechanisms to ensure that minority voters would have an opportunity to register to vote and fully participate in the electoral process free of discrimination." Moreover, "[t]he intent of Section 5 was to prevent states that had a history of racially discriminatory electoral practices from developing new and innovative means to continue to disenfranchise black voters." Prior to the Act's original passage in 1965, Congress had already passed several laws attempting to protect minority citizens. Nevertheless, "despite the earnest efforts of the Justice Department and of many federal judges . . . laws [did] little to cure the problem of vot[er] discrimination." Prior to Congress' passage of Section 5, "the federal government, through the Civil Rights Division of the Department of Justice undertook the arduous and time-consuming task of filing individual suits against each discriminatory voting law. This approach proved unsuccessful in increasing black voter registration." Arguably, the Act has proved so effective because of the requirements within Section 5.

57. See Gingles, 478 U.S. at 50–51, 106 S. Ct. at 2766–67 (citations omitted).
58. NCSL supra note 21, at 80; see also McDuff supra note 27, at 974.
59. Id.; McDuff supra note 27, at 974 ("In passing the 1965 Voting Rights Act, Congress attempted, among other things, to prevent states and localities with severe histories of electoral discrimination from devising new schemes to frustrate the emergence of black political power.").
60. See Martinez, supra note 16, at 1336.
62. NCSL, supra note 21, at 80. Before passage of Section 5, only 29 percent of blacks were registered to vote in several southern states, including Louisiana and Mississippi, compared with 73.4 percent of whites. By 1967, only two years after Section 5 was adopted, more than 52 percent of blacks were registered in those same states. See id. (citing B. Grofman, L. Handley, & R. Neimi, Minority Representation and the Quest for Voting Equality 23 (Cambridge University Press 1992)).
Section 5 requires covered jurisdictions\(^{63}\) to submit any proposed changes in voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting to either the U.S. Department of Justice or the U.S. District Court for the District of Columbia for preclearance before the proposed change can be implemented.\(^{64}\) If a covered jurisdiction seeks preclearance through the courts,\(^{65}\) the preclearance is considered "judicial."\(^{66}\) Conversely, if the jurisdiction seeks the preclearance through the Department of Justice, the preclearance is considered "administrative."\(^{67}\)

In 1970, Congress extended the preclearance requisite of Section 5 for an additional five years.\(^{68}\) The Act's 1975 and 1982 amendments broadened the substantive scope of Section 5 even further and also extended its operation until 2007. In 1975, Congress extended the section's preclearance requirements for an additional seven years, or through the 1980 redistricting cycle.\(^{69}\)

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64. See NCSL, supra note 21, at 80 (citing 42 U.S.C. § 1973c). To obtain judicial preclearance for the U.S. District Court for the District of Columbia, a covered jurisdiction must file a petition for declaratory judgment with the requisite burden of proving the proposed electoral change will not have the effect of denying or abridging the right to vote on account of race or color or membership in a language minority group. The Department of Justice serves as the opposing party in litigation. See generally 42 U.S.C. § 1973c.
65. See McDuff supra note 27, at 974–75; see also NCSL supra note 21, at 92–93 (describing the process of filing a petition for declaratory judgment against the Department of Justice and the requisite burden of proof associated therewith).
67. The Department of Justice has issued guidelines regarding the administrative preclearance process. The most recent guidelines were issued in 1988 and updated in 1998. See 28 CFR § 51. In light of the Supreme Court's decision in Reno v. Bossier Parish School Board, 520 U.S. 471, 117 S. Ct. 1491 (1997), questioning the validity of the regulations, the Department of Justice repealed the part of the Section 5 preclearance guidelines that required a plan to also comply with Section 2 of the Act. See generally, 28 C.F.R. §§ 51.13–27 (2005).
68. NCSL, supra note 21, at 80. Congress' 1970 amendments to the Act also expanded coverage to those states and political subdivisions that used a specified test or devise and where less than half the voting age population actually voted in the November 1968 federal elections. As a result of Section 5's 1970 amendments, three counties in New York and parts of New Hampshire became subject to Section 5's preclearance requirements. See id. at 81 n.350.
69. See id.
Similarly, in 1982, Congress again extended the section's preclearance requirements for an additional twenty-five years. With regard to covered jurisdictions, therefore, the preclearance requirements of Section 5 are almost absolute.\textsuperscript{70}

The 1975 amendments required the use of bilingual election materials and assistance if five percent of the jurisdiction's voting age citizens were of a single language minority and the literacy rate of that language minority group was greater than the national average.\textsuperscript{71} Furthermore, the 1975 amendments expanded the coverage requirements of Section 5 to include jurisdictions that maintained any test or device and had less than half of their voting age population either registered on November 1, 1972 or voting in the November 1972 federal election.\textsuperscript{72} Because the 1982 amendments only extended Section 5's preclearance requirement an additional twenty-five years, they did not make any substantive changes to the section.

4. Judicial Interpretation of Section 5

In \textit{Beer v. United States}, the Supreme Court addressed the issue of whether changes in the apportionment of city council districts in the city of New Orleans ("the City") violated the Act.\textsuperscript{73} The City conducted its standard decennial reapportionment after it received the figures from the 1970 Census. When the City attempted to obtain administrative preclearance of its reapportionment from the U.S. Department of Justice, however, the attorney general rejected the City's plans as impermissibly diluting black voting strength by combining a number of black voters with a larger number of white voters.\textsuperscript{74} The City, therefore, filed a petition for declaratory

\textsuperscript{70} The Act's only exception to Section 5's requirements is the so-called "bail out" provision. \textit{See} 42 U.S.C. § 1973b (a)(1). Under it, an otherwise covered jurisdiction may bail out from Section 5's preclearance requirements if it can demonstrate that, during the proceeding ten year period, it complied with the Act and undertook efforts to ensure minority participation in the electoral process. \textit{See} NCSL, \textit{supra} note 21, at 94 (citing 42 U.S.C. § 1973b (a)(1)).

\textsuperscript{71} \textit{See} NCSL, \textit{supra} note 21, at 80 (citing 42 U.S.C. § 1973b (f)(4)).

\textsuperscript{72} \textit{See} id. at 81. As a result of the Act's 1975 amendments, Alaska, Arizona, New Mexico, Texas and parts of California, Florida, Michigan and South Dakota were covered under the Act. \textit{Id.} n.353; \textit{see also} McDuff, \textit{supra} note 27, at 974.

\textsuperscript{73} 425 U.S. 130, 96 S. Ct. 1357 (1976).

\textsuperscript{74} \textit{See} id. at 137, 96 S. Ct. 1357, 1361–62. Even before the Department of Justice rejected the City's Plan I, it began working on Plan II. Plan II was nevertheless also rejected by the attorney general. \textit{See} id. See 28 C.F.R. §
judgment with the U.S. District Court for the District of Columbia, pursuant to Section 5 of the Act.

The City sought judicial preclearance of its newly adopted city council reapportionment plan. Similar to the Department of Justice, however, the district court found the City's new reapportionment plan would abridge the voting rights of the City's black citizens and concluded that "Plan II would have the effect of abridging the right to vote on account of race or color." According to the district court, the new plan would have the effect of abridging the right to vote on account of race or color.

On appeal, the Supreme Court reversed and remanded. The Court found the City's new reapportionment plan was valid where it had the effect of enhancing the position of racial minorities. In reversing, the Court noted "[t]he language of § 5 clearly provides that it applies only to proposed changes in voting procedures. 'Discriminatory practices . . . instituted prior to November 1964 . . . are not subject to the requirement of preclearance [under § 5]'". Moreover, the Court wrote that "[a] new legislative apportionment cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution."

In 1983, the Court broadened the Beer Court's retrogression standard in City of Lockhart v. United States. In Lockhart, the Court precleared an electoral change that did not improve the position of minority voters. The Court noted, however, that "[a]lthough there may have been no improvement in [minority] voting strength, there has been no retrogression, either." Accordingly, the Court reasoned that "[s]ince the new plan did not increase the degree of discrimination against blacks, it was entitled to Section 5 preclearance."

51.54(a) (2005) for the standard the Department of Justice employs in such cases.

75. Id.

76. Beer v. United States, 374 F. Supp. 363, 402 (D.D.C. 1974) ("[T]he feature of the city's electoral scheme by which two councilmen are selected at large has the effect of impermissibly minimizing the vote of black citizens; and the further conclusion that for this additional reason the city's redistricting plan does not pass constitutional muster.") (citations omitted).

77. Id. at 135, 103 S. Ct. 1004.

78. Id. at 135, 103 S. Ct. 1004.
Justice Thurgood Marshall, the Court’s only black member, dissented in *Lockhart*. Justice Marshall wrote that “[b]y holding that § 5 forbids only electoral changes that *increase* discrimination, the Court reduces § 5 to a means of maintaining the status quo.”\(^{83}\) Marshall therefore reasoned the Court’s view would permit the adoption of a discriminatory electoral scheme, provided the scheme was no more discriminatory than its predecessor and was consistent with both the language and intent of Section 5.\(^{84}\)

In *Young*,\(^{85}\) the Supreme Court specifically addressed the question of whether changes the state of Mississippi made to the procedure by which its residents and citizens were allowed to register to vote—changes made to be in compliance with the National Voter Registration Act of 1993\(^ {86}\)—required preclearance under Section 5.\(^ {87}\) The Court began from the position that all electoral changes, regardless of the reason therefore, must be precleared by covered jurisdictions.\(^ {88}\) Accordingly, the Court expressly ruled that Mississippi’s compliance with the NVRA was subject to the requirements under Section 5.\(^ {89}\)

The NVRA requires states to provide simplified systems for registering to vote in federal elections. In accordance with the NVRA, states must provide a system for voter registration by mail,\(^ {90}\) at various state offices,\(^ {91}\) and on a driver’s license application.\(^ {92}\) In an effort to comply with the statute, the state of

\(^{83}\) *Id.* at 137, 103 S. Ct. at 1005 (Marshall, J., dissenting).

\(^{84}\) *See id.*


\(^{87}\) *Young*, 520 U.S. at 275, 117 S. Ct. at 1231.


\(^{89}\) *Young*, 520 U.S. at 275, 117 S. Ct. at 1231.


\(^{91}\) *Id.* § 1973gg-5.

\(^{92}\) *Id.* § 1973gg-3.
Mississippi made certain changes in its registration procedures. The changes were subsequently challenged by four private plaintiffs in the United States district court and consolidated with a similar matter filed by the United States. The three-judge district court granted the defendant’s motion for summary judgment and rejected the plaintiffs’ argument. The district court essentially rejected plaintiffs’ arguments by reasoning that because the changes at issue were an attempt to correct a misapplication of state law, they consequently did not require preclearance under Section 5 of the Act.

In discussing the critical nature of Section 5’s preclearance provision(s) in all instances when a covered jurisdiction makes any changes to voter and voting practices or procedures, the Supreme Court reversed the district court’s ruling. In generally discussing the absolute necessity of preclearance, the Court wrote that

[p]reclearance is, in effect, a determination that the 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.” In the language of § 5 jurisprudence, this determination involves a determination that the change is not retrogressive.

Furthermore, in specifically examining the issue sub judice in Young, the Court went on to hold the following:

The problem for Mississippi is that preclearance typically requires examination of discretionary changes in context—a context that includes history, purpose, and practical effect . . . . The applicants and the government argue . . . the particular changes and the way Mississippi administers them could . . . abridge the right to vote. We cannot say whether or not that is so, for that is an argument for the merits. The question here is “preclearance,” and

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93. As previously indicated, all such changes within covered jurisdictions must receive Section 5 preclearance. See Allen, 393 U.S. at 566–69, 89 S. Ct. 877, 832–34. It is important to note, therefore, that the NVRA specifically provides that it does not supersede, restrict, or limit the Act’s application and does not “authoriz[e] or requir[e] conduct that is prohibited by the Voting Rights Act of 1965.” Young, 520 U.S. at 276, 117 S. Ct. at 1232 (quoting 42 U.S.C. § 1973gg-9(d)).
94. Id. at 280–81, 117 S. Ct. at 1234.
95. See id. at 281, 117 S. Ct. at 1234.
96. Id. at 276, 117 S. Ct. 1232 (citing Beer v. United States, 425 U.S. 130, 141, 96 S. Ct. 1357, 1363–64 (1976)).
preclearance is necessary so that the appellants and the government will have the opportunity to find out if it is true.\textsuperscript{97}

The Court reversed the district court's grant of summary judgment against the plaintiffs. It also remanded the litigation, directing the state of Mississippi to preclear the changes it made to be in compliance with the NVRA.\textsuperscript{98}

III. SECTIONS 2 AND 5 OF THE ACT AND LOUISIANA'S JUDICIARY: CHISOM V. EDWARDS AND THE SUBSEQUENT LOUISIANA SUPREME COURT SEAT

Prior to 1984, there is only one known case where plaintiffs challenged a judicial election system as racially discriminatory.\textsuperscript{99} In \textit{Voter Information Project v. City of Baton Rouge}, the plaintiffs challenged the at-large judicial election method for the City Court and 19th Judicial District Court for the Parish of East Baton Rouge.\textsuperscript{100} The U.S. District Court for the Middle District of Louisiana originally dismissed the litigation, concluding if the one-man, one-vote principle did not apply to judicial elections, the Fourteenth Amendment's anti-vote dilution provisions did not apply either.\textsuperscript{101}

On appeal, the U.S. Fifth Circuit Court of Appeals reversed. The Fifth Circuit held that although the one-man, one-vote principle was different from racial vote dilutions claims, any racial discrimination in judicial elections was the proper subject of the lawsuit.\textsuperscript{102} Specifically, the court noted "[i]t may well be true that judges are elected to serve the people, not to represent them. But this fact makes plaintiffs' claim of racial discrimination no less important and no less deserving of constitutional protection."\textsuperscript{103} After the Fifth Circuit then remanded the litigation for a new trial, the U.S. Supreme Court issued its previously discussed ruling in

\textsuperscript{97} \textit{Id.} at 290–91, 117 S. Ct. at 1239 (citations omitted).
\textsuperscript{98} \textit{Id.} at 291, 117 S. Ct. at 1239.
\textsuperscript{99} See McDuff, \textit{supra} note 27, at 936 (citing \textit{Voter Information Project, Inc. v. City of Baton Rouge}, 612 F.2d 208 (5th Cir. 1980)).
\textsuperscript{100} 612 F.2d 208, 209 (5th Cir. 1980).
\textsuperscript{101} \textit{Id.} at 210.
\textsuperscript{102} \textit{Id.} at 212.
\textsuperscript{103} \textit{Id.}
Accordingly, under Bolden’s “discriminatory intent” test, the plaintiffs dismissed their case.1

A. Historical Background and Rationale Supporting the Plaintiffs’ Claim

The case of Chisom v. Edwards106 began in 1987 when Ronald Chisom, four other black plaintiffs, and the Louisiana Voter Registration Education Crusade filed a complaint on behalf of the class of all black persons registered to vote in Orleans Parish.107 The plaintiffs alleged that the at-large method of electing justices from their Supreme Court judicial district impermissibly diluted minority voting strength in violation of Section 2 of the Act, as amended in 1982,109 and the Fourteenth and Fifteenth Amendments of the United States Constitution.110 Consequently, the Chisom plaintiffs brought suit against the governor and other state officials seeking a remedy that would have divided the First Supreme Court District into two districts: one for Orleans Parish and the second for the other three parishes.111

104. 446 U.S. 55, 100 S. Ct. 1490 (1980).
105. See McDuff, supra note 27, at 936.
107. See id.
108. Louisiana’s First Supreme Court Judicial District was comprised of Orleans, Jefferson, St. Bernard, and Plaquemines Parishes. The district’s voters elected two justices from the district.
110. See Chisom, 839 F.2d at 1057. The Supreme Court considered vote dilution claims for the first time in Fortson v. Dorsey, 379 U.S. 433, 85 S. Ct. 498 (1965). In dicta, the Court wrote,

It might well be that, designedly or otherwise, a multimember constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. When this is demonstrated it will be time enough to consider whether the system still passes constitutional muster.

Id. at 439; see also Gaffney v. Cummings, 412 U.S. 735, 751, 93 S. Ct. 2321, 2331 (1973).

111. “The concept of vote dilution involves two contributing factors which act in tandem to produce a discriminatory result at the polls: (1) the existence of racially-polarized bloc voting within certain voting populations; and (2) districting schemes which, in combination with this bloc voting, operate in a manner that minimizes or cancels out minority voting strength.” Mark W.
The Louisiana Supreme Court First Judicial District's population was approximately thirty-four percent black and sixty-three percent white. Moreover, the registered voter population showed a similar percentage breakdown, with approximately thirty-two percent black and sixty-eight percent white. The statistics showed that "[o]ver half of the four parish First Supreme Court District population and over half of the district's registered voters live[d] in Orleans Parish. Importantly, Orleans Parish ha[d] a fifty-five percent black population and a fifty-two percent black registered voter population." The Chisom plaintiffs sought a division whereby one proposed judicial district would be comprised of Orleans Parish, with a greater black population, and a second judicial district would be comprised of Jefferson, Plaquemines, and St. Bernard Parishes.

Initially, the district court in Chisom dismissed the plaintiffs' Section 2 claim, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for failure to state a claim upon which relief could be granted. The court reasoned that Section 2 did not apply to the election of state court judges. On appeal, however, the Fifth Circuit focused on whether state judges and justices are "representatives" within the meaning of Section 2 of the Act.

On appeal, the Fifth Circuit reversed. Section 14(c)(1) of the Act defines "voting" and "vote" for the Act's purpose. Specifically, it sets forth the types of election practices encompassed within the Act's regulatory scope. In light of this

112. Chisom, 839 F.2d at 1057.
113. See id.
114. Id.
115. See id. at 1058.
117. The district court concluded that because judges were not "representatives," judicial elections were not covered by Section 2 of the Voting Rights Act. See Chisom, 659 F. Supp. at 187.
118. The U.S. Supreme Court has indirectly, at least, regarded elected judges as representatives by noting that "persons holding state elective or important nonelective executive, legislative, and judicial positions . . . perform functions that go to the heart of representative government." Sugerman v. Dougall, 413 U.S. 634, 647, 93 S. Ct. 2842, 2850 (1973).
119. Section 14(c)(1) provides the following:

The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, included
section, the Fifth Circuit in *Chisom* held that "judges are 'candidates for public or party office' elected in a primary, special, or general election; therefore, Section 2, by its express terms, extends to state judicial elections. This truly is the only construction consistent with the plain language of the Act."\(^{120}\)

The *Chisom* court viewed and interpreted the Act's legislative history with an eye toward determining whether Congress intended to exclude judicial elections from the Act's purview.\(^{121}\) As such, the judges arguably focused on the fact that

[t]he legislative history of the 1982 amendment reveals two instances from which it can be inferred that the congressional understanding was that the amendment applied to judicial elections. First, *Senator Orrin Hatch, in comments contained in the Senate Report, stated that "the term 'political subdivision' covered all governmental units, including city and county councils, school boards, judicial districts, as well as state legislatures."* Second, the House and Senate hearings on various versions of the Act were replete with references to the election of judicial officials under the Act. *These references were to election results, which included judicial elections* that either demonstrated an advance or loss of minority candidate success under prior versions of the Voting Rights Act. Finally, throughout the Senate Report, Congress used the word "representative" interchangeably with "officials" and "candidates" when discussing the meaning of [S]ection 2; this the court thought further suggested that the congressional intent was not to give the word "representative" a specially technical legal meaning.\(^{122}\)

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but not limited to registration, pursuant to this subchapter or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public office and propositions for which votes are received in an election.


120. *Chisom*, 839 F.2d at 1060. The Fifth Circuit subsequently overruled itself on the issue of judicial elections being covered under Section 2 of the Act in *League of United Latin American Citizens Council v. Clements*, 914 F.2d 620, 631 (5th Cir. 1990) (on rehearing en banc) (*Clements II*).

121. *See Mohoney, supra* note 111, at 761.

122. *Id.* at 761-62 (citations omitted) (emphasis added).
The Chisom court, therefore, placed judicial elections squarely within the scope of the Act’s Section 2.123

B. Section 2 of the Act and Judicial Elections: A Word on Clements and Houston Lawyers’ Ass’n v. Attorney General of Texas124

Notwithstanding the Fifth Circuit’s reasoning in Chisom, the Fifth Circuit later reversed its holding that Section 2 of the Act applies to judicial elections in Clements II.125 In examining the Act’s interpretative jurisprudence, it is imperative to discuss Clements I126 and II and Clements II’s subsequent reversal in Houston Lawyers’ Ass’n v. Attorney General of Texas.127

In Clements I, the plaintiffs filed suit against the Texas attorney general, secretary of state, and other state officials. They alleged the county election of trial judges, with at-large elections on a county basis, diluted minority voting strength in nine targeted counties from which 172 of the 390 district judges were elected.128 In challenging specific Texas law, the plaintiffs filed a Petition for Declaratory Judgment and sought an injunction against further elections and the subdistricting of the nine targeted county districts.129

The district court rejected the plaintiffs’ constitutional claims for failure to establish purposeful discrimination; however, under a totality of the circumstances standard, the court concluded “that each targeted district violated [S]ection 2 under the amended ‘results test’ and its accompanying standard of proof.”130

On appeal, the state defendants argued judicial elections were beyond the scope of Section 2 of the Act. Alternatively, they argued that even if the court found judicial elections within the scope of Section 2, vote dilution claims cannot be upheld where the elected official singly performs all functions of the office.131 In rejecting these contentions and affirming Chisom, the Clements I court wrote as follows:

123. See Chisom, 839 F.2d at 1060.
125. 914 F.2d 620.
126. 902 F.2d 293 (5th Cir. 1990).
128. 902 F.2d at 294, 93 S. Ct. at 2850.
129. Id. at 294–95, 93 S. Ct. at 2850.
130. Mohoney, supra note 111, at 763–64 (citing Clements I, 902 F.2d at 295).
131. See generally Clements I, 902 F.2d at 295–303.
After careful consideration we conclude that *Chisom* was correctly decided, and Section 2 of the Voting Rights Act applies to judicial elections. There cannot be a violation of Section 2(b), however, through at-large elections of the trial judges who sit on the Texas district courts. While elected judges are representatives, in that they are accountable to a constituency of electors, the full authority of a trial judge's office is exercised exclusively by one individual, and there can be no share of such a single-member office. Consequently, the county-wide election of district court judges does not violate the Voting Rights Act.\(^{132}\)

On rehearing in *Clements II*, however, the court determined that state judicial office was beyond the purview of subsection (b) of Section 2. Consequently, the court decided it did not need to address the single-member office exception that served as the basis for its previous holding.\(^{133}\) As one author noted in describing *Clements II*, "[t]he majority . . . held that [S]ection 2 of the Voting Rights Act applied only to 'representatives,' and that judges are not representatives because they do not represent the people, but serve them by making decisions based on principles higher than the popular will."\(^{134}\) As such, the Fifth Circuit did an about face and departed from its previous holdings.\(^{135}\) The *Clements II* majority expressly "exempted judicial elections from the coverage of [S]ection 2 because it found that judges do not fall within the meaning of the term 'representative,' which was included in the amended language of the section."\(^{136}\)

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132. Id. at 308.
133. See *Clements II*, 914 F.2d at 624; see also Mohoney, supra note 111, at 764.
135. See *Clements II*, 914 F.2d at 622–25.
136. Dulaney, supra note 25, at 1229 (citations omitted).
In *HLA*, the Supreme Court reversed the Fifth Circuit's *Clements II* ruling on the issue of judicial elections being exempt from Section 2 of the Act. The Court remanded the litigation to the Fifth Circuit where a panel of the court found in favor of the plaintiffs in *Clements III*. The plaintiffs, however, were ultimately unsuccessful because of the Supreme Court's dictum in *HLA*. In relevant part, the Court wrote:

[W]e believe that the State's interest in maintaining the electoral system—in this case Texas' interest in maintaining a link between a district judge's jurisdiction and the area of residency of his or her voters—is a legitimate factor to be considered by courts among the "totality of the circumstances" in determining whether a § 2 violation has occurred. A State's jurisdiction for its electoral system is a proper factor for the courts to assess in a racial vote dilution inquiry . . . .

As such, the *Clements* plaintiffs failed because after remand from the Supreme Court and another finding for the plaintiffs at the district court, an *en banc* Fifth Circuit again concluded "the State of Texas had an overriding interest in maintaining the impartiality of the bench, that the county-wide election system promotes that interest and that the district judge's findings were not supportive of a violation of the Voting Rights Act." The

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137. Houston Lawyers' Ass'n v. Attorney General of Texas, 501 U.S. 419, 111 S. Ct. 2376 (1991). In *Chisom v. Roemer*, 501 U.S. 380, 111 S. Ct. 2354 (1991), the Supreme Court also rejected the Fifth Circuit's reasoning of excluding the elected judiciary from the Act. Instead, the Court noted that a better reading of the word "representative" describes the winners of popular elections. Accordingly, the Court reasoned if executive officers, like prosecutors, sheriffs, state attorneys general, and state treasurers are considered representatives because they won a popular election, the same reasoning should then apply to members of the judiciary. See id.; see also Still, supra note 134, at 356–57.


139. 986 F.2d 728 (5th Cir. 1993).


141. Ifill, supra note 138, at 109; see also McDuff, supra note 27, at 954–68 (providing a detailed discussion of "state interests" in judicial election voting rights litigation).
Supreme Court subsequently denied certiorari.142 Relative to this article, however, the critical fact drawn from *HLA* and *Chisom v. Roemer* is that judicial elections clearly fall within the Act's scope.143

IV. **THE CHISOM AND CLARK CASES SET THE FOUNDATION FOR A SIGNIFICANT AFRICAN-AMERICAN PRESENCE IN LOUISIANA'S JUDICIARY**

A. **Understanding Clark v. Edwards and What the Litigation did to Increase the Amount of African-American Jurists in Louisiana**

1. **Phase 1: Acknowledging the Problem**

In *Clark v. Edwards*,144 a group of black lawyers, all possessing the statutory qualifications for election to Louisiana district court, family court, and court of appeals office, alleged Louisiana's system of multimember judicial elections diluted black voting strength in violation of the Fourteenth and Fifteenth Amendments to the United States Constitution and Section 2 of the Voting Rights Act.145 The plaintiffs sued Louisiana state officials, including the governor, secretary of state, and attorney general—all in their official capacities—as well as various other election officials.

After trial on the merits, the district court issued a preliminary injunction, enjoining the respective state officials from holding certain judicial elections that were originally scheduled for October 1988.147 In its subsequently promulgated opinion, the court permanently enjoined the elections at issue because it found systematic violations of Section 2 of the Act.148

The court specifically observed the Fifth Circuit's then-recent ruling in *Chisom v. Edwards*,149 for the position that judicial

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145. Id. at 287.

146. Id.

147. See id.

148. See id. at 303.

149. 839 F.2d 1056 (5th Cir. 1988).
elections fall squarely within the scope of Section 2 of the Act. However, the court specifically rejected the notion that judicial elections are subject to the "one man-one vote" concept by writing as follows:

Judicial districts are created, not by reason of population, but for the purpose of the administration of justice in a particular jurisdiction. Judgeships are added, not because of population, but because of caseload. The boundaries of district courts are jurisdictional, not related to population. Judges are charged, not with making legislative or social policy, but with the duty of deciding individual cases according to law, even when it is unpopular to do so.

Hence, it has been recognized that the "one man-one vote" principle of legislative apportionment does not apply to judicial elections.

Nevertheless, in applying the seven analytical factors promulgated by the Senate Judiciary Committee while amending the Act in 1982, the court found significant systemic evidence of violations of Section 2 of the Act. Of particular note, in evaluating racially polarized voting—the second of the seven factors—the court noted "[t]he existence of racially polarized voting in Louisiana has been found by many courts." This is particularly significant because in discussing one of the expert witness' determinations, the court stated:

[In 28 of the 32 elections for district court and court of appeal, including Orleans, black voters expressed a preference for black candidates (27 by majority, one by plurality), while white voters never cast a majority or even a plurality for any black candidate. In the other 20 judicial elections which were analyzed, Dr. Engstrom estimated

151. Id. (citing Wells v. Edwards, 347 F. Supp. 453 (M.D. La. 1972), aff'd, 409 U.S. 1095, 93 S. Ct. 904 (1973); Voter Information Project v. City of Baton Rouge, 612 F.2d 208 (5th Cir. 1980)); see also McDuff, supra note 27, at 971–74 (discussing the one-man, one-vote principle and judicial elections).
that black voters expressed a preference for black candidates in 19 (one by plurality and 18 by majority). Again, white voters never cast even a plurality for any black candidate.

The parties have stipulated that in 13 judicial districts and several court of appeal districts, the black population is sufficiently large and geographically compact to constitute a majority in at least one single-member sub-district.\(^\text{154}\)

Furthermore, in discussing Louisiana's polarized voting patterns and the systemic problem of Section 2 violations, the court also observed that "[i]n 49 of 54 elections black voters preferred a black candidate; white voters never voted even a plurality for a black candidate."\(^\text{155}\) The court also found through stipulations that even though "black citizens comprise about thirty percent of Louisiana's population[,] [b]lack lawyers now hold only 5 of the 178 district court judgeships and only 1 of 48 court of appeal judgeships."\(^\text{156}\)

In concluding that Louisiana's system of judicial elections violated Section 2 of the Act, the court referred to certain prominent facts:

In the twentieth century, only six black judges have been elected to the district court or court of appeal in Orleans. They are: Israel Augustine (Court of Appeal), Ernest Morial (Court of Appeal), Joan Armstrong (Court of Appeal), Revius Ortique, Jr. (Civil District Court), Bernette Johnson (Civil District Court) and Yada McGee (Civil District Court). When Judge Augustine was elected to the Court of Appeal, he was a sitting criminal district judge and he had no opposition. When Judge Morial was elected to the Court of Appeal, he was a sitting Juvenile Court judge—a position to which he had been appointed. Judge Morial was the first black lawyer to be elected to the Court of Appeal in the twentieth century and that election was in 1972. There has never been more than one black Court of Appeal judge at any one time in the twentieth century in Louisiana.\(^\text{157}\)

The court, therefore, reasoned that the foregoing facts combined with the expert testimony provided at trial "illustrate the

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\(^\text{154. Id. at 296–97 (emphasis added).}\)

\(^\text{155. Id.}\)

\(^\text{156. Id. at 299.}\)

\(^\text{157. Id. at 299–300.}\)
difficulty which blacks have encountered in attempting to be elected to judicial office in Louisiana."

In permanently enjoining the Louisiana judicial elections at issue, the court concluded that under the "totality of the circumstances," Louisiana's use of multimember judicial election districts and circuit wide election districts afforded blacks less opportunity than others to fully participate in the political process.159

Therefore notwithstanding its determination that the "one-man, one-vote" concept does not apply to judicial elections, the court nevertheless enjoined the judicial elections:

Neither the Constitution nor the Voting Rights Act requires that black citizens have judicial seats reserved for their candidates or that they be granted judicial posts in proportion to their numbers in the general population. But, where black citizens constitute a significant minority of the population, they are politically cohesive and generally lose because of racial voting patterns, Section 2 violations arise.

* * *

There are many alternatives which may be considered. This court has no preconceived notion as to what changes the [g]overnor and the [l]egislature ought to make. This court is simply convinced that the present system of electing family court, district court, and court of appeal judges in Louisiana has produced violations of Section 2 of the Voting Rights Act and that it will continue to produce violations unless it is changed.

Accordingly, the preliminary injunction previously issued will be made permanent and will be expanded to enjoin all family court, district court, and court of appeal elections until revisions in the electoral process are made.160

Thus, the court had identified Louisiana's systemic problem of vote dilution and found it a violation of Section 2 of the Act.161 The stage was therefore set to find and implement a solution.

2. Phase 2: Fixing the Problem Through a Court-Implemented Remedy

158. Id.
159. See id. at 302.
160. Id. at 302-03.
161. Because the court was able to resolve the controversy on statutory grounds, it did not address the constitutional allegations. See id. at 294.
In *Clark v. Roemer*, the district court considered its former findings of fact and introduced a remedy to the vote dilution problems. The court began by noting that after its ruling in *Clark v. Edwards*, and before its ruling in *Clark v. Roemer*, while the state legislature was fashioning a plausible solution to Louisiana’s vote dilution problem, the Fifth Circuit issued *Clements I*. This ruling had a significant impact on the litigation and the court’s remedy.

In addressing *Clements I*’s application to the *Clark* litigation, the court remarked:

[*Clements I*] effectively undercuts the teaching of *Chisom* because it holds that although Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, does indeed apply to judicial elections, the use of at-large election districts in the election of Texas trial judges does not violate Section 2. Since Louisiana’s trial judges are also elected at-large, that holding, if it becomes final, will have a significant impact upon the decision which this court must hand down in this Louisiana case.

Therefore, rather than maintain its previous position that the entire system under which Louisiana elects members of the judiciary was systemically flawed, the court evaluated specific judicial districts on a case-by-case basis.

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162. 777 F. Supp. 445 (M.D. La. 1990). At the time the initial *Clark* litigation was filed, Louisiana’s governor was Edwin W. Edwards. At this point in the litigation, however, Louisiana’s governor had become Charles “Buddy” Roemer. All facts previously identified in *Clark v. Edwards* are the same and applicable to *Clark v. Roemer*.


166. *Clark*, 777 F.2d at 449. The court also noted that because the Fifth Circuit ordered an *en banc* rehearing in *Clements I*, the decision was effectively vacated. As such, because of the time sensitive nature of the vacant judicial offices in Louisiana’s state judiciary, the court proceeded under *Chisom* as the only Fifth Circuit authority on-point in addressing the issues involved in the litigation. See id.

167. See id. at 453–65 (evaluating each of the judicial districts at issue to determine if vote dilution problems were present). In *Clark v. Edwards*, however, the court adopted a “systemic problem” approach and specifically wrote “[a]lthough minority vote dilution was not proved in each of the 41 district court districts or in all of the court of appeal districts, racial polarization
After evaluating the specific judicial districts at issue, the court changed its previous position and found that some judicial districts did not have systemic vote dilution problems in violation of Section 2 of the Act. Accordingly, in addressing possible remedies for those specific districts found to have vote dilution problems, and maintaining cognizance of Louisiana’s long-standing statutory and constitutional preference of electing the state judiciary, the court adopted the subdistricting method which resulted in so many black lawyers being elected to the bench in the 1990s.

In adopting the subdistricting method of judicial elections, the court conclude[d] that the subdistrict approach suggested by plaintiffs . . . represents the only proposal which will actually remedy the violations of Section 2 (short of devising an entirely different system). Election subdistricts will be drawn in those judicial districts where violations have been found. State residence requirements shall be

in voting in all types of elections, including judicial elections, was clearly established statewide.” 725 F. Supp. 285, 302 (M.D. La. 1988).


169. In fashioning its remedy, the court specifically noted the injunction prayed for would only be made permanent as to the “first, fourth, ninth, fourteenth, fifteenth, eighteenth, nineteenth, twenty-fourth and fortieth judicial districts and as to the Family Court for the Parish of East Baton Rouge and as to the Court of Appeal First Circuit, District 2.” Id. at 469. As to the others, the court wrote “[t]he injunction will be vacated as to all other judicial districts.” Id.

170. “Federal courts should follow policies expressed in state statutory and constitutional provisions whenever adherence to state policy would not detract from federal constitutional requirements. This same rule of deference applies in Section 2 cases.” Id. at 465–66 (citations omitted).

171. It bears noting that the eventual remedy was significantly delayed by the Fifth Circuit’s decision in Clements II, 914 F.2d 620 (5th Cir. 1990). As a result of Clements II, the district court lifted the injunction it previously imposed. See Clark v. Roemer, 750 F. Supp. 200, 201 (M.D. La. 1990). As previously detailed, however, Clements II was overruled by the Supreme Court in Houston Lawyers’ Ass’n v. Attorney Gen. of Texas, 501 U.S. 419, 111 S. Ct. 2376 (1991). In eventually implementing its remedy and doing so with deliberate haste, the court wrote “[b]ut for the—as it turned out—erroneous decision of the Fifth Circuit in the LULAC [Clements II] case, these plaintiffs would already have their relief, because the subdistrict elections would have been held at the regularly scheduled judicial elections in 1990.” Clark, 777 F. Supp. at 485.
maintained in the judicial district but there shall be no residence requirement as to any election subdistrict. All other state election requirements shall be maintained.\footnote{172}

Consequently, pursuant to the court's order, minority judicial subdistricts were drawn to address the vote dilution problem in the specific judicial districts where the problems were proven to have occurred.\footnote{173}

\textbf{B. The "Chisom Seat" was Created Through Compromise}

In describing the \textit{Chisom} seat's creation, enabling Louisiana's first African-American justice to be placed on the state's highest court,\footnote{174} at least one legal commentator indicated the process took 185 years, a new state law, six years of litigation, and a federal consent decree.\footnote{175} The \textit{Chisom} seat's creation was the result of Act 512 of Louisiana's 1992 legislative session.\footnote{176} However, because the same Supreme Court that was the subject of Act 512 declared the statute unconstitutional,\footnote{177} a federal consent decree created a minority presence on Louisiana's highest court.

\textit{I. A Note on the Perschall Litigation}

In an effort to reach settlement of the ongoing \textit{Chisom} litigation that was at the U.S. Court of Appeals for the Fifth Circuit, State Senator Charles D. Jones introduced Senate Bill

\footnote{172} \textit{Id.} at 468.\footnote{173} Furthermore, in another subsequent opinion, \textit{Clark v. Roemer}, 777 F. Supp. 471 (M.D. La. 1991), the court adopted several stipulations by the parties as part of implementing the remedy it created in its previous opinion.\footnote{174} In 1992, former Orleans Parish Civil District Court Judge Revius Ortique was elected to the \textit{Chisom} seat. In 1994, when Justice Ortique reached the mandatory retirement age of 70 under the Louisiana Constitution of 1974, see \textit{La. Const.} art. V, § 23 (B), Bernette Joshua Johnson, then serving as the first female chief judge of the Civil District Court for the Parish of Orleans, was elected to Ortique's unexpired term. In 2000, upon expiration of the \textit{Chisom} seat, Justice Johnson was elected to the Supreme Court from District 7 rather than from the temporary district of "Orleans."\footnote{175} See generally C.C. Campbell-Rock, \textit{Justice Seeks Justice: the Chisom Seat Challenge}, 12 NBA Magazine 23 (Nat'l Bar Ass'n. Jan./Feb. 1998).\footnote{176} See generally 1992 La. Acts No. 512, § 1.\footnote{177} See Perschall v. State, 96-0322 (La. 7/01/1997), 697 So. 2d 240, 259 (declaring Act 512 unconstitutional because its provisions effectively created an eighth justice to the Louisiana Supreme Court in violation of the Louisiana Constitution of 1974's provision for seven justices under article V, § 3).
1255 during the 1992 legislative session. In its original form, the bill was to divide the first and third districts of the Louisiana Second Circuit Court of Appeal into two election sections, each having a majority black population and voter registration. After the bill's original reading, it was sent to a Senate Judiciary Committee where Senator Jones and Judge Bill Roberts testified and made several significant amendments to the original bill. The legislature's final resolution of Senator Jones' bill was signed into law by Governor Edwin Edwards on June 22, 1992 and became Act 512 of the 1992 legislative session.

Act 512, codified in Title 13 of the Louisiana Revised Statutes, provided the following:

A. There is hereby established an additional judgeship for the Court of Appeal for the Fourth Circuit, to temporarily increase the number of judges for the court of appeal for the circuit to thirteen judges.

B. The judge provided for in Subsection A shall be elected from the first district of the fourth circuit by the qualified voters of that district in 1992. The term of office of the judge shall commence on January 1, 1993.

C. Pursuant to Article V, Section 5(A) of the Constitution of Louisiana, the judge provided for in Subsection A shall be immediately assigned to the Louisiana Supreme Court. While assigned to the supreme court, the judge shall participate and share equally in the cases and duties of the justices of the supreme court during the period of the assignment.

D. The judgeship provided for in Subsection A shall expire automatically on the date that a justice of the supreme court takes office after being elected in a special election called for the office of justice of the supreme court which is held in District 7, as provided in R.S. 13:101.1(D) or from the date that a justice takes office after being elected in the regular supreme court election held in the year 2000 from District 7, whichever occurs first.

On August 21, 1992, all parties to the Chisom litigation, and the federal district judge before whom the matter was pending,

178. See id. at 245.
179. See id.
180. See id.
181. Id. at 247.
183. Id.
signed a consent decree in the U.S. District Court for the Eastern District of Louisiana. The district court’s order stated that the Consent Judgment ‘memorializes’ La. Acts 1992, No. 512 and effectively closed the Chisom case." Accordingly, in Chisom v. Edwards, the Fifth Circuit wrote “[t]he consent judgment referred to in our order . . . having been entered by the district court, these appeals are dismissed.” The case was then remanded to the district court for final settlement.

In the Perschall v. State litigation, an attorney and resident of New Orleans filed a petition for declaratory judgment in the Nineteenth Judicial District Court for the Parish of East Baton Rouge. The plaintiff challenged the constitutionality of Act 512 under the United States and Louisiana Constitutions and prayed the statute be declared unconstitutional and void ab initio. He alleged, inter alia, the statute violated Louisiana’s constitutional provision specifically providing that the state Supreme Court shall be comprised of a chief justice and six associate justices.

After a series of procedural maneuvers whereby the litigation was removed to the U.S. District Court for the Middle District of Louisiana, transferred to the Eastern District of Louisiana and eventually sent back to state court under the Pullman abstention doctrine, the state supreme court exercised its supervisory jurisdiction in February 1996 and issued a stay of all lower court proceedings so it could adjudicate the case. In doing so, the court addressed the plaintiff’s constitutional argument as follows:

It is apparent from a plain reading of [S]ection 312.4 that the legislature was attempting to effectuate an immediate remedy of alleged voting rights violations by providing a majority-minority appellate court district, with concomitant assignment of the duly elected judge to the supreme court, to serve in the full capacity of a justice during the period assigned. We recognize this course of action was undertaken in good faith to effectuate a remedy least

184. Perschall, 697 So. 2d at 247.
185. Id.
186. 975 F.2d 1092 (5th Cir. 1992).
187. Id. at 1093.
188. 697 So. 2d 240.
189. See id. at 243
190. Id. (citing La. Const. art. V, § 3).
192. Perschall, 697 So. 2d at 248–49.
injurious to the institution, at a point in time when the voting rights jurisprudence was in transition. However, [S]ection 312.4’s implementation effectively created an eighth position on this [C]ourt, implicating state constitutional concerns. While meant to be temporary, [S]ection 312.4 has administered a process that we must find is constrained by article V, section 3’s numerative limit.

* * *

Therefore, we must hold . . . Act [512] unconstitutional under article V, section 3, insofar as it effectively imposes an eighth justice on the supreme court . . . . 193

Even though the Chisom legislation was declared constitutionally infirm, the seat was preserved from 1992 to 2000 under a consent decree. Creation of the Chisom seat was, therefore, the product of compromise.

V. THE CHISOM SEAT’S BENEFICIARY: A LOOK AT JUSTICE BERNETTE JOSHUA JOHNSON’S DISTINGUISHED CAREER BEFORE TAKING HER OATH TO SERVE AS THE FIRST BLACK FEMALE ON LOUISIANA’S HIGHEST COURT

Ascension Parish, Louisiana native and Louisiana Supreme Court Associate Justice Berette Joshua Johnson was born June 17, 1943 to Mr. and Mrs. Frank Joshua, Jr. 194 As a young child, she moved to New Orleans and was educated in the Orleans Parish public schools. In 1960, she graduated class valedictorian from Walter L. Cohen, Senior High School. 195 She also earned an academic scholarship to Spelman College in Atlanta, Georgia and received her Bachelor of Arts degree in 1964. 196

Appreciating the social significance of the mid-1960s and civil rights movement, after earning her college degree, Justice Johnson worked as a community organizer for the NAACP Legal Defense

193. Id. at 259.
195. See id.
196. Id. Justice Johnson has also served as a member of the executive committee of the National Alumnae Association of Spelman College. In celebration of her commitment to humanity and service to her alma mater, in 2001, Spelman College awarded her an honorary doctorate of laws degree. See Louisiana Supreme Court Justices, supra note 8.
Fund. By the fall of 1965, she realized that the law was a vehicle through which she could drive change and do her part in civil rights. She therefore returned to her native Louisiana to attend the law school at Louisiana State University in Baton Rouge. Justice Johnson subsequently served as a legal intern with the Civil Rights Division of the U.S. Department of Justice and earned her law degree in January 1969.

In 1994, after serving ten years as a judge of the Civil District Court for the Parish of Orleans and as that court's first female chief judge, Johnson announced her candidacy for the unexpired term of Justice Revius Ortique on the Louisiana Supreme Court. Her candidacy was tested against two sitting judges in Orleans Parish. She advanced from the primary election to the run-off and was elected when her opponent withdrew from the race. History was then written. On November 16, 1994, surrounded by family, friends, and admirers, Johnson was sworn in as the first black female justice of the Louisiana Supreme Court.

VI. LOOKING AT THE NUMBERS: CHISOM AND CLARK LEAD TO A SIGNIFICANT INCREASE IN AFRICAN-AMERICANS ELECTED TO THE BENCH

As one legal scholar notes, "[t]he lack of racial diversity on our nation's courts threatens both the quality and legitimacy of judicial decision-making." If this premise is accepted as true, the quality and legitimacy of Louisiana's judiciary greatly increased in the 1990s. A comparative statistical analysis of the number of African-Americans on the state bench pre-Chisom and Clark versus post-Chisom and Clark poignantly illustrates the numerical progress.

In 1988, six African-American jurists served in the Louisiana judiciary. Three of them, Judges Revius Ortique, Bernette Johnson, and Yada Magee, served on the Orleans Parish Civil

197. See Guide to the Louisiana Judiciary, supra note 194, at 60.
198. See Transcript of Induction Ceremony of the Honorable Bernette Joshua Johnson (November 16, 1994).
199. See id.
200. See Louisiana Supreme Court Justices, supra note 8.
201. See Guide to the Louisiana Judiciary, supra note 194, at 60.
202. See id.
203. See id.
204. See Transcript of Induction Ceremony, supra note 198.
District Court in New Orleans. Judge Joan Armstrong served on the Fourth Circuit Court of Appeal in New Orleans. Only two jurists, Judge Freddie Pitcher in East Baton Rouge Parish and Judge Carl Stewart in Caddo Parish (Shreveport), served outside of New Orleans. During the entire twentieth century through 1988, only four African-American attorneys had been elected to district court judgeships in Louisiana outside New Orleans. None had been elected to a court of appeal seat except in New Orleans.\(^\text{206}\)

The dramatic shift in attaining diversity and racial parity in Louisiana’s judiciary is manifested by the exponential rise in the number of African-American jurists. The charts in Appendix A graphically illustrate the enhanced presence of African-Americans on the bench in 2005.

From the charts in the Appendix, one can see that fifty-four percent of African-American judges are elected in judicial subdistricts outside of Orleans Parish, which is a consequential impact of *Chisom* and *Clark*.\(^\text{207}\) Orleans Parish has a majority African-American population, but no Section 2 violation was found.\(^\text{208}\) Hence, at-large elections occur.

Two of the ten African-American intermediate appellate court judges, Ulysses Gene Thibodeaux of the Third Circuit Court of Appeal and Joan B. Armstrong of the Fourth Circuit Court of Appeal, serve as the chief judge of their court by virtue of their seniority.\(^\text{209}\)

The enormity of *Chisom*’s and *Clark*’s statistical impact on Louisiana’s judiciary is further heightened by a comparison of these numbers to the number of African-American judges in America’s three largest states: California, Texas, and New York.\(^\text{210}\)

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<table>
<thead>
<tr>
<th></th>
<th>California</th>
<th>Texas</th>
<th>New York</th>
<th>Louisiana</th>
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</thead>
<tbody>
<tr>
<td>Population</td>
<td>33,871,648</td>
<td>20,851,820</td>
<td>18,976,450</td>
<td>4,468,976</td>
</tr>
<tr>
<td>No. of Judgships</td>
<td>1611</td>
<td>512</td>
<td>536</td>
<td>365</td>
</tr>
<tr>
<td>No. of African-American Judges</td>
<td>78</td>
<td>18</td>
<td>50</td>
<td>76</td>
</tr>
</tbody>
</table>
The enhanced presence of African-American judges has had a concomitant impact on the social, psychological, and political milieus of their communities. The obvious increase in visibility has inspired a search for role models among minority youth. As one participant in a public hearing on racial fairness in the courts articulated:

\[
\text{[Y]ou have to get in the communities, and white judges are extremely guilty about this in this area . . . we don’t ever see them at any black functions whatsoever. We do see some of the black judges that [sic] comes [sic] out, and they sit with the people, and when kids are here, they’re like role models for the kids.}\]

Providing a positive role model, particularly for youngsters in troubled communities, is all the more advantageous given the unenviable fact that 77.4% of all incarcerated juveniles in Louisiana are African-American.\(^{211}\) There is indeed an aspirational alternative to prison.

The enlarged visibility of African-American judges adds to the appearance of fairness in the judicial system. Like their white counterparts, African-American jurists are compelled to maintain ties with their communities. Louisiana elects its judges. As a matter of political expediency, a certain degree of social and political interaction is desirable, if not necessary. Yet, too often in the past, the minority populace has known judges \textit{in absentia}. The effect is "that the social and professional isolation of judges and other court personnel from persons who may not share the same culture or ethnicity is a significant underlying problem contributing to the perception, if not the reality, of bias in the court system."\(^{213}\) Knowing that one’s community desires a tangible presence increases a judge’s sense of responsibility and attachment to that community and ensures against charges of insularity. Further, community identification with a judge facilitates the perception of

\[
\begin{array}{|c|c|c|c|}
\hline
\text{Percentage of African-American Judges} & 4.8\% & 3.5\% & 9.3\% & 20.8\% \\
\hline
\end{array}
\]


\(^{212}\) LSU School of Social Work, Office of Social Service Research and Development (2002).

individual fairness and a collective systemic fairness within our judiciary. "Justice should not only be done, but manifestly and undoubtedly be seen to be done." The system must not only be fair; it must appear to the general public to be sensitive and fair if courts are to perform in an effective and efficient manner.

The changed complexion of Louisiana's judiciary has fostered a new confidence in the legitimacy and credibility of Louisiana's system of justice. African-American citizens are now greater stakeholders in our system because of their vicarious participation through African-American representatives on the bench. That representation has instilled much needed faith and respect for the integrity of the judiciary. Moreover, the increased numerical representation of African-American judges in the judiciary has provided a forum for injecting the viewpoints of a formerly excluded group into the legal arena. The judicial system is now seen as a truly pluralistic society where the voices of all segments of society are heard.

To have a properly functioning judicial system that fulfills its mission to an orderly society, it is imperative to have an effective administration of that system. The accomplishment of this responsibility is due, in large part, to the formulation and implementation of policies by committees, boards, and commissions.

Since 1992, African-American judges have been an integral component in administering the wheels of justice. The Judicial Budgetary Control Board, for instance, establishes rules and regulations governing "the expenditure of all funds appropriated by the legislature to the judiciary." The chief judge of each court of appeal or his designee sits on this board. Thus, the chief judges of the third and fourth circuit courts of appeal, both of whom are African-American, have a voice in the preparation, review, and approval of the state judiciary's budgetary requests.

The Judiciary Commission of Louisiana is the disciplinary body for Louisiana judges. Its judicial composition consists of one court of appeal judge and two district court judges appointed by the Louisiana Supreme Court. Its function is to investigate and

214. Rex v. Sussex, Justices, (1924) 1 L.J.K.B. 259 (Eng.).
216. Id. § 4(a).
218. La. Const. art. 5, § 25.
make recommendations to the Supreme Court regarding judicial misconduct. Its present chairperson is Judge Benjamin Jones of the Fourth Judicial District in Monroe. Justice Bernette Johnson of the Louisiana Supreme Court serves on the Judicial Council. Its responsibility is to study the organization of the courts and to receive suggestions “relating to remedies for fault in the administration of justice.” The Louisiana State Law Institute is the official law reform agency of the state of Louisiana, which functions “to secure the better administration of justice” and to “encourage the clarification and simplification of the law of Louisiana and its better adaptation to present social needs.” At least three African-American judges serve as members of the Institute. Finally, the governing bodies of the district and appellate courts, the Louisiana District Judges Association and the Conference of Court of Appeal Judges, were recently led by African-American judges.

VII. CONCLUSION

Prior to the passage of the Voting Rights Act of 1965, there were very few African-American lawyers and absolutely no African-American jurists in Louisiana. Consequently, many in the state’s African-American community viewed Louisiana’s judicial system in the same manner as the poet Langston Hughes:

That Justice is a blind goddess
Is a thing to which we blacks are wise,
Her bandage hides two festering sores
That once perhaps were eyes.

223. Judge Ulysses Gene Thibodeaux of the Third Circuit Court of Appeal; Judge Luke Lavergne of the East Baton Rouge Parish Family Court; and Judge Curtis Calloway of the Nineteenth Judicial District Court (East Baton Rouge Parish).
Largely because of *Chisom* and *Clark*, however, Louisiana's judicial system is seen differently. It can now be responsive to all sections of the community because it is comprised of jurists from all sections of the community. African-American judges, in collegial cooperation with their white colleagues, have—in the words of Henry David Thoreau—carved and painted the very atmosphere and medium through which we look to affect the quality of the day. That medium is Louisiana's now-diverse judiciary, where the judges' work is the very highest of the arts.
Chart 1

Number of African-American Judges Compared to Total Number of Judges in Louisiana

<table>
<thead>
<tr>
<th></th>
<th>Total</th>
<th>Supreme Court</th>
<th>Intermediate Appellate Courts</th>
<th>District Courts</th>
<th>City &amp; Parish Courts</th>
<th>Family &amp; Juvenile Courts</th>
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<tbody>
<tr>
<td>No. of Judgeships</td>
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<td>7</td>
<td>53</td>
<td>214</td>
<td>73</td>
<td>18</td>
</tr>
<tr>
<td>No. of</td>
<td>76</td>
<td>1</td>
<td>10</td>
<td>46</td>
<td>12</td>
<td>7</td>
</tr>
<tr>
<td>African-American</td>
<td></td>
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<td></td>
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<tr>
<td>Judges</td>
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<tr>
<td>Percentage</td>
<td>20.8%</td>
<td>14.3%</td>
<td>18.9%</td>
<td>21.5%</td>
<td>16.4%</td>
<td>38.8%</td>
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<tr>
<td>of African-American</td>
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<tr>
<td>Judges</td>
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Chart 2

Number of African-American Judges Within Orleans Parish and Outside of Orleans Parish

<table>
<thead>
<tr>
<th></th>
<th>Total</th>
<th>Supreme Court</th>
<th>Intermediate Appellate Courts</th>
<th>District Courts</th>
<th>City &amp; Parish Courts</th>
<th>Family &amp; Juvenile Courts</th>
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<tbody>
<tr>
<td>No. of Judgeships</td>
<td>76</td>
<td>1</td>
<td>10</td>
<td>46</td>
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<td>7</td>
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<tr>
<td>No. of Judgeships in Orleans Parish</td>
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<td>1</td>
<td>5</td>
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<td>4</td>
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<tr>
<td>No. of Judgeships Outside Orleans Parish</td>
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<td>5</td>
<td>27</td>
<td>6</td>
<td>3</td>
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<tr>
<td>Percentage of African-American Judges Outside of Orleans Parish</td>
<td>54%</td>
<td>0%</td>
<td>50%</td>
<td>58.7%</td>
<td>50%</td>
<td>42.9%</td>
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227. *Id.*