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NOTE

THIRSTING FOR EQUAL PROTECTION: THE LEGAL IMPLICATIONS OF MUNICIPAL WATER ACCESS IN KENNEDY V. CITY OF ZANESVILLE AND THE NEED FOR FEDERAL OVERSIGHT OF GOVERNMENTS PRACTICING UNLAWFUL RACE DISCRIMINATION

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The sound of rain on the roof is music to Jerry Kennedy’s ears. Kennedy’s appreciation is practical—for fifty-four years of his life, Kennedy did not have running water in his home and he and his family relied on rainwater to do their laundry.1

Kennedy lives outside Zanesville, a city at the confluence of the Muskingum and Licking Rivers in the rolling hills of southeast Ohio.2 Zanesville first installed municipal water outside its limits in the 1930s, and in the 1950s a city ordinance allowed water to be run along Adamsville Road and Langan Lane.3 These roads intersect with Coal Run Road4—a one-lane strip of blacktop5 and namesake for the historically African American neighborhood of approximately twenty-five homes.6

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587
African American citizens in Coal Run—including the Kennedy family—unsuccesfully requested access to the municipal water supply for decades. Various government entities denied their requests while simultaneously granting access to white residents on the same street, causing African American residents in Coal Run to live without a reliable supply of water. To meet their needs, African American residents collected rainwater, melted snow, or purchased water. But these alternatives presented health and safety concerns: rainwater "was fouled with crawfish, snakes, and rats [and] the residue from old coal deposits...sometimes could leave the water as red as blood." Meanwhile, white neighbors living within 200 yards of Coal Run enjoyed access to unlimited running water, enabling them to water their lawns and fill their hot tubs.

The odyssey of Kennedy v. City of Zanesville began on November 13, 2003, when Coal Run residents Cynthia Hairston, Jerry Kennedy, and Richard Kennedy joined the Fair Housing Advocates Association to file suit against the City of Zanesville and Washington Township in the United States District Court for the Southern District of Ohio. In early 2004, after the lawsuit had begun, the City extended municipal water to Coal Run. On July 11, 2008, a jury handed down a verdict holding the City and county liable for race discrimination.

This Note will examine the circumstances and legal implications of Kennedy v. City of Zanesville. In Part I, this Note explores available remedies for such discrimination by discussing monetary damages, injunctive relief, and a type of

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7. See City of Zanesville, 505 F. Supp. 2d at 496 (detailing the attempts of Coal Run residents to obtain access to municipal water); Dirk Johnson, For a Recently Plumbed Neighborhood, Validation in a Verdict, N.Y. TIMES, Aug. 12, 2008, at A15 (observing the city and county failed to grant water access to plaintiffs for more than forty-five years).

8. See City of Zanesville, 505 F. Supp. 2d at 497; Ludlow, supra note 5 (announcing that nearby white homes had municipal water access but that residents of Coal Run did not); see also Johnson, supra note 7.

9. See James Dao, Ohio Town’s Water at Last Runs Past a Color Line, N.Y. TIMES, Feb. 17, 2004, at A1 (“The [Ohio Civil Rights] Comission found on Coal Run Road, none of the 17 black or mixed-race homes had city water service, while two white homes did.”).

10. Id.; see also Anderson, supra note 6, at 1110–11.

11. Johnson, supra note 7. Additionally, water storage units attracted parasites, snails, and insects; as a result, residents were forced to treat the water with chemicals. Anderson, supra note 6, at 1111.

12. Dao, supra note 9. Facing similar hardship, minorities in the Buckhorn/Perry Hill neighborhood of Mebane, North Carolina were unable to get a permit for replacement water and septic systems when well water became contaminated, despite being located across the street from a large trucking station with working sewer and water service. Anderson, supra note 6, at 1107–08.


15. Kathy Thompson, Appeal to be Filed in Coal Run Lawsuit, ZANESVILLE TIMES RECORDER, Aug. 2, 2008, at 1A.
government oversight known as preclearance. Part II outlines the litigation timeline of events. In Part III, this Note underscores the significance of City of Zanesville by presenting demographic information about the surrounding area and asserting that the recent date of the litigation is a reminder of continuing race discrimination in our government and society. Part IV applies established legal standards to determine the extent that the denial of water service to Coal Run minorities was racially motivated. Notwithstanding the limits imposed by the incomplete record—typical of a jury case—this section will conclude the jury in City of Zanesville was correct in finding discrimination. Finally, this Note concludes that Kennedy v. City of Zanesville is a straightforward case which correctly applied substantive civil rights law; however, the law must go further to prevent future racism by applying strict federal oversight to jurisdictions practicing race discrimination.

I. REVISITING CONSTITUTIONAL PROTECTIONS IN THE TWENTY-FIRST CENTURY

A. Were Coal Run Residents Victims of Intentional Discrimination? A Look at Federal and State Laws that Require Intent to Discriminate

City of Zanesville directly implicates fundamental rights guaranteed in the Thirteenth and Fourteenth Amendments of the U.S. Constitution and their statutory enactments. The Thirteenth Amendment states: “[n]either slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction.” Similarly, the Fourteenth Amendment provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”


18. U.S. CONST. amend. XIII.
19. U.S. CONST. amend. XIV.
Fourteenth Amendments. For example, § 1981(a) states: "[a]ll persons . . . shall have the same right . . . to the full and equal benefit of all laws . . . and property as is enjoyed by white citizens." Similarly, § 1982 instructs that "[a]ll citizens of the United States shall have the same right . . . to . . . hold and convey real and personal property." The right to sue for violations of these rights is granted in § 1983, which specifies in pertinent part that "[e]very person who . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law."

Analogously, 42 U.S.C. § 2000d affirms "[n]o person . . . shall, on the ground of race, color, or national origin, be excluded from . . . or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Each of these statutes requires a showing of discriminatory intent. Thus, the issue of whether denials of utility service were racially motivated is central to plaintiffs' claims in City of Zanesville.


27. City of Zanesville, 505 F. Supp. 2d at 497–98 (holding that the plaintiffs established a prima facie case of racial discrimination thus forming a presumption that the city's actions were racially motivated).
B. The Fair Housing Act: No Showing of Intent Required

Plaintiffs in City of Zanesville also alleged a violation of the Fair Housing Act, which does not require a showing of discriminatory intent in the United States Court of Appeals for the Sixth Circuit. Instead, the court evaluates a Fair Housing Act claim by examining the discriminatory effect of an action. Therefore, courts require plaintiffs suing under §§ 1981, 1982, 1983, and 2000d to establish discriminatory intent—a standard not imposed on those bringing suit under the Fair Housing Act.


Where claims of discriminatory treatment are based on indirect evidence of discrimination, the Sixth Circuit applies a three-step, burden-shifting framework that was articulated in McDonnell Douglas v. Green. The first step of McDonnell Douglas requires a plaintiff to establish, through evidence, a prima facie case that raises "an inference of discrimination." Next, the Plaintiff
burden shifts to the defendant to provide a "legitimate, non-discriminatory reason for the challenged actions." Finally, the evidentiary burden shifts back to the plaintiff to prove that the defendant's proffered explanation is "merely a 'pre text' for unlawful discrimination."37

In 1971, a successful model for using evidentiary support to prove discrimination emerged in the leading case of Hawkins v. Town of Shaw.38 In Hawkins, African American citizens in Mississippi alleged race-based disparity in street paving and lighting, sewer systems, water drainage, and fire hydrants.39 The plaintiffs successfully established a prima facie case of discrimination by presenting statistical differences in the administration of

Hawkins v. Town of Shaw, 437 F.2d 1286, 1292 (5th Cir. 1971) ("[W]e have not . . . been guided by a statutory set of standards or regulations clearly defining how many paved streets or what kind of sewerage system a town like Shaw should have."). aff'd, 461 F.2d 1171 (5th Cir. 1972) (per curiam); Middlebrook v. Bartlett, 341 F. Supp. 2d 950, 959–60 (W.D. Tenn. 2003) (holding that when analyzing a claim of discrimination under the Fair Housing Act, the court must apply the three-part burden-shifting analysis set forth in McDonnell Douglas).


37. Id. (citing McDonnell Douglas Corp., 411 U.S. at 804).


39. Hawkins, 437 F.2d at 1288. Municipal-service equalization cases comprise just one type of discrimination against minorities by governments. Another type, for example, is "environmental racism," which refers to "distinct and identifiable racially-based conduct resulting in an inequitable distribution of environmental burdens on minority communities." Jill E. Evans, Challenging the Racism in Environmental Racism: Redefining the Concept of Intent, 40 ARIZ. L. REV. 1219, 1221 (1998). An example of environmental racism is the disproportionate selection of minority communities for the placement of waste-treatment facilities and landfills. See id. at 1247. The United States Government Accountability Office (GAO) and various private organizations have conducted studies on the correlation between the location of waste facilities and the racial composition of nearby communities. Id. One private study identified race as the strongest indicator of the location for waste facilities. Id. at 1247–48 (discussing a study conducted by the Commission for Racial Justice of the United Church of Christ and noting that the study concluded "that race was the single best predictor of where hazardous waste facilities were located"). In 1990, the National Law Journal published findings indicating that both the penalties issued by the Environmental Protection Agency for hazardous waste contamination and the scope of cleanup efforts varied based on the race of the surrounding community. Id. at 1249 ("The study reported that at sites located in white communities, agency action was faster, clean up remedies were superior, and penalties imposed on waste generators were stiffer than at sites located in minority communities."). In addition to the superiority of cleanup efforts in white communities, the National Law Journal found that penalties imposed on violating companies were found to be 500% greater in areas with a high concentration of white residents. Id. Overall, these studies have found that minority communities excessively shoulder the burden of environmental risks and dangers. Id. at 1252. Litigants claiming environmental racism, however, have generally failed. Id. at 1277. The plaintiffs have had difficulty proving discriminatory intent due to the increasingly "less overt" forms of racism. Id. at 1279.
municipal services and arguing that geographic segregation led to a pattern of discrimination.\footnote{40}{Hawks, 437 F.2d at 1288. The Hawks court restated its commitment to the theory that "figures speak and when they do, [c]ourts listen." Id. at 1288 (quoting Brooks v. Beto, 366 F.2d 1, 9 (5th Cir. 1966)). In its analysis, the court relied on statistics showing almost complete residential racial segregation, as well as statistics indicating that 98% of people living on unpaved roads were African American. Id. at 1288. The court similarly noted that 99% of white residents had access to a sanitary sewer system, while close to 20% of the African American population did not. Id. at 1290; Hoidal, supra note 38, at 197 (discussing the statistics cited in Hawks and relied on by the plaintiffs to establish a prima facie case of racial discrimination).}

This statistical approach became a model for plaintiffs in subsequent municipal-service equalization cases.\footnote{41}{Johnson v. City of Arcadia, 450 F. Supp. 1363, 1368 (M.D. Fla. 1978).} In 1978, plaintiffs in Florida alleged race-based discrimination in the city's road paving, recreational facilities, and water-distribution facility.\footnote{42}{Id. at 1379.} In Johnson v. City of Arcadia, the court introduced three requirements necessary to establish a prima facie case of discrimination in municipal services suits: "(1) existence of racially identifiable neighborhoods in the municipality; (2) substantial inferiority in the quality or quantity of the municipal services and facilities provided in the [minority] neighborhood; and, (3) proof of intent or motive."\footnote{43}{The Johnson court noted decades of historical discrimination against African Americans by city officials, and cited statistical disparities in the opinion and in elaborate appendices. Id. at 1369-77, 1381-91. The statistical data showed that white residents were two-and-a-half times more likely than African American residents to have their street paved. Id. at 1370. The court also denounced the fact that water lines underneath the African American community were smaller in diameter than those serving the white community; consequently, fire hydrants in the African American neighborhoods did not have sufficient water pressure. Id. at 1376. The court ruled that no major improvements could be made in white areas until the requisite improvements were made in African American areas. Id. at 1380.} The plaintiffs met this intent-based standard by using the Hawkins evidentiary model,\footnote{44}{Johnson, 450 F. Supp. at 1378-79 ("Statistical proof coupled with historical showing of broad-based racial discrimination satisfied Plaintiffs' burden of proving the intent requirement . . . .").} the court inferred discriminatory intent based on evidence of segregated housing and statistical inequalities in city services.\footnote{45}{Dowdell v. Apopka, 698 F.2d 1181, 1184-86 (11th Cir. 1983). Plaintiffs in Dowdell intentionally modeled their complaint after Hawks and Johnson. Id. at 1184. A similar fact pattern lent itself to such emulation—in Dowdell, African American residents sued the city over the unequal provision of road paving, water drainage and distribution, sewers, and recreational facilities. Id.}

The United States Court of Appeals for the Eleventh Circuit also followed Hawkins in Dowdell v. Apopka, a Florida case where the court announced a series of factors to determine whether there is a strong enough correlation between race and service inequities to require a finding of discriminatory intent.\footnote{46}{Id. at 1184.} The Dowdell court found the following factors to be indicative of
discriminatory intent: "the magnitude of the disparity . . . , the legislative and administrative pattern of decision-making," and whether or not an unequal provision of services was a "foreseeable outcome" of the city's actions.47 In addition, the Dowdell court applied a "cumulative evidence" test, establishing that discriminatory intent did not mandate evidence that racial subversion be the only goal.48 Rather, the court concluded "[i]t is . . . the cumulative evidence of action and inaction which objectively manifests discriminatory intent."49

Florida plaintiffs in Ammons v. Dade City also modeled their suit after Hawkins.50 Again the court applied the Dowdell factors,51 but also added to their analysis of discriminatory intent an inquiry into whether the government had knowledge of the inequality.52

In addition to African American plaintiffs, other minority groups have applied the Hawkins factors with success.53 This case law pattern establishes

47. Id. at 1186. The court indicated that ""actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose." id. (quoting Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464 (1979)).

48. Id. at 1185 (citing McGinnis v. Royster, 410 U.S. 263, 276–77 (1973)).

49. Id.

50. Ammons v. Dade City, 783 F.2d 982, 983 (11th Cir. 1986). Plaintiffs alleged that Dade City, the mayor, and city commissions violated the Thirteenth and Fourteenth Amendments by providing unequal municipal services to the African American community in road paving, road resurfacing, road maintenance, and storm-water drainage. Id. The district court's analysis modeled Hawkins, first identifying a pattern of residential segregation in Dade City, then reviewing statistical evidence for disparities in municipal-service provision. Id. at 983, 985.

51. Id. at 988. The Ammons court found that the great magnitude in service inequality was "explicable only on racial grounds," noting that a lesser allocation of funds to the African American community would "lead to the foreseeable outcome of a deprived black residential community." id. In making its determination, the court relied on "a multitude of documentary and testimonial evidence covering practically every aspect of municipal conduct in Dade City throughout its history." id.

52. See id. Evaluating the knowledge factor, the court determined that the defendants knew of the disparity based on the obvious nature of the service discrepancies. Id. ("A brief visit to the black community makes obvious the need for street paving and storm water drainage control.").

53. See, e.g., United Farmworkers of Fla. Hous. Project, Inc. v. City of Delray Beach, 493 F.2d 799, 808, 812 (5th Cir. 1974). In United Farmworkers, Delray Beach—a city in Palm Beach County, Florida—refused to grant a permit to a subsidized housing project for Hispanic and African American farm workers to connect to municipal water and sewer lines. Id. at 800–01. Applying Hawkins, the court identified geographic and racial segregation and discussed the City's past history of zoning decisions against minorities. Id. at 808. The court noted previous city council meetings where proposals to build similar housing projects on the same parcel of land were discussed and where the council ultimately determined that the high population density that would accompany such a development was "incompatible with the City's 'wishes.'" Id. at 810. Consequently, the court concluded the City's previous and current actions had a cumulative effect of restricting low-income housing to one area of the city, bolstering segregation, and discouraging construction of affordable housing. Id. Comparably, the court found the present action of granting zoning exceptions to white citizens while denying the same exceptions to minorities was a violation of Sections 1981, 1982, 1983, and the Fair Housing Act. Id. at 808. The court granted
that plaintiffs in municipal-service equalization cases can successfully prove a prima facie case of discrimination when they cite statistical differences and argue that physical and political segregation created a tradition of inequitable treatment toward minorities.

D. Compensating for Discrimination: Monetary Damages and Tort Liability for Constitutional Violations

The United States Supreme Court endorses the award of damages as a remedy for violations of civil rights derived from both the Constitution and federal statutes. Specifically, courts have held that § 1982, protecting property rights, permits the award of compensatory damages where race discrimination occurs in real estate transactions, and accounts for humiliation resulting from the discrimination. Courts also award compensatory damages for violations of § 1983, protecting individual rights, and have historically interpreted coverage of the statute broadly. In order to recover, however, courts insist that damages must be tied to actual injury, rather than the

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54. See Hoidal, supra note 38, at 197–99. Commentators have similarly observed discriminatory practices in the zoning and annexation policies of local governments. See, e.g., Cedar Grove Institute for Sustainable Communities, Fighting Institutionalized Discrimination and Exclusion of Minorities, http://home.mindspring.com/~mcmoss/cedargrove/id11.html [hereinafter Cedar Grove] (last visited Feb. 13, 2010) ("We are finding that it is common practice for governments of small and medium-sized towns to use their powers of annexation, zoning, provision of infrastructure and public services, long-term planning, and maximization of tax base to exclude minority and low-income communities from full participation in the town's benefits and governance."). Commentators refer to this policy of annexing cities in avoidance of low-income minority areas as "municipal underbounding." Anderson, supra note 6, at 1113. The Cedar Grove Institute for Sustainable Communities has developed a program relying on geographic information systems (GIS) to overlay evidence of discriminatory application of government services with maps indicating the racial and socioeconomic makeup of the region. Cedar Grove, supra.


56. Compensatory damages are defined as: "[d]amages sufficient in amount to indemnify the injured person for the loss suffered." BLACK'S LAW DICTIONARY 444 (9th ed. 2009).

57. Seaton v. Sky Realty Co., 491 F.2d 634, 636 (7th Cir. 1974) (holding that compensatory damages are appropriate for humiliation in violation of § 1982 and commenting that "[h]umiliation can be inferred from the circumstances as well as established by the testimony").


59. See Kemner v. Hemphill, 199 F. Supp. 2d 1264, 1265 (N.D. Fla. 2002) (citing Slicker v. Jackson, 215 F.3d 1225, 1231 (11th Cir. 2000)) (explaining that actual injuries "include["
"abstract value of the constitutional right[s]" that may have been violated.  

The practical effect of this distinction is that plaintiffs must first show that their constitutional rights were violated, and then that the violation caused a "compensable injury." 

The Fair Housing Act (FHA), in contrast, permits compensatory damages, punitive damages, and injunctive relief.  

Like § 1982 and § 1983 damages, FHA damages "are not limited to out-of-pocket losses but may include an award for emotional distress and humiliation." In brief, monetary damages are a familiar remedy for constitutional violations.

E. Injunctive Relief in Municipal-Service Equalization Cases

Injunctive relief is another frequent remedy in municipal-service equalization cases. In this regard, courts require a close link between the emotional injury standing alone . . . [and] typically are physical, emotional, or fiscal in character"). In the absence of actual injury, courts will permit the plaintiff to seek nominal damages. Slicker, 215 F.3d at 1231 ("We have held unambiguously that a plaintiff whose Constitutional rights are violated is entitled to nominal damages even if he suffered no compensable injury.").

60. Memphis Cmty. Sch. Dist., 477 U.S. at 307–08 ("Rights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests . . . . Where no injury was present, no 'compensatory' damages could be awarded." (quoting Carey, 435 U.S. at 254)).


62. See Baumgardner v. Sec'y, United States Dep't of Hous. & Urban Dev., 960 F.2d 572, 580 (6th Cir. 1992) (interpreting the Fair Housing Act through 42 U.S.C. § 3613 to "authorize[] 'actual and punitive damages' as well as injunctive relief" (quoting 42 U.S.C. § 3613)).

63. Steele v. Title Realty Co., 478 F.2d 380, 384 (10th Cir. 1973).

64. Injunctive is defined as: "[t]hat has the quality of directing or ordering; of or relating to an injunction." BLACK'S LAW DICTIONARY, supra note 56, at 800.

65. See, e.g., Ammons v. Dade City, 783 F.2d 982, 983–84 (11th Cir. 1986) (affirming an injunction against the city prohibiting the provision of municipal services in the white neighborhoods until those in the black neighborhoods were provided for equally); Dowdell v. City of Apopka, 698 F.2d 1181, 1184–85 (11th Cir. 1983) (affirming the lower court's order enjoining the city "from initiating or constructing any new municipal services or improvements in the white community until such time as the disparities in the black community facilities were eliminated"); Hawkins v. Town of Shaw, 437 F.2d 1286, 1293 (5th Cir. 1971), aff'd, 461 F.2d 1171 (5th Cir. 1972) (per curiam) (condemning the town's actions and mandating a proposal to eliminate discrimination in providing municipal services); Johnson v. City of Arcadia, 450 F. Supp. 1363, 1368 (M.D. Fla. 1978) (enjoining the city from spending funds without court permission and approving a plan to "equalize" municipal services in the black community); Hadnott v. City of Prattville, 309 F. Supp. 967, 975 (M.D. Ala. 1970) (granting an injunction to prohibit the city from offering municipal services on a basis of racial discrimination); Kennedy Park Homes Ass'n v. City of Lackawanna, 318 F. Supp. 669, 697–98 (W.D.N.Y. 1970) (ruling that the city must not interfere with construction of a subdivision and must take affirmative action to assist the building of the subdivision); Gautreaux v. Chicago Hous. Auth., 304 F. Supp. 736, 737–38 (N.D. Ill. 1969) (instructing the housing authority to provide equal housing to African American tenants), aff'd, 436 F.2d 306 (7th Cir. 1970). But see Middlebrook v. City of Bartlett, 341 F. Supp. 2d 950, 959 n.8 (W.D. Tenn. 2003) (admitting the existence of race discrimination in violation of the Fair Housing Act but concluding injunctive relief was not appropriate because,
constitutional violation and the judicial response, maintaining "that federal court decrees must directly address and relate to the constitutional violation itself."66

In Hawkins v. Town of Shaw, the United States Court of Appeals for the Fifth Circuit mandated that the town file a plan with the court explaining how the town would cure its disparate provision of street paving, street lights, sanitary sewers, fire hydrants, and water-drainage services.67 In Johnson v. City of Arcadia, in addition to ordering improvements to minority residents’ water systems, recreation facilities, and streets, the court prohibited any significant improvements to white communities until the City instituted improvements in the minority community.68 The court in Dowdell v. City of Apopka restricted the City’s use of funds, ruling that the funds only be used exclusively for improvements in the municipal services for the minority community.69 Going even further, the lower court in Ammons v. Dade City required the City to submit a plan to institute municipal improvements to the minority community and retained jurisdiction of the case to ensure the judgment was properly implemented.70 These cases display the trend of courts ruling to “cure the ‘condition that offends the Constitution’” by granting injunctive relief to municipal-service plaintiffs.71

F. Injunctive Relief on Steroids: Forced Compliance with Government Procedures and the Preclearance Model of the Voting Rights Act

1. What is Preclearance? Background and Coverage

Where constitutional voting rights are threatened, Congress has gone beyond the remedies discussed above by enacting laws with strict reporting and monitoring requirements.72 A prominent example of such laws is the system of "federal preclearance," which is required when states or municipalities with a history of voting rights violations seek to alter voting procedures.73

at the time of remedy, plaintiffs had been granted access to water), aff’d, 103 F. App’x 560 (6th Cir. 2004).
67. Hawkins, 437 F.2d at 1288, 1293.
68. Johnson, 450 F. Supp. at 1380.
69. Dowdell, 698 F.2d at 1184.
70. Ammons, 594 F. Supp. at 1306.
72. See, e.g., Berry v. Doles, 438 U.S. 190, 199–200 (1978) (Powell, J., concurring) (discussing “how § 5, enacted to further the exercise of an important constitutional right, has been judicially expanded to cover the most inconsequential change in any aspect of election procedure”).
73. See 42 U.S.C. § 1973c(a) (2006) (requiring jurisdictions covered by the Voting Rights Act to seek preclearance and explaining that preclearance can be obtained either by declaratory
Specifically, § 5 of the Voting Rights Act of 1965 requires regulated jurisdictions to seek prior approval for changes to their election laws. The ultimate goal of this provision is oversight. The Court has observed that "the purpose of § 5 is to establish procedures in which voting changes can be scrutinized by a federal instrumentality before they become effective."

In recognition of the importance of voting rights, courts have interpreted the preclearance statute broadly, determining that Congress intended for preclearance to be followed when state laws affect voting in even an indirect or slight manner. Courts determine whether an entity designated to perform a government responsibility is subject to preclearance requirements by considering federal and state law, in addition to the entity's authority and responsibilities. For example, the rule emerging from Supreme Court case law indicates that a utility company providing general services normally paid for by a municipality would be subject to preclearance requirements when large projects must be approved by elections—thereby implicating voting—

judgment issued by the United States District Court for the District of Columbia, or by approval from the Attorney General); see also United States v. Bd. of Comm'rs, 435 U.S. 110, 119–20 (1978). The Court in Bd. of Comm'rs explained that this requirement applies to states that "maintained any 'test or device' . . . and . . . had voter registration or voter turnout of less than 50% . . . during specified Presidential elections. When this formula is not met in an entire State, coverage is triggered in any 'political subdivision' within the State that satisfies the formula." Bd. of Comm'rs, 435 U.S. at 119–20.

74. City of Lockhart v. United States, 460 U.S. 125, 128–29 (1983). Addressing the definition of "change," the Supreme Court noted:

In order to determine whether an election practice constitutes a "change" as that term is defined in our § 5 precedents, we compare the practice with the covered jurisdiction's "baseline." We have defined the baseline as the most recent practice that was both precleared and "in force or effect"—or, absent any change since the jurisdiction's coverage date, the practice that was "in force or effect" on that date. Riley v. Kennedy, 128 S. Ct. 1970, 1982 (2008). In explaining the rationale for the preclearance procedure, the Court reasoned that "Congress realized that existing remedies were inadequate to [guarantee the Fifteenth Amendment] and drafted an unusual, and in some aspects a severe, procedure for insuring that States would not discriminate on the basis of race in the enforcement of their voting laws." Allen v. State Bd. of Elections, 393 U.S. 544, 556 (1969).

75. See Bd. of Comm'rs, 435 U.S. at 136.

76. Id. at 136. The requirement that proposed alterations not be discriminatory "serve[s] to 'shift the advantage of time and inertia from the perpetrators of the evil to its victims.'" Riley, 128 S. Ct. at 1978 (quoting South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966)) (explaining the purpose of charging the jurisdiction with the burden of preclearance).

77. See City of Pleasant Grove v. United States, 479 U.S. 462, 468 (1987); see also Bd. of Comm'rs, 435 U.S. at 127 ("[T]he substantive duties imposed in the Act . . . apply not only to governmental entities formally acting in the name of the State, but also to those political units that may exercise control over critical aspects of the voting process"). But see City of Combes v. E. Rio Hondo Water Supply Corp., 244 F. Supp. 2d 778, 782 (S.D. Tex. 2003) (per curiam) (holding that Texas Law does not recognize a municipal water authority as a political unit for purposes of the Voting Rights Act)

78. City of Combes, 244 F. Supp. 2d at 780 (reasoning that "states could avoid coverage by delegating decisions regarding electoral policy to entities that state law does not characterize as 'political subdivision[s]'") (quoting Bd. of Comm'rs, 435 U.S. at 139 (Powell, J., concurring)).
because the utility company exercises governmental authority and is financed by municipal funds.  

2. How Preclearance Is Granted

Prior approval for preclearance may be granted by one of two methods: (1) seeking a declaratory judgment in the United States District Court for the District of Columbia “that the changes do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race” or (2) filing the change with the Attorney General, who is given sixty days to object to the plan.  

Preclearance will be granted if the change “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color.”

3. Failure to Comply and the Overall Effectiveness of Preclearance

While funding for enforcement has increased, this initiative does not necessarily translate into compliance. The Supreme Court has observed that there is “widespread noncompliance” with preclearance provisions. Similarly, Congress has observed that the Department of Justice has no method in place to monitor states and thus cannot make sure all changes are reported.

79. See id. ("[F]ederal courts should examine how precisely, the entity at question is treated—rather than merely defined—in the context of the pertinent state’s law of intergovernmental relations."); cf. Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 728–29 (1973) (finding that a water-storage district was not in violation of the Fourteenth Amendment’s Equal Protection Clause because it had “relatively limited authority...[and provided] no other general public services such as schools, housing, transportation, utilities, roads, or anything else of the type ordinarily financed by a municipal body”).

80. City of Lockhart v. United States, 460 U.S. 125, 128–29 (1983). Congress has provided the financial resources needed by the Department of Justice to oversee the substantial undertaking of monitoring the preclearance procedure. See generally U.S. COMMISSION ON CIVIL RIGHTS, FUNDING FEDERAL CIVIL RIGHTS ENFORCEMENT: THE PRESIDENT’S 2006 REQUEST, Introduction (2005), http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/28/0e/3f.pdf [hereinafter COMMISSION] (discussing the substantial funding needed for civil rights enforcement). Out of six federal agencies with supervision of civil rights programs, the Department of Justice Civil Rights Division had the largest funding increase from 1994 to 2005, with its annual budget growing 79.6% to a recent total of $110,437,000 in fiscal year 2006. Id. at Intro. & Ch. 4.


83. Nw. Austin Mun., 573 F. Supp. 2d at 256.

Despite its shortcomings, preclearance has been hailed as a "vital prophylactic tool" that subtly impedes discriminatory changes.\(^8\) Furthermore, jurisdictions that fail to seek preclearance are subject to judicial reprimand.\(^9\) If a jurisdiction does not seek prior approval for voting changes, the Attorney General or a private citizen may sue to require preclearance pursuant to § 5.\(^10\) Courts have prevented the execution of the non-precleared changes by issuing injunctions halting implementation.\(^11\) Thus, while compliance is not absolute, the Voting Rights Act nonetheless serves to prevent discriminatory changes to voting laws.\(^12\)

4. The Constitutionality of Preclearance: Historical and Modern Challenges

The Supreme Court has established a framework for evaluating the constitutionality of statutes authorized under the Fourteenth Amendment. In 1966, the Supreme Court, in *South Carolina v. Katzenbach*, upheld the constitutionality of the "extraordinary"\(^13\) preclearance provision, proclaiming that "Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting"\(^14\)—the rationality test. Although *South Carolina v. Katzenbach* applied to protections based on the Fifteenth Amendment,\(^15\) shortly thereafter *Katzenbach v. Morgan* used the rationality test to uphold sections of the Voting Rights Act passed under the enabling clause of the Fourteenth Amendment.\(^16\)

In *City of Boerne v. Flores*, however, the Supreme Court reined in Congress's ability to pass legislation under the Fourteenth Amendment, stating "this 'power is . . . not unlimited.'\(^17\) Rather, the Court required that the statutory remedy be both "congruent[t]" with and "proportional" to the injury.\(^18\)

\(^8\) *Nw. Austin Mun.*, 573 F. Supp. 2d at 265.
\(^9\) Id. at 256.
\(^10\) Id.
\(^11\) See, e.g., *Lopez v. Monterey County*, 519 U.S. 9, 20 (1996) ("If a voting change subject to § 5 has not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting implementation of the change.").
\(^12\) *See Nw. Austin Mun.*, 573 F. Supp. 2d at 264–75 (underscoring the deterrent value of sanctions).
\(^13\) *Beatty v. Esposito*, 439 F. Supp. 830, 832 (E.D.N.Y. 1977) (describing the preclearance procedure as an "extraordinary measure").
\(^14\) *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966) (upholding the constitutionality of the preclearance provision under the Fifteenth Amendment).
\(^15\) Id. at 337 ("We here hold that the portions of the Voting Rights Act properly before us are a valid means for carrying out the commands of the Fifteenth Amendment.").
\(^18\) Id. at 520.
On July 27, 2006, Congress extended the provisions of the Voting Rights Act for another twenty-five years, prompting another constitutional challenge that was recently heard by the Supreme Court. In Northwest Austin Municipal Utility District Number One v. Mukasey, the District Court for the District of Columbia held that Congress's 2006 decision to extend the Voting Rights Act was rational, and thus constitutional, under the rationality standard announced in South Carolina v. Katzenbach. The court determined that the Katzenbach rational test was the appropriate standard because preclearance implicates both freedom from racial discrimination and voting, two essential rights that justify statutory protection. The court went further, finding the extension of the law valid under the more stringent City of Boerne "congruen[t]" and "proportional" standard. In reaching this conclusion, the court used a strict level of scrutiny and examined the violation for which the legislation was designed to remedy, noting that "any § 5 legislation ‘must be judged with reference to the historical experience . . . it reflects.’"

In an eight-to-one decision reviewing Northwest Austin Municipal, the Supreme Court avoided a complete constitutional analysis of § 5 of the Voting Rights Act but, nevertheless, upheld the law’s preclearance provision. However, without making a decision, the Court openly questioned whether the political and racial circumstances necessitating the Voting Rights Act continue to exist today. Recognizing the constitutional significance of allowing jurisdictions to remove themselves from the preclearance regime, the Court held that governments must be afforded the option to “bail out” of the preclearance requirements.


98. Nw. Austin Mun., 573 F. Supp. 2d at 223–24 (reasoning that the legislative history showed ample evidence of racial discrimination and that the extension of § 5 coverage was a rational means to prevent racial discrimination in contemporary voting procedures).

99. Id. at 245.

100. Id. at 224 (“Given Section 5’s tailored remedial scheme, the extension [of the Voting Rights Act] qualifies as a congruent and proportional response to the continuing problem of racial discrimination in voting.”).


103. Nw. Austin Mun., 129 S. Ct. at 2511–12 (observing that the discrimination prompting § 5 “may no longer be concentrated in the jurisdictions singled out for preclearance” and that “there is considerable evidence that [the law] fails to account for current political conditions”).

Perhaps in anticipation of these constitutional pressures, legislation has begun to include exit procedures that no longer make preclearance requirements absolute.105

5. Sunset for Discrimination? Exit Options and Defining an End Date for Federal Programs

When Congress extended the preclearance requirements of the Voting Rights Act for twenty-five years in 2006, it justified the period of extension by reasoning that the law responded to nearly a century of discrimination.106 The Northwest Austin Municipal court declared this a legislative policy determination not subject to judicial review.107 Similarly, in Grutter v. Bollinger, the Supreme Court observed that provisions to remedy racial disparity in the context of a higher-education admissions process must have a "termination point," and thus suggested a twenty-five-year sunset provision for race-conscious provisions.108

In addition to the limitation of the statute's twenty-five-year sunset, the preclearance requirements of the Voting Rights Act are not absolute.109 The statute includes a "bailout" provision that permits jurisdictions falling under preclearance requirements but without recent violations to remove themselves from § 5 obligations by seeking a declaratory judgment in the United States District Court for the District of Columbia.110 In order for the court to approve such a declaratory judgment, the jurisdiction must show that "during the past ten years they used no test or device, were the subject of no judicial findings of racial discrimination in voting, successfully precleared all voting changes, and engaged in constructive efforts to eliminate intimidation and harassment of voters."111 Essentially, showing good behavior for a ten-year period will relieve a previously monitored jurisdiction from the compliance requirements of § 5.112

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107. Nw. Austin Mun., 573 F. Supp. 2d at 267–68. The Supreme Court showed similar deference, stating that finding a federal law "unconstitutional is the 'most delicate' task"—a task that the Court refused to undertake upon reviewing the case. Barnes, supra note 97 (quoting Nw. Austin Mun., 129 S. Ct. at 2513).

108. Grutter, 539 U.S. at 342–43.


110. Id. at 230–31.

111. Id. at 228.


Courts have awarded various remedies in response to violations of federal anti-discrimination statutes, including damages and injunctions. The Supreme Court has also authorized Congress's ability to pass legislation to prevent violations of the Fourteenth Amendment that are frequently alleged in municipal-service equalization cases. In addition to judicially granted remedies, the Voting Rights Act represents a federal-review mechanism designed to protect the Fifteenth Amendment right to vote.

II. SEARCHING FOR EQUALITY IN THE OHIO HILLS: THE PROCEDURAL HISTORY OF KENNEDY v. CITY OF ZANESVILLE

The process of defining and defending these constitutional rights came into focus when twenty-five citizens of Washington Township, Ohio—the area surrounding Coal Run—filed a complaint with the Ohio Civil Rights Commission (OCRC) on July 26, 2002. After observing that the Township granted water access to white residents while simultaneously denying water access to African American residents, the OCRC found probable cause of racial motivation.

113. See, e.g., Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 306–07 (1986) (stating that damages are an appropriate remedy for a § 1983 violation but stressing that actual injury is required in order for compensatory damages to be awarded); see also Carey v. Piphus, 435 U.S. 247, 264 (1978) (ruling that compensatory damages are available for mental and emotional injury caused by a § 1983 violation but only with "proof that such injury actually was caused").

114. See, e.g., Hawkins v. Town of Shaw, 437 F.2d 1286, 1293 (5th Cir. 1971) (condemning the town's discriminatory action and mandating a proposal to eliminate discrimination in municipal services provision).

115. See, e.g., Hawkins, 437 F.2d at 1287–88 (granting injunctive relief under § 1983 in order to vindicate plaintiffs' Fourteenth Amendment rights to be free from racial discrimination in the distribution of municipal services); Hague v. Comm. for Indus. Org., 101 F.2d 774, 788 (3d Cir. 1939), modified, 307 U.S. 496 (1939) (observing that 42 U.S.C. § 1983 was "enacted originally to enforce recognition by the states of the civil rights secured by the Fourteenth Amendment").

116. See Berry v. Doles, 438 U.S. 190, 199–200 (1978) (Powell, J., concurring) (commenting that § 5 of the Voting Rights Act was designed to protect "an important constitutional right"—the right to vote); see also U.S. CONST. amend. XV ("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.").


118. See Dao, supra note 9 (reporting that OCRC concluded that two white homes on Coal Run Road—one located within 200 yards of the African American community—and eighteen white homes on neighboring Langan Lane had access to city water while the seventeen African American or mixed-race homes on Coal Run Road did not).
Sixty-eight individual plaintiffs then filed suit in the United States District Court for the Southern District of Ohio, listing defendants as: the City of Zanesville, Muskingum County, Washington Township, “and individual elected officials from the County and Township.”\textsuperscript{119} Seeking remedies of damages, as well as injunctive and declaratory relief, the plaintiffs filed a complaint on November 13, 2003, claiming violations of 42 U.S.C. §§ 1981, 1982, 1983, 2000d, the Fair Housing Act, and an Ohio civil rights statute.\textsuperscript{120}

Both sides filed motions for summary judgment.\textsuperscript{121} The court granted the plaintiffs’ motion, finding Muskingum County liable for discriminatory actions of the East Muskingum Water Authority.\textsuperscript{122} The defendants’ motions for summary judgment argued lack of plaintiffs’ standing, expiration of the statute of limitations, failure to prove a prima facie case of discrimination under McDonnell Douglas, and that the plaintiffs’ claims were barred by the equitable doctrines of laches and estoppel.\textsuperscript{123} The court rejected these arguments and dismissed Washington Township from the case.\textsuperscript{124} The court then heard oral argument on June 4, 2007, and issued its opinion on the summary judgment motions on September 7, 2007.\textsuperscript{125}

On July 10, 2008, one year after summary judgment oral argument, two months after being sworn in, and after two weeks of deliberation, the jury delivered a verdict.\textsuperscript{126} The jury found that the City and County had unlawfully

\textsuperscript{119} City of Zanesville, 505 F. Supp. 2d at 463.

\textsuperscript{120} Id. at 476; supra note 21 and accompanying text.

\textsuperscript{121} City of Zanesville, 505 F. Supp. 2d at 463.

\textsuperscript{122} Id. at 480 (determining that a “de facto merger” had occurred between the County and the municipal water authority and thus the County was liable for the water authority’s actions).

\textsuperscript{123} Id. at 483. Defendants filed motions for summary judgment on all of plaintiffs’ claims on March 14, 2007. Plaintiffs filed a “Combined Response in Opposition to Defendants’ motions along with a Cross Motion for Summary Judgment” on April 23, 2007. Id. at 477.

\textsuperscript{124} Id. at 501. In reaching its conclusion, the court engaged in a fact-intensive analysis of the township’s actions during the history of water denials. As a preliminary matter, the court noted that “in order to have standing, a plaintiff must have suffered injury that is fairly traceable to the challenged action of the defendant.” Id. at 484 (citing Warth v. Seldin, 422 U.S. 490, 499 (1975)) (emphasis omitted). For example, plaintiff Jerry Kennedy stated that he requested water from Township Trustee Doug Culbertson; however, the court ultimately found that the conversation between Kennedy and Culbertson was an inquiry, not a request. Id. at 485 n.14. Most critically, the court found that the decisions about water access were not made by the Township. Id. at 486 (“The Township never had the ability to provide [p]laintiffs, or anyone else, with water.”). Accordingly, the court dismissed the Township as a defendant in the action because its actions did not result in the denial of water service to the plaintiffs. Id. at 487 (granting the Township’s summary judgment motion).

\textsuperscript{125} Id. at 477.

\textsuperscript{126} See U.S. District Court Civil Docket, Nos. 420–36, City of Zanesville, 505 F. Supp. 2d 456 (No. 2:03cv1047) (noting that the jury was sworn in on May 12, 2008, issued instructions and sent into deliberation on June 26, 2008, and delivered a verdict on July 10, 2008); Kathy Thompson, Coal Run Road Water Bill: $10.8 Million, ZANESVILLE TIMES RECORDER, July 11, 2008, at 1A.
discriminated and it awarded plaintiffs nearly $11 million in damages.\textsuperscript{127} Both the City and County filed post-judgment motions seeking relief from the verdict, arguing that the improper participation of an alternate juror was grounds for a new trial,\textsuperscript{128} and similarly claiming that the plaintiffs failed to

\textsuperscript{127} See Johnson, supra note 7 (reporting that plaintiffs would individually receive anywhere from $15,000 to $300,000). According to plaintiffs' attorney Reed Colfax, the responsibility for paying the awarded damages was divided between the water authority, the County, and the City. Julie Carr Smyth, Jury: Black Neighborhood Was Denied Water Service, THE ASSOCIATED PRESS (July 10, 2008), available at http://www.truthout.org/article/racial-discrimination-ohio-neighborhood-denied-water-service (indicating that the damages awarded to plaintiffs “covered both monetary losses and the residents’ pain and suffering between 1956, when water lines were first laid in the area, and 2008 when Coal Run got public water”). The water authority was responsible for fifty-five percent of the damages, the County owed twenty-five percent, and the City owed twenty percent. \textit{Id}. The water authority no longer exists, however, and the County is now responsible for paying that portion of the damages. \textit{Id}

Because City of Zanesville is a jury verdict, there is not a complete record to review, but studies have indicated that jurors’ attitudes may be impacted by the type of defendant involved. See EDIE GREENE & BRIAN H. BORNSTEIN, DETERMINING DAMAGES: THE PSYCHOLOGY OF JURY AWARDS 70 (2003). One example is the “deep pockets effect,” which refers to the idea that jurors are more likely to award higher damages against defendants with the ability to pay. Monica K. Miller, How Juryphobia and Fears of Fraudulent Claims Disserve Medical Malpractice Reform Efforts, in CIVIL JURIES AND CIVIL JUSTICE 175, 178 (B.H. Bomstein et al. eds., 2008). Specifically, scholars have observed the “deep pockets effect” to situations where the government is the defendant. See Neil Vidmar, Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases, 43 DUKE L.J. 217, 220 (1993) (finding that the deep pockets effect extended to “government defendants”). One study found that plaintiffs suing the government had a 48% chance of prevailing, higher than plaintiffs alleging malpractice (a 33% success rate), or plaintiffs suing in products liability cases (a 44% success rate). GREENE & BORNSTEIN, supra, at 73 (citing a 1991 study). Another study found that government defendants received damage penalties 15% higher than corporations and 50% higher than individuals. Michael J. Saks, Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not? 140 U. PA. L. REV. 1147, 1275 n.493 (1992).

\textsuperscript{128} See U.S. District Court Civil Docket, supra note 126, at Nos. 444, 447-48. The County filed a Motion for Mistrial and notice of appeal. \textit{Id}. at No. 446. The City filed a Motion for a New Trial and/or Motion for Relief from Judgment. Thompson, supra note 15. The City also filed a Motion for a Judgment as a Matter of Law, and a Motion to Stay Execution on Judgment Without Bond. See U.S. District Court Civil Docket, supra note 126, at Nos. 447-49. Attorneys for the city argued that a juror was not able to complete deliberations because of health issues. See Thompson, supra note 15. The parties disagreed as to whether an alternate juror should replace the sick juror and the judge decided against using an alternate. \textit{Id}. City attorneys then asserted that despite the court’s ruling, an alternate juror had deliberated for approximately fifteen to twenty minutes, and that such participation justifies a new trial under Sixth Circuit precedent. \textit{Id}

Relative to other circuits, the Sixth Circuit applies a more expansive standard when determining whether the participation of alternate jurors is grounds for a new trial. See, e.g., Hanson v. Parkside Surgery Ctr., 872 F.2d 745, 749 (6th Cir. 1989) (holding that a district court’s use of an eight-member jury was not reversible error, despite the mandating of a six-member jury). On the other hand, the “Second, Fourth, Fifth, Ninth, Tenth, and Eleventh [Circuits] agree that reversal is required . . . where an alternate juror actually participates in the jury deliberations without the consent of counsel.” Cabral v. Sullivan, 961 F.2d 998, 1003 (1st Cir. 1992). The Sixth Circuit deemed alternate juror participation “harmless error” where a substantial right is not
satisfy the burden of proof in establishing a prima facie case of discrimination.\textsuperscript{129} On March 5, 2009, the plaintiffs settled with the City and County, ending the appeal process and resulting in a $9.6 million dollar award to be split among the plaintiffs.\textsuperscript{130}

III. AN UNCOMFORTABLE ANACHRONISM: GOVERNMENT-SPONSORED RACISM AND THE SIGNIFICANCE OF KENNEDY V. CITY OF ZANESVILLE

This historic lawsuit was set in the sparsely populated hills of southeast Ohio.\textsuperscript{131} The City of Zanesville has a population of approximately 25,361,\textsuperscript{132} and Muskingum County has a population of 85,087.\textsuperscript{133} Although approximately 85\% of Coal Run residents are African American,\textsuperscript{134} African Americans comprise only 4.0\% of the population of Muskingum County.\textsuperscript{135}

\textsuperscript{129} Hanson, 872 F.2d at 749–50. In light of the less stringent standard applied in the Sixth Circuit, the alternate juror deliberating for a matter of fifteen to twenty minutes was unlikely to have caused significant harm to defendants’ rights and a court would be unlikely to find the alternate juror’s deliberation grounds for a new trial.

Post-trial, defendants also characterized the case as a greedy grab for legal fees by out-of-town lawyers. Thompson, supra note 126. In addressing such an assertion, the Sixth Circuit applies localizing factors in order to ensure that out-of-state attorneys are compensated in amounts appropriate to local legal rates. See Brian A. v. Hattaway, 83 F. App’x 692, 694 (6th Cir. 2003) (articulating the Sixth Circuit test for finding the prevailing market rate of attorney fees). However, there is flexibility in this standard if the selection of the “out-of-town” specialist was “reasonable” and “if the rates sought by the out-of-town specialist are reasonable for an attorney of his or her degree of skill, experience, and reputation.” Brian A., 83 F. App’x at 694 (citing Hadix v. Johnson, 65 F.3d 532, 535 (6th Cir. 1995)).

Given the flexibility in rates permitted by Sixth Circuit jurisprudence, the defendants’ claims that the “case has always been about out-of-state lawyers taking advantage of a situation” and that they are putting their hands “in the pockets of the hardworking people of Muskingum County” are likely unfounded. Thompson, supra note 126.


\textsuperscript{130} See Randy Ludlow, Coal Run Residents Settle for $9.6 Million, COLUMBUS DISPATCH, Mar. 6, 2009, at B1.

\textsuperscript{131} City of Zanesville, Ohio, supra note 2.


\textsuperscript{135} U.S. Census Bureau, Muskingum County, Ohio, supra note 133.
Municipal water service is not universal in Muskingum County. Only an estimated 52,900 out of 85,087 county residents have municipal water. Unfortunately, digging a well is not a safe alternative in many areas because coal mines in the surrounding area have contaminated the water table, rendering it non-potable. Consequently, until municipal water was installed in 2004, Coal Run residents sought alternatives varying from expensive to frontier-like, such as collecting rainwater and melting snow.

The timing of *City of Zanesville* is highly significant. The facts and storyline of a local government racially discriminating against a group of residents is reminiscent of issues common during the Civil Rights Era. Although systematic racial discrimination is often characterized as a past problem in the United States, the *City of Zanesville* court recently ruled in plaintiffs' favor, endorsing the view that the City employed a “policy, pattern, and practice of denying public water service . . . to the individual Plaintiffs during the last fifty years because they are African American and/or because they reside in a predominantly African American neighborhood,” which continued until discrimination complaints were filed in 2002. In 2004, the same year that then-Illinois State Senator Barack Obama—the first African American President of the United States—emerged on the national scene at the

136. See Brian Gadd, *Water, Water Everywhere?*, ZANESVILLE TIMES RECORDER, July 20, 2008, at 1A [hereinafter Gadd, *Water*] (noting that “approximately half of the county’s residents who live in unincorporated areas of the county . . . lack access to public water”). Inadequate water infrastructure, a problem commonly associated with the developing world, is a problem not only in Muskingum County but also in other United States communities. Anderson, *supra* note 6, at 1106–07. For example, the Texas Water Development Board estimates that over a million Texas residents require water-system upgrades that would cost an estimated $4.5 billion. *Id.* at 1105. In February 2009, a local Zanesville newspaper reported that the City of Zanesville submitted for inclusion in the national economic stimulus package a $17.3 million request, $9 million of which would go towards a new water-treatment facility. Brian Gadd, *City Seeking $17M in Stimulus Funding*, ZANESVILLE TIMES RECORDER, Feb. 10, 2009, at 3A.


138. Suddath, *supra* note 13; explaining that although the coal mines are closed, sulfur remaining in the soil turns the water red.

139. Dao, *supra* note 9 (noting that by purchasing water, Coal Run residents spent five to ten times more money on water than other area residents); *see also* Johnson, *supra* note 7 (discussing one family’s method of using an electric pump to bring water into the house, even though the water was contaminated).


142. *Id.* at 469.
Democratic National Convention, Muskingum County, Ohio extended water to the largely African American residents of Coal Run.

The recent timing of City of Zanesville delivers a poignant reminder of race-based inequality and an important race discrimination case that may shape the course of Civil Rights jurisprudence.

IV. STATUTORY RELIEF IS NEEDED TO COMPENSATE FOR SOCIAL DIVISIVENESS CAUSED BY GOVERNMENT RACE DISCRIMINATION

The jury in City of Zanesville determined correctly that the County and City unlawfully discriminated in its allocation of municipal services; but a jury verdict alone is not sufficient. In order to penalize and deter discriminatory conduct by local and state governmental entities, a new federal law should be enacted that would require government bodies found liable for discrimination


144. City of Zanesville, 505 F. Supp. 2d at 469.

145. In the early race discrimination case of Korematsu v. United States, the Supreme Court announced the strict scrutiny standard for addressing claims of race discrimination, stating that “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.” Korematsu v. United States, 323 U.S. 214, 216 (1944), superseded by statute, Adaranol Constr. v. Pena, 515 U.S. 200, 215 (1995). In the context of higher education and race, Brown v. Board of Education is distinguished from prior education race cases because it directly addressed and rejected the concept of separate but equal. Brown, 347 U.S. at 493. In Brown, Chief Justice Earl Warren proclaimed that the method of separate but equal is unconstitutional and causes harm to minority school children. Id. The Brown decision has been recognized as “among the most significant judicial turning points in the development of our country” and a case that “laid the foundation for shaping future national and international policies regarding human rights.” Brown Foundation for Educational Equity, supra note 140. Brown was not the first school segregation case; rather, it was preceded by litigation as early as 1849. Id. However, Brown had a significant impact on the history and law of the United States and triggered racial reform in schools around the country. Id.

The Court again addressed race in the context of education relatively recently in the landmark affirmative action cases involving the consideration of race in the admissions process for the University of Michigan law program. Grutter v. Bollinger, 539 U.S. 306, 311 (2003). In Grutter, the Court held that diversity is a compelling government interest and, after applying strict scrutiny, upheld the law school admission program as narrowly tailored to achieve that interest. Id.; see also Blend It, Don’t End It: Affirmative Action and the Texas Ten Percent Plan After Grutter and Gratz, 8 HARV. LATINO L. REV. 33, 37 (2005). Simultaneously, the Supreme Court announced Gratz v. Bollinger, in which the Court declared the University of Michigan undergraduate admissions program was unconstitutional because it was not narrowly tailored. Gratz v. Bollinger, 539 U.S. 244, 270-71 (2003).

Another landmark civil rights case is Loving v. Virginia, a case in which the Supreme Court addressed a Virginia law banning interracial marriage. Loving v. Virginia, 388 U.S. 1, 2 (1967). At the time, Virginia was one of sixteen states that prohibited interracial marriages. Id. at 6. The Loving Court struck down the law and affirmed that “[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.” Id. at 10.
to justify denials or adjustments of service through preclearance requirements monitored by the federal government.

A. Denials of Service Were Racially Motivated

Several indicators in City of Zanesville show that the jury correctly recognized the correlation between race and the lack of municipal water service for Coal Run residents. In bringing their allegations, Coal Run residents followed the Hawkins model of citing statistical discrepancies in the residents with access to municipal water supply. For example, one report noted that

on Coal Run Road, none of the 17 black or mixed-race homes had city water service, while two white homes did. On nearby Langan Lane, all of the 18 white homes on top of the hill had city water, while five of the eight black or mixed-race homes in the hollow did not. (The other three families had connected to the municipal lines by themselves.).

The facts of City of Zanesville also mirror prior successful municipal-service equalization cases. The plaintiffs satisfied the Johnson requirements for showing discrimination in a municipal service context. Because Coal Run is a majority African American community in a majority white county, the first Johnson prong is satisfied by the existence of a racially identifiable neighborhood. Second, there was substantial inferiority in the provision of services because white residents had municipal water while African American residents did not, a disparity that satisfies the second Johnson element. The third Johnson element—showing discriminatory intent or motive by the City—is met by applying the Dowdell factors.

147. See Hawkins v. Town of Shaw, 437 F.2d 1286, 1288 (5th Cir. 1971). Plaintiffs in City of Zanesville followed the Hawkins model by presenting statistical evidence of geographic segregation, noting that Coal Run is comprised of 85% African American residents. City of Zanesville, 505 F. Supp. 2d at 463. In contrast, Muskingum County is comprised of 93.7% white residents. U.S. Census Bureau, Muskingum County, Ohio, supra note 133.
148. See Dao, supra note 9 (observing that white homes on Coal Run Road and Langan Lane had access to city water while nearby African American or mixed-race homes did not).
149. Id.
150. See, e.g., Hawkins, 437 F.2d at 1288; see also supra Part I.C. (highlighting municipal-service equalization cases).
151. Johnson v. City of Arcadia, 450 F. Supp. 1363, 1379 (M.D. Fla. 1978); see also supra text accompanying note 43. In City of Zanesville, the quality of service afforded to African American residents was substantially inferior to that afforded to white homes—the former had no water, while the latter were provided service. Dao, supra note 9. As in Johnson, the City of Zanesville court can infer discriminatory intent, because plaintiffs identified geographically segregated housing patterns and corresponding inequalities in city services. City of Zanesville, 505 F. Supp. 2d at 464.
152. City of Zanesville, 505 F. Supp. 2d at 463; supra notes 132–35 and accompanying text.
153. See generally Dao, supra note 9.
The Dowdell factors for finding discriminatory intent are also satisfied. Similar to Dowdell, in City of Zanesville there was a significant disparity in the quality of services—the lack of reliable running water critically affected the lives of Coal Run residents. Further, there was a pattern of discriminatory decision-making for decades, as residents of Coal Run had been requesting access to the city water supply since the 1950s. An unequal provision of services was a foreseeable outcome of the City's actions because providing water to one group of people while denying it to another, as in City of Zanesville, necessarily creates inequitable access.

The same factors that required a finding of discriminatory intent in Dowdell are thus satisfied under the facts of City of Zanesville.

The standard for knowledge of the alleged discriminatory impact as announced in Ammons is also satisfied in City of Zanesville. This is demonstrated through a March 2000 report by the City's water superintendent, which showed that the defendants in City of Zanesville had knowledge for over thirty-five years of denials of service to the residents of Coal Run.

The grounds on which defendants appealed further indicate that the jury correctly found race discrimination—the motions of both the City and the County focus predominantly on procedural issues, rather than substantive law.

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154. Dowdell v. City of Apopka, 698 F.2d 1181, 1186 (11th Cir. 1983); see also supra text accompanying note 47 (discussing the Dowdell factors). The Dowdell court held that the following factors are "probative of discriminatory intent:... the magnitude of disparity... the legislative and administrative pattern of decision-making...[and whether] the continued and systematic relative deprivation of the black community was the obviously foreseeable outcome" of the city's actions. Dowdell, 698 F.2d at 1186.

155. See Johnson, supra note 7.


157. Ludlow, supra note 5 (reporting that "[s]urrounding white residents had public water" even though Coal Run residents did not).

158. Ammons v. Dade City, 783 F.2d 982, 988 (11th Cir. 1986) (holding that the city had knowledge of discriminatory impact because "[a] brief visit to the black community makes obvious the need for street paving and storm water drainage control").

159. Kennedy v. City of Zanesville, 505 F. Supp. 2d 456, 496 (S.D. Ohio 2007) (noting that "[f]or at least the last thirty-five years the residents of Coal Run... approached various members of the Zanesville Water Division as to the possibility of extending water into their neighborhood").

160. See Memorandum in Support of Motion of Defendant, City of Zanesville, for Judgment as a Matter of Law at 3–11, Kennedy v. City of Zanesville, No. C2-03-1047 (S.D. Ohio July 31, 2008). The City dedicated eight pages in the beginning of its Motion for a Judgment as a Matter of Law to mostly procedural issues, such as the statute of limitations, while spending just five pages at the end of the brief claiming that plaintiffs did not sufficiently establish the elements of their claim. Id. at 11–16. Similarly, the City's Motion for a New Trial and/or Relief From Judgment focused exclusively on the improper participation of an alternate juror. See Memorandum in Support of Defendant City of Zanesville's Motion for New Trial and/or Relief From Judgment at 2–4, Kennedy v. City of Zanesville, No. C2-03-1047 (S.D. Ohio July 31, 2008). The County's Motion for a New Trial also focused on improper alternate juror
Racially derisive statements allegedly made by various government officials also suggest that the denial of service was racially motivated. For example, plaintiff Nancy Kennedy overheard a water-authority representative say "those n[- - -] will never have running water." Plaintiff Cynthia Hairston found a severed pig's head in her driveway when she began organizing her neighbors to obtain water access. Although this act was not directly tied to the action of the defendants, such occurrences are further evidence of the racially tense environment in which this case was litigated. Taking into account the clear racial undertones at play, it appears that the court in City of Zanesville correctly found the defendants liable for unlawful racial discrimination in its denial of water access to Coal Run residents.

B. Compensation for Unconstitutional Race Discrimination: Mandatory Government Oversight is Necessary to Punish and Prevent Government Discrimination

City of Zanesville is a straightforward application of substantive civil rights law, with the compelling warning that steps must be taken to prevent such discrimination in the future. To the extent that plaintiffs endured decades of denials of water service based on their race, increased health dangers caused by the contamination of alternative water sources, and increased costs for safe water, plaintiffs sustained an actual injury and impairment of their participation. Memorandum in Support of Motion for New Trial by Defendant Muskingum County, No. C2-03-1047 (S.D. Ohio Sept. 2, 2008). The County's Motion for a Mistrial similarly focused on evidentiary and procedural issues, rather than substantive law. See Memorandum in Support of Motion for Mistrial by Defendant Muskingum County, Kennedy v. City of Zanesville, No. C2-03-1047 (S.D. Ohio July 18, 2008).

161. See City of Zanesville, 505 F. Supp. 2d at 466. Plaintiff Helen McCuen testified she and other "Coal Run residents were told that 'they couldn't bring [water] out here, out our way.'" Id. Plaintiffs Jerry and Richard Kennedy testified that Commissioner Montgomery told them at a 2001 hearing that Coal Run "would not have water until the President dropped spiral bombs and hopefully hit deep enough to hit good water." Id. at 468. Montgomery also allegedly stated that "maybe Coal Run's great grandchildren would see water." Id. (internal quotation marks omitted).

162. Id. at 466.

163. Id. at 469 ("Plaintiffs claim that Ms. Hairston held numerous meetings with neighbors about the lack of water, and on the morning of one of the meetings, she awoke to find a severed pig's head in her driveway.").

164. See, e.g., Johnson, supra note 7 (noting that some Coal Run residents, such as Jerry Kennedy, lived without municipal water for over forty-five years).

165. See id. (stating that water pulled from cisterns was “fouled with crawfish, snakes and rats” as well as “residue from old coal deposits”); see also Anderson, supra note 6, at 1111 (observing that water cisterns attracted insects and snails).

166. See, e.g., Dao, supra note 9. By some estimates, Coal Run residents paid more than ten times what recipients of city water paid for the in-home water service. Anderson, supra note 6, at 1111. Further, residents had increased insurance expenses because there was no reliable water for firefighting purposes. Id. The problem is not limited to Coal Run—other minority communities around the country have faced similar expenses as a result of not having access to city water. Id. at 1100. For example, near Austin, Texas, poor residents in Northridge Acres pay twice the

1. Precedent Shows Legislative Action Is Fundamental to Preventing Discrimination

This case, and other aforementioned legal precedent, makes clear that new legislation is urgently needed to prevent future transgressions by deterring other localities from similar forms of discrimination.172 Before settlement, the City of Zanesville filed post-trial motions claiming the plaintiffs failed to prove discrimination,173 and indicating the City did not consider its actions unlawful.
Thus, the City may again attempt to discriminate in the provision of essential utilities to the thousands of county residents who still lack access to the municipal water supply.\textsuperscript{174} Muskingum County and other county and local governments must understand that there are permanent consequences of unlawfully discriminating based on race. Although deterrence can be hard to quantify,\textsuperscript{175} testimony before Congress has stated that the analogous Voting Rights Act preclearance requirements "quietly but effectively deter[ed] discriminatory changes."\textsuperscript{176} Specifically, the testimony listed instances in which jurisdictions retreated from making certain changes in voting policy or procedure upon learning they would be received critically by the Department of Justice.\textsuperscript{177} \textit{City of Zanesville} shows that a law is needed to combat and deter racism, and congressional testimony and prior law demonstrate that such laws can be effective.\textsuperscript{178}

2. The Proposed Scope of the Legislative Solution

Specifically, a new federal law passed under Section 5 of the Fourteenth Amendment's Enabling Clause should require jurisdictions found to have discriminated to seek preclearance from the Department of Justice before any changes or denials to water and electric service.\textsuperscript{179} The burden of

\textsuperscript{174} Gadd, \textit{Water}, supra note 136 (observing that half of the county’s residents in unincorporated areas do not have access to municipal water).


\textsuperscript{176} \textit{Id.}

\textsuperscript{177} \textit{See id. at 264–65} ("Elsewhere section 5’s deterrent effect proved so potent that formal objections were unnecessary to thwart discriminatory voting changes; all the Attorney General had to do was indicate informally that preclearance was unlikely.").

\textsuperscript{178} \textit{See id.} ("Beyond expert testimony, the record contains several concrete examples of section 5 quietly but effectively deterring discriminatory changes. In some cases, jurisdictions reacted to previous objections by altering their behavior."); cf. \textit{H.R. REP. NO. 109-478, at 41} (2006) ("[M]any defiant covered jurisdictions and State and local officials continue to enact and enforce changes to voting procedures without the Federal Government’s knowledge.").

\textsuperscript{179} \textit{See U.S. CONST. amend. XIV, § 5} ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."). But see \textit{Richard L. Hasen, Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane}, 66 OHIO ST. L.J. 177, 177 (2005) ("As part of [the new federalism] revolution, the Court has greatly restricted the ability of Congress to pass laws regulating the conduct of the states under its enforcement powers granted in Section Five of the Fourteenth Amendment.").
implementing this oversight program would be lessened by integrating it into the Department of Justice Civil Rights Division—an existing department of the federal government that traditionally receives more funding than other agencies addressing civil rights issues.  

The scope of this statute would be limited to reviewing state, county, and local governments with a judicially established history of discrimination in the provision of essential utilities such as water and electricity. More specifically, to be bound by the requirements of preclearance, the government entity would need to be found liable for violating 42 U.S.C. §§ 1981, 1982, 1983, or 2000d. The litigation finding discrimination should be final—the appeals process must run its course before a jurisdiction would be subject to preclearance.

3. Constitutionality and Duration of Oversight for Covered Jurisdictions

Courts have examined the duration of legislation in reference to the violation it seeks to cure. For example, § 5 of the Voting Rights Act’s twenty-five-year extension was found to be appropriate given the century-long history of discrimination. By analogy, jurisdictions monitored under this proposal would be required to comply for fifteen years—reasonable, given the nearly half-century of discrimination identified in City of Zanesville. After fifteen years, the requirements would sunset, in recognition of Grutter’s mandate that legislation must ultimately expire. Similarly, this legislation would include a bailout provision similar to that in the Voting Rights Act, so that jurisdictions demonstrating conformity with preclearance and refraining from

180. See generally COMMISSION, supra note 80, at Introduction (observing that the Department of Justice Civil Rights Division had the most substantial budget increase over the last twelve years).
181. Cf Nw. Austin Mun., 573 F. Supp. 2d at 225 (restricting the applicability of the Voting Rights Act to only the “states and political subdivisions with particularly egregious histories of racial discrimination”).
184. Id. (describing Congress’s decision to extend the preclearance provisions for another twenty-five years as rational).
185. See Dao, supra note 9 (considering the impact on residents from lifetimes without running water and quoting eighty-nine-year-old Helen McCuen, a fifty-seven-year resident of Coal Run, as stating, “I never thought I’d live to see it”).
186. Grutter v. Bollinger, 539 U.S. 306, 341–42 (2003) (“A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race. Accordingly, race-conscious admissions policies must be limited in time. This requirement reflects that racial classifications . . . may be employed no more broadly than the interest demands.” (internal citation omitted)).
discriminating in municipal-service decisions for ten years would be able to seek removal from the oversight requirements.\textsuperscript{187}

The proposed legislation would also pass the congruence and proportionality test announced in \textit{City of Boerne} and \textit{Northwest Austin Municipal}.\textsuperscript{188} As in \textit{Northwest Austin Municipal}, the court in \textit{City of Zanesville} identified a constitutional right at issue: equal protection.\textsuperscript{189} Also, the court in \textit{City of Zanesville} identified a pattern of constitutional violations.\textsuperscript{190} The limited duration and bailout provisions that the court cited as indicative of congruence and proportionality in \textit{Northwest Austin Municipal} are also present in the proposed legislation.\textsuperscript{191} Additionally, when courts review statutes designed to remedy race discrimination, judicial deference to Congress is at a maximum,\textsuperscript{192} further justifying such legislation given the presence of extensive minority discrimination in \textit{City of Zanesville}.

The Supreme Court has upheld such massive enforcement mechanisms by finding support in the Enforcement Clause of the Fifteenth Amendment.\textsuperscript{193} The Constitution similarly enables statutory enforcement of Equal Protection guarantees in Section 5 of the Fourteenth Amendment.\textsuperscript{194} Applying this enforcement mechanism to Fourteenth Amendment violations is necessary to remedy the social harm stemming from governmental race-based discrimination and to prevent repeat conduct by jurisdictions practicing discrimination.

\textsuperscript{187} See \textit{Nw. Austin Mun.}, 573 F. Supp. 2d at 227-28 ("[C]overed jurisdictions seeking bailout . . . [must] demonstrate (among other things) that during the past ten years they used no test or device, were the subject of no judicial findings of racial discrimination in voting, successfully precleared all voting changes, and engaged in constructive efforts to eliminate intimidation and harassment of voters.").

\textsuperscript{188} Id. at 268-70 (stating the \textit{City of Boerne} requirements for the congruence and proportionality test, but disagreeing with their applicability).

\textsuperscript{189} See id. at 242; Verdict Form, U.S. District Court Civil Docket No. 436, No. 2:03cv01047 (S.D. Ohio July 10, 2008).

\textsuperscript{190} \textit{Kennedy v. City of Zanesville}, 505 F. Supp. 2d 456, 463 (S.D. Ohio 2007) (recognizing the plaintiffs' claim that the City, County, and water authority adhered to a "policy, pattern, and practice of denying public water service" on the basis of race).

\textsuperscript{191} See \textit{Nw. Austin Mun.}, 573 F. Supp. 2d at 268-69 (setting out congruence and proportionality requirements). The Supreme Court also focused on the importance of bailout provisions, noting the municipal jurisdiction being sued was qualified for a bailout from the law's requirements. Barnes, supra note 97.

\textsuperscript{192} \textit{Nw. Austin Mun.}, 573 F. Supp. 2d at 270 (indicating that "the Court gives Congress significant leeway to craft broad remedial prohibitions when fundamental rights or protected classes are at stake").

\textsuperscript{193} \textit{South Carolina v. Katzenbach}, 383 U.S. 301, 337 (1966) ("We here hold that the portions of the Voting Rights Act properly before us are a valid means for carrying out the commands of the Fifteenth Amendment.").

\textsuperscript{194} \textit{Nw. Austin Mun.}, 573 F. Supp. 2d at 237 ("Like section 2 of the Fifteenth Amendment, section 5 of the Fourteenth Amendment gives Congress 'power to enforce, by appropriate legislation, the provisions of this article.'" (quoting U.S. CONST. amend. XIV, § 5)).
V. CONCLUSION

*City of Zanesville* is a modern statutory-rights case that evokes the vigorous constitutional battles of the Civil Rights Era. To the residents of Coal Run Road who were without municipal water as recently as five years ago, however, racial discrimination is not in the past. This case reminds us that race discrimination can prevent access to essential municipal services and unchecked personal prejudices carry the potential to contaminate government action.

The jury in *City of Zanesville* was correct in finding the City and County liable for discrimination. Yet while courts continue to successfully adjudicate race discrimination claims, continued racism by our own governments makes it urgently clear that the law must do more. The federal government should expand its oversight to include supervision of jurisdictions with a judicially established history of discriminating against minorities in the provision of essential municipal services. Although such an oversight mechanism may not be a silver bullet to ending all racial discrimination, it is an effective internal safeguard and deterrent for governments that have shown they need one.

By expanding oversight to municipal services, the law would both defend the equality for which Jerry Kennedy and the residents of Coal Run have fought for so long and advance the still unrealized dream of equal rights for every citizen on every street in the United States.

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195. See supra note 140 and accompanying text.
196. United States district court judges have proved reliable and effective at responding to racial disputes as they arise. For example, United States District Judge James Brady ended forty-seven years of litigation over the desegregation of East Baton Rouge Parish Schools when he “pushed the warring parties into more than a year of ultimately successful talks behind closed doors.” National Association for Neighborhood Schools, East Baton Rouge Case Ends with Settlement Agreement, http://www.nans.org/eastbatonrouge.shtml (last visited Feb. 14, 2010); Baton Rouge Area Chamber, EBR Desegregation Case’s Finality Gets Attention (July 16, 2007), http://www.brac.org/site.php?pageID=199&newsID=304.