SUPREME COURT OF THE UNITED STATES

Nos. 01–1437 and 01–1596

BEATRICE BRANCH, ET AL., APPELLANTS
01–1437 *v.*
JOHN ROBERT SMITH ET AL.

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01–1596 *v.*
BEATRICE BRANCH ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

[March 31, 2003]

JUSTICE STEVENS, with whom JUSTICE SOUTER and JUSTICE BREYER join, concurring in part and concurring in the judgment.

In 1967 Congress enacted a brief statutory provision that banned at-large elections for Representatives. In my opinion the portion of that statute that is codified at 2 U. S. C. §2c impliedly repealed §2a(c). The reasons that support that conclusion also persuade me that the 1967 federal Act pre-empted Mississippi's statutory authorization of at-large election of Representatives in Congress. Accordingly, while I join Parts I, II, and III–A of the Court's opinion, I do not join Parts III–B or IV.

The question whether an Act of Congress has repealed an earlier federal statute is similar to the question whether it has pre-empted a state statute. When Congress clearly expresses its intent to repeal or to pre-empt, we must respect that expression. When it fails to do so expressly, the presumption against implied repeals, like the presumption against pre-emption, can be overcome in

two situations: (1) if there is an irreconcilable conflict between the provisions in the two Acts; or (2) if the later Act was clearly intended to "cove[r] the whole subject of the earlier one." *Posadas* v. *National City Bank*, 296 U. S. 497, 503 (1936).[1]

As I read the 1967 statute it entirely prohibits States that have more than one congressional district from adopting either a multimember district or electing their Representatives in at-large elections, with one narrow exception that applied to the 1968 election in two States. After a rather long and contentious legislative process, Congress enacted this brief provision:

> "AN ACT
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> "For the relief of Doctor Ricardo Vallejo Samala and to provide for congressional redistricting.
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> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That, for the purposes of the Immigration and Nationality Act, Doctor Ricardo Vallejo Samala shall be held and considered to have been lawfully admitted to the United States for permanent residence as of August 30, 1959.
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> "In each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an apportionment

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[1] Compare *Posadas*, 296 U. S., at 503 ("There are two well-settled categories of repeals by implication—(1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act"), with *Freightliner Corp.* v. *Myrick*, 514 U. S. 280, 287 (1995) ("[A] federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, *English* v. *General Elec. Co.*, 496 U. S. 72, 78–79 (1990), or when state law is in actual conflict with federal law").

> made pursuant to the provisions of subsection (a) of section 22 of the Act of June 18, 1929, entitled 'An Act to provide for apportionment of Representatives' (46 Stat. 26), as amended, there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, *and Representatives shall be elected only from districts so established*, no district to elect more than one Representative (except that a State which is entitled to more than one Representative and which has in all previous elections elected its Representatives at Large may elect its Representatives at Large to the Ninety-first Congress)." Pub. L. 90–196, 81 Stat. 581 (emphasis added).

The second paragraph of this statute enacts a general rule prohibiting States with more than one congressional Representative from electing their Representatives to Congress in at-large elections.[2] That the single exception to this congressional command applied only to Hawaii and New Mexico, and only to the 1968 election, emphasizes the fact that the Act applies to every other State and every other election. Thus, it unambiguously forbids elections that would otherwise have been authorized by §2a(c)(5). It both creates an "irreconcilable conflict" with the 1941 law and it "covers the whole subject" of at-large congressional elections. *Posadas*, 296 U. S., at 503. Under either of the accepted standards for identifying implied repeals, it repealed the earlier federal statute. In addition, this statute pre-empts the Mississippi statute setting the default rule as at-large elections.

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[2] The States of Hawaii and New Mexico were the only two States that met the statutory exception because they were "entitled to more than one Representative" and had "in all previous elections elected [their] Representatives at Large." Pub. L. 90–196, 81 Stat. 581.

The first paragraph of the 1967 statute suggests an answer to the question of why Congress failed to enact an express repeal of the 1941 law when its intent seems so obvious. The statute that became law in December 1967 was the final gasp in a protracted legislative process that began on January 17, 1967, when Chairman Celler of the House Judiciary Committee introduced H. R. 2508, renewing efforts made in the preceding Congress to provide legislative standards responsive to this Court's holding in *Wesberry* v. *Sanders,* 376 U. S. 1 (1964), that the one-person, one-vote principle applies to congressional elections.[3] The bill introduced by Representative Celler in 1967 contained express language replacing §2a(c) in its entirety.[4] H. R. 2508, as introduced, had three principal components that are relevant to the implied repeal analysis. First, the bill required single-member district elections: "[T]here shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled; and Representatives shall be elected only from districts so established, no district to elect more than one Representative." H. R. 2508, 90th Cong., 1st Sess., p. 2 (1967). Second, the bill limited gerrymandering, requiring each district to "at all times be composed of contiguous territory, in as compact form as

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[3] In 1965, the House of Representatives passed a bill identical, in all relevant respects, to the bill Representative Celler introduced in January 1967. See H. R. 5505, 89th Cong., 1st Sess. (1965).

[4] Specifically, §2a(c) would have been expressly repealed by the following language, present in all but the final version of H. R. 2508: "That section 22 of the Act of June 18, 1929, entitled 'An Act to provide for the fifteenth and subsequent decennial censuses and to provide for apportionment of Representatives' (46 Stat. 26), as amended, is amended as follows:

"Subsection (c) is amended by striking out all of the language in that subsection and inserting in place thereof the following: . . . ." H. R. 2508, 90th Cong., 1st Sess., 1 (1967).

practicable." *Ibid.* Third, the bill required proportional representation: "[N]o district established in any State for the Ninetieth or any subsequent Congress shall contain a number of persons, excluding Indians not taxed, more than 15 per centum greater or less than the average obtained" by dividing the population by the number of Representatives. *Ibid.*

This bill generated great controversy and discussion. Importantly for present purposes, however, only two of the three components were discussed in depth at all. At no point, either in any of the numerous Conference Reports or lengthy floor debates, does any disagreement regarding the language expressly repealing §2a(c) or the single-member district requirement appear. Rather, the debate was confined to the gerrymandering requirement, the proportionality rule, and the scope and duration of the temporary exceptions to the broad prohibition against at-large elections.

The House Judiciary Committee amended the bill, limiting the proportional differences between districts in all States to not exceed 10 percent and creating an exception to the general rule for the 91st and 92d Congresses (1968 and 1970 elections) that allowed for "the States of Hawaii and New Mexico [to] continue to elect their Representatives at large" and for the proportional differences to be as large as 30 percent. H. R. Rep. No. 191, 90th Cong., 1st Sess., 1–2 (1967). The House then passed this amended bill. The Senate Judiciary Committee then amended this bill, striking Hawaii from the exception and allowing for 35 percent, rather than 30 percent, variation between districts during the 91st and 92d Congresses. S. Rep. No. 291, 90th Cong., 1st Sess., 1 (1967). The bill went to conference twice, and the conference recommended two sets of amendments. The first Conference Report, issued June 27, 1967, recommended striking any exception to the general rule and limiting proportional

variation to 10 percent or less. See H. R. Conf. Rep. No. 435, 90th Cong., 1st Sess., 1–2 (1965). After this compromise failed to pass either the House or the Senate, the conference then recommended a measure that was very similar to the second paragraph of the private bill eventually passed—a general rule requiring single-member districts with an exception, of unlimited duration, for Hawaii and New Mexico. H. R. Conf. Rep. No. 795, 90th Cong., 1st Sess., 1 (1965). Importantly, every version of the bill discussed in the House Report, the Senate Report, and both Conference Reports contained a provision expressly repealing §2a(c). In spite of these several modifications, the bill, as recommended by the last conference, failed to pass either chamber.

The decision to attach what is now §2c to the private bill reflected this deadlock. Indeed, proponents of this attachment remarked that they sought to take the uncontroversial components of the prior legislation to ensure that Congress would pass some legislation in response to *Wesberry* v. *Sanders,* 376 U. S. 1 (1964).[5] The absence of

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[5] Senator Bayh introduced one amendment to the private bill that excluded Hawaii and New Mexico while Senator Baker offered another that had no exceptions. Senator Bayh characterized his amendment as follows: "What I have tried to do is to take that part of the conference report over which there was no dispute, or a minimal amount of dispute, and attach that part to the bill which is now the pending business." 113 Cong. Rec. 31719 (1967). Senator Baker described his amendment as follows: "The measure makes no other provision. It has nothing to do with gerrymandering. It has nothing to do with compactness. It has nothing to do with census. It strictly provides in a straightforward manner that when there is more than one Member of the House of Representatives from a State, the State must be districted, and that the Members may not run at large. . . . I believe that my amendment is the most straightforward and direct and simple way to get at the most urgent need in the entire field of redistricting, and that is to prevent the several States of the Union from being under the threat of having their Representatives to the U. S. House of Represen-

any discussion, debate, or reference to the provision expressly repealing §2a(c) in the private bill prevents its omission from the final bill as being seen as a deliberate choice by Congress. Any fair reading of the history leading up to the passage of this bill demonstrates that all parties involved were operating under the belief that the changes they were debating would completely replace §2a(c).

JUSTICE O'CONNOR has provided us with a convincing exposition of the flaws in JUSTICE SCALIA's textual interpretation of §2a(c)(5). See *post*, at 7–10 (opinion concurring in part and dissenting in part). Ironically, however, she has been misled by undue reliance on the text of statutes enacted in 1882, 1891, 1901, and 1911—a period in our history long before the 1950's and 1960's when Congress enacted the voting rights legislation that recognized the central importance of protecting minority access to the polls. It was only then that an important federal interest in prohibiting at-large voting, particularly in States like Mississippi, became a matter of congressional concern. This intervening and dramatic historical change significantly lessens the relevance of these earlier statutes to the present analysis.

Moreover, her analysis of the implied repeal issue apparently assumes that if two provisions could coexist in the same statute, one could not impliedly repeal the other if they were enacted in successive statutes. Thus, she makes no comment on the proviso in the 1967 statute that preserved at-large elections in New Mexico and Hawaii for

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tatives stand for election at large." *Id.*, at 31718.

In a colloquy between Senators Bayh and Baker on the floor, they both agreed that the final amendment left no doubt as to its effect: "This will make it mandatory for all Congressmen to be elected by single-Member districts, whether the reapportionment is done by State legislatures or by a Federal court." *Id.*, at 31720 (remarks of Senator Bayh).

1968. This proviso surely supports the conclusion that it was the only exception intended by Congress from the otherwise total prohibition of at-large elections. The authorization of at-large elections in the 1882 statute cited by JUSTICE O'CONNOR was also set forth in a proviso; although the words "provided that" are omitted from the 1891, 1901, and 1911 statutes, they just contain examples of differently worded exceptions from a general rule. It is also important to note that the text of the 1967 statute, unlike the four earlier statutes, uses the word "only" to create a categorical prohibition against at-large elections. As a matter of plain English, the conflict between that prohibition and §2a(c) which permitted at-large elections, is surely irreconcilable.

JUSTICE O'CONNOR's consideration of the legislative history of the 1967 statute fails to give appropriate consideration to the four bills that would have expressly repealed §2a(c)(5). See *supra*, at 4–7. Those bills, coupled with the absence of any expression by anyone involved in the protracted legislative process of an intent to preserve at-large elections anywhere except in New Mexico and Hawaii, provide powerful support for the conclusion that, as a literal reading of the text of §2c plainly states, Congress intended to enact a categorical prohibition of at-large elections. The odd circumstance that the final version of the prohibition was added to a private bill makes it quite clear that the omission of a clause expressly repealing §2a(c) was simply an inadvertence. Canons of statutory construction—such as the presumption against implied repeals or the presumption against pre-emption—are often less reliable guides in the search for congressional intent than a page or two of history.

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The history of the 1967 statute, coupled with the plain language of its text, leads to only one conclusion—Con-

gress impliedly repealed §2a(c). It is far wiser to give effect to the manifest intent of Congress than, as the plurality attempts, to engage in tortured judicial legislation to preserve a remnant of an obsolete federal statute and an equally obsolete state statute. Accordingly, while I concur in the Court's judgment and opinion, I do not join Parts III–B or IV of the plurality opinion.