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Minority Vote Dilution An Overview

Chandler Davidson

Taylor, Texas, is a farming town of 10,000 people located near Austin, the state capital. Twenty percent of its population is black. Another 17 percent is Mexican American.

The town is in central Texas, not far enough south toward the Mexican border for its Chicanos to have caught the fever of militancy that radiated from Crystal City through the medium of La Raza Unida party. Nor is it far enough east for its blacks to have shared the hopes of their race, in some of the Texas "black belt" counties, of achieving political power through the mobilization of sheer numbers. Nevertheless, in the 1960s leaders of both groups in Taylor dared hope that the winds of change blowing across the South and Southwest after the passage of the Voting Rights Act would kick up dust in their town, too.

Changes were desperately needed. As in most Texas cities, the minority population was socially and economically deprived. Its status could be traced directly to historical and continuing discrimination by Anglos, including long exclusion from meaningful political participation. The disabilities thus created resulted in special needs that by any defensible theory of justice placed extraordinary obligations on the city government.

Only in 1965 was the first minority person appointed to a municipal board, and he remained the sole minority representative into the 1970s. No blacks or Mexican Americans had been appointed as city election officials. Most minority employees on the city payroll held the least desirable, lowest paying jobs, and none worked at city hall. The town's three housing projects in the 1960s were totally segregated.

Officialdom's neglect of minority neighborhoods was reflected in the poorly maintained streets, the park that was run-down, particularly compared to the Anglos' park, and the city's refusal to heed requests for increased recreational equipment at the housing projects and for refurbishment of a neighborhood center. In 1961, minority spokesmen had asked for a fire station in their area—a request still not acted on by 1982, although a substation was built in an Anglo neighborhood. Serious allegations of police misconduct toward minorities were ignored by city government.¹

In 1967, minority leaders decided to use the electoral system to help remedy their problems. They got together, black Baptists and brown Catholics, and agreed that the arithmetic of the situation dictated unity in local elections. The newly formed

ment, is also an indirect result of vote dilution. If electoral rules make it impossible for minority-preferred candidates to win office, their number will gradually decline, as it did in Taylor.

Vote dilution, like the other major forms of vote discrimination, diminishes the political power of a group. Unlike them, however, dilution can operate even when there are no barriers to casting a ballot, and when the group's candidates are able to run for office without hindrance.

The essential characteristics of vote dilution are difficult to specify. In spite of two decades of vote dilution litigation and a number of articles on the subject in law reviews and other scholarly journals, no concise and comprehensive definition has emerged. To be sure, there are several electoral mechanisms, discussed below, that the courts have found to play a role in unlawful dilution under certain circumstances. But because the dilutionary effect of the mechanisms is so closely tied to the context in which they are used, no standard definition has been forthcoming.

What seems to be common to the various types of vote discrimination dealt with by the authors of this book under the label *dilution* is a process whereby election laws or practices, either singly or in concert, combine with systematic bloc voting among an identifiable group to diminish the voting strength of at least one other group. Ethnic or racial minority vote dilution is a special case, in which the voting strength of an ethnic or racial minority group is diminished or cancelled out by the bloc vote of the majority. In extreme cases, minority vote dilution results in the virtual exclusion of one or more groups from meaningful participation in a political system.

Four aspects of vote dilution should be mentioned at this point. First, students of the subject have stressed that the process by which dilution occurs is subtle, compared with some other forms of discrimination. A law stating that a black person's vote must be weighted at half the value of a white person's vote is discriminatory on its face, and if enforced, it would accomplish its discriminatory purpose in a straightforward manner. In the case of "dilutionary laws," on the other hand, there is nothing in their wording to suggest that they are discriminatory and, indeed, they are not in all situations.

Second, dilution as it is discussed in the following pages is a *group* phenomenon. It occurs because the propensity of an identifiable group to vote as a bloc waters down the voting strength of another identifiable group, under certain conditions. One individual acting alone could not dilute the vote of another individual or of a group of individuals.

Third, dilution often operates to diminish a group's potential voting strength that derives from the group's geographic concentration. This is most obviously true for at-large elections and the various forms of dilution that fall under the heading of *gerrymandering*. The dilutionary process is thus often connected with what the political scientist Andrew Hacker once called "political cartography"—drawing or erasing electoral boundaries in ways that advantage one group at the expense of another.

Fourth, the diminished power resulting from vote dilution is not the result of the behavior of the group whose votes are diluted. It is caused not by apathy,

political ineptitude, or ignorance, but by laws or practices that operate in a discriminatory fashion when combined with bloc voting by the majority. Some groups, of course, may suffer diminished voting strength solely as a result of their own shortcomings—their inability to unite behind a candidate, for example. To say that a group's votes are diluted, however, implies that the ineffectiveness of its ballots is beyond its control, and that the causes inhere in the larger political structure.

TYPES OF DILUTIONARY MECHANISMS

At-large Elections

The situation in Taylor illustrates the problem which minorities face in an at-large election system. Most of the city's blacks and Mexican Americans are concentrated in a few neighborhoods, and in the city as a whole they are outnumbered by Anglos. If the city were divided into a number of voting districts, such that the ethnic minorities constituted a majority in their districts, and if people were allowed to vote only for a representative of their district, blacks and Mexican Americans in Taylor would have a fair chance to realize the full potential of their voting strength, measured in this case by their ability to elect candidates of their choice to the city commission. Such an arrangement is called a *ward-based* or *single-member-district* system.

But a different election method exists in Taylor. Instead of voting for candidates to represent single-member districts, the way Americans elect their congresspersons, for example, all voters in Taylor vote for all the elective positions. The evidence strongly suggests that the vast majority of the blacks and Mexican Americans usually vote for one of the minority candidates, and that they turn out to vote for them in unusual numbers. During the time period described previously there was enough internal discipline that in most of the races contested by minority candidates, only one such minority candidate ran, so as not to split the minority vote. But the Anglos bloc voted as well. Their votes went overwhelmingly to the Anglo candidates. And as the Anglo electorate was much larger than the minority electorate, their ballots deluged those of the ethnic minorities year after year. This is at-large vote dilution at its most dramatic. The minority communities were effectively denied the presence on city commission of someone whom they had chosen as their representative, and who was answerable to them. Milton Morris, in Chapter 12, assesses the measurable results to minority groups of having their own representatives in elective office. As one might expect, these results can be considerable.

When courts have found illegal vote dilution to exist, they have typically ordered a *remedy* consisting of the creation of single-member districts, on the assumption that if they are fairly drawn, they will greatly increase the chances of minority groups to elect candidates of their choice. (By examining a wide variety of evidence, George Korbel and I test this assumption in Chapter 4, and find it to be correct. Alternatives to the single-member-district remedy are discussed by Edward Still in Chapter 11.)

coalition put forward a personable candidate, Paul Sanchez, to campaign for city commissioner. Sanchez was the first minority candidate ever to run for the office. The elections were at large rather than district based. An Anglo candidate defeated Sanchez, although Sanchez received the overwhelming majority of votes cast by blacks and Mexican Americans.

Three years later, another Chicano ventured forth, again with bi-ethnic backing. Gumie Gonzales, who had spent time in the highly politicized climate of nearby Austin, brought the first sophisticated political campaign to Taylor. Gonzales used telephone banks, door-to-door canvassing, and the solicitation of endorsements from most of the ethnic preachers and lay leaders in Taylor. He lost. In 1971, Tommie Rivers, a black, ran and, by prior agreement, no Chicano entered the race. He lost. In 1972 two Chicanos and a black ran. The voter turnout that year was the largest in the city's history up to that point. None of the three was elected.

In 1974, another black ran unsuccessfully. Seven years passed without a minority candidate running for city commissioner. In 1981 Gumie Gonzales ran again. Three posts were to be filled, and there were four candidates—Gonzales and three Anglos. Gonzales came in fourth. Then, a week after the election, an incumbent commissioner resigned, and his post was filled in a special election by another Anglo. Had the incumbent resigned before the earlier election, Gonzales would have won a seat.

Between 1967 and 1974, voter turnout was 50 percent higher in contests where minorities challenged whites than in those where only Anglos contended. By all accounts, the minority community turned out in unprecedented numbers. But Anglos—rallied by the local newspaper, whose special election-day editions hinted ominously of heavy minority turnout—trooped to the polls as well.

After 1974, no Anglo candidates made overtures to the minority community. No campaign promises in return for votes were made to its leaders. Blacks and Chicanos were virtually excluded from the municipal political system. In the late 1970s, minority registration was low, and actual voter turnout, when compared to Anglo rates, even lower. The winds of change seemed to have passed the city by.

Minority leaders, however, had filed a suit in the mid-1970s arguing that Taylor's at-large elections were unconstitutional because they were instrumental in preventing minority voters from electing candidates of their choice. The suit had just been put on the trial docket in the spring of 1980 when the Supreme Court delivered its decision in *City of Mobile v. Bolden*,² in which such election systems were declared unconstitutional only if they were intentionally created to discriminate.

The decision presented serious problems to the plaintiffs in Taylor, whose at-large system had been established in 1914. The files of the local newspaper only went back to the 1930s, and official city documents relating to the charter revision shed no light on the motives for the change. After much soul searching, the plaintiffs withdrew the suit, at the cost of three years of trial preparation, dashing the minorities' lingering hopes that the U.S. Constitution might provide them relief.³

Minorities in other cities in the South and Southwest were in a comparable situation in the wake of *Bolden*. After having won the franchise at great cost, blacks

and Mexican Americans had discovered that it was a useless political tool in many situations. The Supreme Court was now informing them that the Fifteenth Amendment does not guarantee a group the right to cast an effective ballot, and the Fourteenth Amendment does so only when it can be shown that election laws were established purposely to abridge this right.

The story of Taylor illustrates aspects of a phenomenon that scholars and jurists refer to as vote dilution. It is one of three major types of electoral discrimination, in addition to disfranchisement and candidate diminution.

Disfranchisement prevents or discourages people from voting. This may be accomplished directly by prohibiting persons belonging to a particular group from casting a ballot, either by law or extralegally. In the antebellum period, in the North as well as the South, all slaves and the vast majority of free people of color were legally disfranchised. After Reconstruction, blacks were often prevented from voting by force and violence.

Disfranchisement may also be accomplished indirectly by rules and practices that on their face are not discriminatory but in fact discourage a group of potential voters from casting a ballot. For example, around the turn of the century, literacy tests, the poll tax, and similar measures removed most southern blacks from the electorate.

Today several practices still discourage minority groups from voting. They include purges of registration rolls;⁴ changing polling places on short notice (or without any notice at all);⁵ the establishment of difficult registration procedures;⁶ decreasing the number of voting machines in minority areas;⁷ and the threat of reprisals.⁸

A continuing pattern of vote dilution may also result in something like disfranchisement. If, after great effort, a minority group decides that the electoral structure prevents it from electing candidates of its choice, as in the case of Taylor, it may cease to vote. This decision may be based on a realistic assessment of the ineffectiveness of the ballot.

A second form of discrimination, *candidate diminution*, occurs when candidates representing the interests of a group of voters are prevented or discouraged from running. Even if a group is enfranchised, therefore, candidate diminution may appreciably affect its voting strength. As with disfranchisement, minority groups have been the major victims of this form of discrimination. Earlier in this century, it was unthinkable for black candidates to run for office in the South. Given the prejudice of whites and the disfranchisement of blacks, a black candidate had no chance of winning. More important, he was likely to encounter violence or threats of violence to himself or his family.

Candidate diminution still exists today. Among the better known methods are the changing of governmental posts from elective to appointive ones when a minority candidate has a chance of winning elective office;⁹ setting high filing and bonding fees;¹⁰ increasing the number of signatures required on qualifying petitions; manipulating qualifying deadlines; abolishing party primaries;¹¹ and intimidating and harassing candidates by threats, violence, cutting off credit, calling in loans and mortgages, and firing them.¹² Candidate diminution, like disfranchise-

In a number of instances these groups have hand-picked a black or Mexican American candidate as part of their slate, refusing to let minority voters have a fair chance to participate in their decision. When this occurs, the slated minority candidate typically is not popular in the minority community, and is chosen for his docility rather than for his ability to effectively represent minority voters. Once the slating group has installed him in office, he is pointed to as evidence that minority voters are represented by "one of their own," or that they have been able to elect candidates of their choice. In some cases, this ploy seems to have been instituted primarily to discourage threatened vote dilution lawsuits. It has met with varied success on this score. In *Zimmer v. McKeithen* the Fifth Circuit declared,

[W]e cannot endorse the view that the success of black candidates at the polls necessarily forecloses the possibility of dilution of the black vote. Such success might, on occasion, be attributable to the work of politicians, who, apprehending that the support of a black candidate would be politically expedient, campaign to insure his election. Or such success might be attributable to political support motivated by different considerations—namely that election of a black candidate will thwart successful challenges to electoral schemes on dilution grounds. In either situation, a candidate could be elected despite the relative political backwardness of black residents in the electoral district. Were we to hold that a minority candidate's success at the polls is conclusive proof of a minority group's access to the political process, we would merely be inviting attempts to circumvent the Constitution. This we choose not to do. Instead, we shall continue to require an independent consideration of the record.¹⁸

The role played by slating groups in four cities using at-large elections is analyzed by Luis Fraga and me in Chapter 6.

Gerrymandering

The boundaries of an entire political jurisdiction can be changed to exclude minority voters. This method is called the "Tuskegee gerrymander," after the city of Tuskegee, Alabama. During the 1950s, when the civil rights movement was raising the political consciousness of blacks throughout the South, the all-white city council of Tuskegee redrew the city's boundaries to exclude almost the entire black population, which had comprised a majority of Tuskegee's citizenry. The Supreme Court held this practice unconstitutional in *Gomillion v. Lightfoot*.¹⁹

A less extreme method is to deannex racially mixed areas of a city that contain a larger percentage of minority residents than whites. More frequently, cities annex disproportionately white areas or consolidate their population with that of other cities so that the white percentage of the total population will be increased. Although there are legitimate reasons for annexation and consolidation, the effects—often intended—are to water down minority voting strength. This gerrymander can have invidious effects in at-large or district systems.

District gerrymandering consists in changing individual district boundaries to decrease minority voting strength. Its use in the South partially explains why in 1981–82 the southern congressional delegation, consisting of 108 representatives, contained only two blacks although 20 percent of the region's population was black. Mississippi, Alabama, and Georgia, with black populations of 35 percent, 26 percent, and 27 percent, respectively, had no black congresspersons among their twenty-

two representatives. In the five southwestern states of California, Arizona, New Mexico, Colorado, and Texas, where most Mexican Americans reside, only four of the area's seventy-eight U.S. representatives (5 percent) were Hispanic, although more than 17 percent of the population was.

District gerrymandering can be dilutive if the minority proportion is kept low in all districts. If racially polarized voting exists, this strategy can prevent any minority-backed candidates from winning. An alternative is to "pack" the minority voters in one or a few districts, so they are deprived of the opportunity to elect a larger share of candidates.

Both of these forms of gerrymandering can be accomplished with districts of equal population size. A third form involves creating unequally populated districts in which the one person, one vote requirement is violated. If the overpopulated districts end up containing a disproportionately large number of minorities, their voting strength is diluted. (The complexities of dilutionary gerrymandering are described by Frank Parker in Chapter 5.)

THE THEORY OF THE SWING VOTE

It should now be obvious that a white majority unwilling to share political power with an ethnic minority has a panoply of weapons at its disposal. In many jurisdictions several are used simultaneously. For example, in Houston—the largest municipality so far required to adopt single-member districts for having violated the Voting Rights Act—an at-large system was combined with place voting and a runoff rule until 1979. The city annexed white suburbs in 1977 and 1978, which led to a Justice Department objection. Before 1955, Houston had elected three councilpersons at large and five from districts, but the district boundaries were gerrymandered so that blacks had little chance of election. The simultaneous use of several dilutionary mechanisms decreases the likelihood that a candidate preferred by the minority community will win.

It might be argued, however, that this arrangement does not preclude minorities from exercising significant electoral influence. For is it not possible for a minority bloc to determine election results even when its favored candidate cannot win?

Implicit in this question is the familiar theory of the "swing vote," which goes as follows:

1. The minority vote is often decisive to electoral outcomes; or in other words, the votes cast by the minority community are necessary to the winners' victory.
2. The winners are aware of the decisive role minority votes played in their victory.
3. Out of gratitude for their support, or a desire to win again in the future, the victorious candidates are receptive to the wishes of the minority community.
4. The victorious candidates therefore enact policies, once in office, that benefit the minority community.

The Runoff Requirement

There are a variety of rules which, used in conjunction with the at-large system, add to its dilutionary impact. Because the at-large system is dilutionary under many conditions, and because these auxiliary mechanisms derive most of their discriminatory force from accompanying a dilutionary at-large system, it is logical to classify them as dilutionary, too.

One of these is the runoff requirement. In many locales, particularly in the South and Southwest, candidates are required to obtain an absolute majority of votes (50 percent plus one) in order to win, rather than a mere plurality. If a majority is not obtained, a runoff election is required between the two top vote-getters. This device, on its face, is democratic—for what is more appropriate than requiring a majority of votes to win in a “majoritarian democracy”? As a matter of fact, however, only 20 percent of American cities have a runoff requirement.¹¹ Nor is a majority of the popular vote required in general elections for the U.S. presidency, Congress, and most state and county offices.

The mandatory runoff precludes the possibility that a minority candidate will win office with a mere plurality if the white vote splits among several other candidates. In that situation, the minority candidate is forced into a runoff against a single white, behind whom the white voters can rally to produce a majority. White officials in numerous instances have changed the election rules to require a runoff after a minority candidate came close to winning—or actually won—under a plurality rule.¹⁴

The runoff is most often encountered in an at-large system, but it is sometimes used in ward systems as well, where it can have a dilutionary impact. In 1960, a black minister in Slaton, Texas, won election to city council from a ward against five white opponents under a plurality rule. Had a runoff been required, the black minister would probably not have been elected. (Almost immediately afterwards, the council held a referendum on abolishing the ward system. Black and Mexican American voters, the major supporters of the minister, were able to defeat the measure.)¹⁵

Anti-single-shot Devices

In a pure at-large system without a majority requirement, there are typically several seats on a government body to be filled by an election, and candidates for all the seats compete against each other. Those with the most votes win. For example, if five seats on a school board are up for election, and twenty candidates declare, each voter has five votes, and the top five vote-getters are declared winners. This system enables a minority group to “single-shot.” The group decides before the election to vote only for one or a few preferred candidates, and to withhold its remaining votes. This procedure has the effect of a weighted vote system, for it deprives other candidates of votes relative to the group’s preferred candidate.

By single-shot voting, minority groups have been able partly to overcome the disadvantages of the at-large system, and elect some candidates of their choice. Responding to this strategy, white lawmakers have passed anti-single-shot or “full

slate” ordinances, invalidating ballots on which the voter has not marked all the choices to which he or she is entitled.

Another device that has the same effect is the place voting system, which also operates to prevent single-shot voting in an at-large context. Place voting requires the candidates to declare for a “place” on the ballot, such as Place 1, 2, 3, and so forth. (An equivalent arrangement is a rule requiring candidates to “represent” a particular geographic area of the city, but to be voted on at large.) The essence of the place system as an anti-single-shot device is that it gives the voter only one vote to cast per candidate per place.

The effectiveness of the single-shot procedure results from the voter’s ability not only to cast a vote for his preferred candidate, but to withhold one or more votes from that candidate’s competitors. By limiting all voters to one vote per place, the place system destroys the voter’s ability to withhold votes from his candidate’s competition.

Proponents of the place system justify it as a means of focusing the electorate’s attention on individual candidates or issues, by breaking one big contest among all candidates into several smaller contests. It is easier—so their argument goes—for the voters to learn about candidates and issues in these “mini-contests.” I know of no scholarly evidence that the place system accomplishes its ostensible purpose. On the other hand, there is ample evidence that it has purposely and successfully been implemented to preclude single-shot voting by minorities.¹⁶ From the viewpoint of racist officials, it also has the advantage of being less obviously discriminatory than the anti-single-shot law.

A third barrier to single-shot voting is staggered terms, which is a variant of the place system. Instead of holding all elections the same year, a jurisdiction may stagger them, usually over a two- or three-year period. In the extreme case, elections can be staggered so that only one position per year is filled, thus eliminating the possibility of a voter’s both casting a vote and withholding a vote, inasmuch as he is only allotted one vote to cast.

Decreasing the Size of the Governmental Body

The actual number of seats on a body such as a council or school board affects the possibility of minority electoral success.¹⁷ In a single-member-district system, decreasing the number of seats can decrease the number—and the percentage—of districts that a minority group can elect candidates from. In either single-member-district or at-large systems white voters appear to be more likely to vote for a minority group’s candidate when he or she will be one among many on a governmental body than when one among few.

Exclusive Slating Groups

In many areas a dominant nominating or slating group controls access to elective office. When it operates in a system that dilutes the votes of minorities, it can play a role in perpetuating dilution, by contributing to the illusion that dilution no longer exists.

vices. For example, fourteen were attempts to institute the place system, staggered terms, candidate residency requirements, or anti-single-shot laws. Twelve would have created multimember districts; three, runoff elections; fifteen, dilutionary annexations; and two, gerrymanders.³¹

Although numerous discriminatory responses to increased minority voting were successfully countered under the Voting Rights Act, others have succeeded for a variety of reasons. Changes in voting procedures are not always submitted to the Justice Department as required by law.³² For example, the Alabama legislature passed at least ninety acts dealing with voting in 1975, but thirty-eight were never submitted for preclearance.³³ When submissions are made by white officials, minority voters in some communities are ignorant of their right to voice their concerns about the impact of the proposed changes, and, consequently, the Justice Department may approve them without full knowledge of the facts.³⁴ Even when submissions are made and objected to, the dilutionary measures are sometimes still implemented. In Mississippi, Georgia, and South Carolina, several jurisdictions whose voting changes were objected to by the Justice Department simply ignored the objections until litigation forced them to obey the law.³⁵

In summary, the history of white response to minority enfranchisement—both after the Civil War and World War II—points to the likelihood that dilutionary devices are concentrated in the southern tier of states. Runoff elections seem to be more prevalent in the South.³⁶ The place system as well is apparently most widespread in that region.³⁷ While the number of cities with at-large elections has grown nationwide over the past thirty years, the West and the South still have a slightly higher percentage of cities employing this method.³⁸

Consequently, it is not surprising to find that blacks are most severely underrepresented on city councils in the South, and Hispanics in the South and West.³⁹ The evidence is overwhelming that this underrepresentation in the two regions with the highest concentrations of blacks and Mexican Americans, respectively, is primarily the result of dilutionary laws combined with white bloc voting. The abolition of dilutionary laws is almost always accompanied by a sharp increase in elected minority officials.⁴⁰

After hundreds of years of slavery and a century of subordination in a racial caste system, blacks in the southern states covered continuously by the Voting Rights Act since 1965 still account for a miniscule proportion of elected officials. In 1980, of 32,977 elective positions in these seven states (Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia) only 1,830 (5.6 percent) were occupied by blacks, and the proportional increase since 1965 had begun to taper off by the mid-1970s.⁴¹ The total population of these states is 25.8 percent black. In the words of the Joint Center for Political Studies, which tabulates the number of black elected officials, "unfavorable electoral arrangements like at-large elections and some racial gerrymandering are major obstacles to further rapid gains by blacks in winning elective office in the South."⁴²

If 5.6 percent of the elected officials in these seven states is black, compared with 25.8 percent of the population, then about one-fifth as many blacks hold office as would be likely in a nonracist society. Suppose that the shoe were on the other foot: the proportion of white officials were reduced to only one-fifth the number

Table 1-1. Blacks as percentage of population and elected officials in southern states covered under the preclearance provisions of the Voting Rights Act, July 1980

State	Population percent black 1980	Total officials	Elected officials	
			Number	Black officials Percent of total
Alabama	25.6	4,151	238	5.7
Georgia	26.8	6,660	249	3.7
Louisiana	29.4	4,710	363	7.7
Mississippi	35.2	5,271	387	7.3
North Carolina ¹	22.4	5,295	247	4.7
South Carolina	30.4	3,225	238	7.4
Texas	12.0	24,728	196	0.8
Virginia	18.9	3,041	124	4.1

¹Statewide data, including the forty counties subject to preclearance.

Source: U.S. Commission on Civil Rights, *The Voting Rights Act: Unfulfilled Goals* (Typescript edition), Washington, D.C., U.S. Government Printing Office, 1981, p. 31.

that one would expect on the basis of their population percentage. The proportion of white officials would drop from the present 94.4 percent to about 15 percent. Surely whites in that instance would interpret this as massive and intolerable exclusion.

In the eight Southern states now covered under the preclearance provision of the Voting Rights Act, the black population in 1980 ranged from 12.0 percent in Texas to 35.2 percent in Mississippi. (See Table 1-1.) The highest percentage of black officials was 7.7 in Louisiana, which had a total black population of 29.4 percent.

The situation of Mexican Americans in the Southwest is comparable to that of blacks in the South. They have historically been the victims of violence, state-sanctioned segregation in schools and housing, Jim Crow practices, and job discrimination. Today they are still widely excluded from effective political participation. Of all persons who served as members of Texas city councils from 1968 to 1978, less than 6 percent were Mexican Americans, although Texas had a Spanish-origin population of 21 percent in 1980. In South Texas, where Mexican Americans comprise a majority of the population, 31.7 percent of city council members during this period belonged to that ethnic group. In reporting these figures, the Texas Advisory Committee to the U.S. Commission on Civil Rights remarked, "It is significant . . . that even today 179 (83.6 percent) of the 214 larger cities in Texas have at-large elections for city council."⁴³

The figures in Table 1-2 reveal the sharp underrepresentation of Hispanics in elective office, compared to their percentage of the population, in 1979-80. Only in Arizona did the percentage of Hispanic officials come anywhere close to the percentage of the Hispanic population. In Texas and California, Hispanics were underrepresented by a factor of about three.

The underrepresentation of blacks and Hispanics is obscured by the occasional election of a minority mayor in a large city, which is often interpreted as a straw in the wind. Reactions to Henry Cisneros' success in San Antonio, Maynard

The first assumption is by no means necessarily correct. In Houston, blacks in recent years have constituted about a quarter of the population, and in city elections their turnout rate has been similar to that of whites. Yet the margin of victory between 1955 and 1975 among winning council candidates under the at-large system was typically so great that the black vote, even when unified, was able to affect the outcome of only four council races out of eighty-eight. In other words, the black voters could have stayed home in eighty-four races, and if the whites' voting patterns had remained unchanged, the same candidates would still have been elected. Between 1955 and 1981 in Abilene, Texas—a city with a combined black and Mexican American population of about 18 percent during this period, the minority bloc under the most optimistic assumptions could have made the difference in election outcomes for only fifteen of sixty-eight winners. Since 1970, the city's minorities could have affected the outcome in only three of twenty-eight cases.

Further, in many instances, it is impossible for the winners to know precisely the extent of their minority support. In many smaller jurisdictions all voters cast their ballot in a single precinct. A postelection scientific sample survey may be required to determine how the various ethnic groups voted. In other cases, extreme racial heterogeneity of voting precincts may increase the difficulty of determining minority support through an analysis of voting returns.

Even when the first two assumptions about the swing vote are correct, winning candidates do not always pay attention to minority interests after the election. The reason is that white votes also "made a difference," because they, too, were necessary if not sufficient for victory. Indeed, more white votes may have been cast for the winning candidate than black votes. Thus, where there is strong racial polarization, the postelection pressure from white constituents of a winner may be strong enough to minimize or nullify minority pressure on him. In recent city elections in Mobile, Alabama, for example, two commissioners who could not have won without black votes specifically disavowed the notion that blacks had been "decisive" in their election.²⁰

In summary, the swing vote theory may sometimes apply. But where minority voters have yet to elect candidates of their choice, and where the racial polarization of attitudes is intense, the swing vote will probably not provide minorities much leverage. Under these circumstances, the minority population is excluded from meaningful political participation. Although its members possess the right to vote, they remain outsiders, unable to use their votes to bargain effectively.

THE GEOGRAPHY OF DILUTION

The history of the adoption of dilutionary practices suggests that they are most often found in the South and Southwest, the areas of the country with the highest proportion of blacks and Hispanics, respectively. (Texas, with its large number of both minorities, is part of both the South—as a former Confederate state—and the Southwest.)

In the postbellum South, as J. Morgan Kousser relates in Chapter 2, at-large city elections "clearly motivated by racial purposes" appeared as early as the first

elections in which blacks were allowed to vote. Atlanta adopted them in 1868. Other cities followed suit. Racial gerrymandering was also widespread then, as were numerous other discriminatory devices.

At-large elections and small elective governing bodies were an integral feature of the city commission form of government and usually characterized the city manager form as well. Both types of "reform" government were first implemented in the South and widely adopted elsewhere during the Progressive Era (1893–1917).²¹ The place voting system was introduced in Texas as a feature of the Terrell Election Law of 1905—the state's major disfranchising legislation.²² The Terrell Law, whose ostensible purpose was to "purify the ballot," codified the laws governing the newly instituted poll tax and legalized use of the white primary. It was widely hailed at the time as "progressive" legislation.

Although the Progressive movement is still portrayed in many civics textbooks as motivated by high-minded "good government" reformers, many of the changes in election rules were aimed at diminishing the clout of the working classes and ethnic and political minorities, and they usually had that effect.²³ As C. Vann Woodward has noted, the leaders of Progressivism in the South were also at the forefront of the disfranchising movement.²⁴

Although Progressives often adopted dilutionary measures after disfranchising legislation had been passed in the southern states, it would be a mistake to infer, as the Supreme Court did in *Balden*, that these measures were therefore not racially motivated. "In fact," writes Kousser, "throughout the South, whites in the 'progressive era' feared that their 'solution' to the 'Negro problem' might unravel."

Charles Beard, the noted contemporary historian and political scientist, stated in his 1912 textbook on municipal government that election at large "substantially excludes minority representation."²⁵ Nonetheless its adoption has continued to the present. The rise of the civil rights movement following World War II, and the increasing enfranchisement of blacks and Mexican Americans in the 1960s, intensified its adoption along with other dilutionary devices. Scholars of southern politics remarked on the shift from wards to districtwide elections at the time, as did the U.S. Commission on Civil Rights.²⁶ One of the more extreme instances of this response occurred in Georgia. From 1964, on the eve of passage of the Voting Rights Act—which gave blacks in that state the right to vote on a mass scale for the first time since Reconstruction—to 1975, twenty county governments and county boards of education switched from district to at-large elections.²⁷ Earlier, in 1964, the Georgia legislature had instituted majority vote and place requirements for all at-large county commission elections in the state.²⁸ In its first session following passage of the Voting Rights Act, the Mississippi legislature enacted laws requiring and allowing members of county boards of supervisors and county school boards, previously elected by wards, to be elected at large.²⁹ In Texas, legislation passed in the 1950s and 1960s allowed hundreds of school districts to adopt the place system for the first time.³⁰

In Alabama, the Justice Department objected to seventy-one proposed changes in election procedures or voting-related matters between 1969 and 1980 on the grounds that they discriminated against minorities. Most involved dilutionary de-

By 1975 Section 5 applied to all or part of twenty-two states, as it does today. It has been interpreted broadly to cover all proposed changes in election laws, including relatively minor ones. Between 1965 and 1982 approximately 35,000 voting changes were submitted for preclearance, and 815 were found objectionable, many because they were dilutionary.⁵² Georgia received the most objections (226), followed by Louisiana (136) and Texas (130), which has been covered by Section 5 only since 1975.⁵³ These statistics suggest that Section 5 has played a significant role in curtailing attempts at dilution and other forms of vote discrimination.

There are three serious limitations to Section 5 as a weapon for attacking dilution, however. First, it does not apply to the entire United States. Second, voting laws and practices adopted prior to the act, or prior to various jurisdictions' inclusion under Section 5, are not subject to challenge unless they were changed—in ways that render them discriminatory still—after the act went into effect.

For example, suppose that a redistricting in a city diluted minority votes when it was implemented in 1960, and it continues to dilute them today. So long as the boundaries remain in effect, and no attempts are made by local officials to change the current electoral arrangements, minority group members cannot use Section 5 to challenge the dilutionary gerrymander.

The third limitation of Section 5 can be illustrated by carrying the gerrymander example a step further. Suppose that today the city officials decide to redraw the 1960 district boundaries, with the effect that they are still dilutionary. Does Section 5 require that the new districts be drawn so that minority votes are no longer diluted? Or does it just require that the new boundaries not cause greater dilution than the old ones?

The Supreme Court, in *Beer v. United States*, held that a redistricting plan that is not actually "retrogressive" in its impact on minority voting strength does not violate Section 5 unless it otherwise violates the Constitution.⁵⁴ According to one student of the law, the retrogression test "has the serious consequence of rewarding those jurisdictions with a history of the worst dilution of black electoral strength."⁵⁵ The exact scope of the *Beer* rule is not always clear,⁵⁶ especially in light of the 1982 amendments to the Voting Rights Act, but to the extent that remedies to dilutionary changes allowed under Section 5 are subject to the retrogression test, Section 5's cutting edge is blunted.

Because of these limitations, many discriminatory practices could only be challenged prior to 1982 through lawsuits in local jurisdictions as violating the Fourteenth and Fifteenth Amendments. This route was sometimes effective, but as one experienced civil rights lawyer described the situation, "It has also proven to be burdensome and time consuming, and results have often been inconsistent and erratic."⁵⁷

The burden for plaintiffs in these suits was never easy. In *White v. Regester*, decided in 1973, the Supreme Court held that a successful constitutional challenge must provide:

evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political process and to elect legislators of their choice.⁵⁸

Zimmer v. McKeithen, a circuit court opinion following *White*, said that unconstitutional dilution could be demonstrated by proving a number of different facts, such as a history of official discrimination, a low proportion of minority group members elected to office, depressed socioeconomic status of minorities, elected officials' lack of responsiveness to the needs of a minority group, a majority vote requirement, lack of access to candidate slating, anti-single-shot requirements, large district size, a tenuous state policy favoring at-large voting, or the absence of places (numbered posts) designated by geographic area.⁵⁹ No single factor or specific subgroup could in itself be determinative of a constitutional violation, the court said. Each trial judge would have to assess the "totality of circumstances" and reach a conclusion after considering all evidence.

Obviously, the *Zimmer* ruling gave much discretion to the courts in deciding dilution cases. It also placed a great burden on plaintiffs, who had no way of knowing which of the "*Zimmer* factors" would turn out to be most important: consequently, they had to collect evidence that addressed each one of them. Plaintiffs' lawyers and experts—sociologists, historians, political scientists, and statisticians—were sometimes forced to spend literally thousands of hours accumulating data.

In 1980, the Supreme Court's *Bolden* decision changed what had been a formidable burden of proof for plaintiffs to an impossible one in many instances.

Blacks in Mobile, Alabama, had sued the three-man city commission in 1975, charging that the at-large system in place since 1911 unconstitutionally diluted their vote. In a city that was one-third black, none had been able to win election to the commission, which was perceived by plaintiffs as unresponsive to the needs of the black community. The trial court, applying the *Zimmer* standards, decided in favor of the plaintiffs. The Fifth Circuit Court of Appeals sustained the trial court's decision, but the Supreme Court reversed it. In a sharply divided opinion, a plurality of justices held that the Fifteenth Amendment guarantees only the right to register and vote; it does not protect against dilution. The Fourteenth Amendment, on the other hand, only protects against dilution when it can be shown that the diluting mechanism was adopted for racially discriminatory purposes. The presence of the *Zimmer* factors, the court held, was insufficient to prove such purposes. The case was remanded to the Mobile court, which had the task of ascertaining whether the voting system was adopted or maintained "in part 'because of,' not merely 'in spite of,' its adverse racial effects."⁶⁰ In 1982—seven years after the suit was originally heard—the *Mobile* court once more found in the plaintiffs' favor, after listening to historians discuss events in the nineteenth and twentieth centuries leading to the adoption of the city's commission form of government in 1911.

The new trial alone took 6,000 hours of lawyers' time, along with 7,000 hours for researchers and expert witnesses; cost \$120,000 not counting lawyers' fees; and lasted two and a half weeks, during which the most minute change in city government from 1819 to the present was explored.⁶¹ (The complex racial forces behind Mobile's at-large system are described in Chapter 3 by Peyton McCrary, a historian in the case.)

The Mobile plaintiffs were more fortunate than many. Their efforts were financed in part by the NAACP.

Table 1-2. Hispanics as percentage of population and elected officials, by state, 1979-1980

State	Population percent Hispanic 1980	Elected officials		
		Total officials	Number	Percent of total
Arizona	16.2	1,547	205	13.2
California ¹	19.2	7,550	496	6.6
Colorado ²	11.7	3,143	172	5.5
Texas	21.0	14,880	933	6.3

¹Statewide data, including the three counties subject to preclearance.

²Statewide data, including one county subject to preclearance.

Source: U.S. Commission on Civil Rights, *The Voting Rights Act: Unfulfilled Goals* (Typescript edition), Washington, D.C., U.S. Government Printing Office, 1981, p. 38.

Jackson's and then Andrew Young's in Atlanta, Ernest Morial's in New Orleans, and Richard Arrington's in Birmingham exemplify this pattern. It is tempting to infer from their election that dilutionary barriers are disappearing.

But these are the exceptions that prove the rule. In each of the cases just mentioned, the city's minority population was near 50 percent, and, consequently, few white votes were needed to put the minority candidate over the top. When Maynard Jackson became mayor of Atlanta in 1974, the city was over 50 percent black. When Ernest Morial, in 1978, and Richard Arrington, a year later, won a mayor's post, New Orleans and Birmingham had black populations of more than 45 and 55 percent, respectively. Henry Cisneros' victory in 1981 occurred in a city whose Hispanic population was 54 percent.

These cases underscore the fact that white bloc voting against minority candidates is so intense in the South and Southwest that an extremely large minority population is typically necessary for the minority community to elect candidates of its choice under at-large conditions. In 1981, for example, twenty Alabama municipalities had black mayors. Except for Birmingham (pop. 284,000) and Prichard (39,541), these were small towns or hamlets, ranging in population from 95 to 11,028. In only one—Franklin, with a population of 133—did blacks make up less than one-half the total. In the remaining nineteen, the average black population was 82 percent.⁴⁴ Of the 147 black elected council members in Alabama municipalities in 1981, two-thirds were in cities with a majority black population,⁴⁵ and some of the remaining black council members were elected from wards.

Although most of the elected minority officials in the South and Southwest appear to be from jurisdictions that are heavily black or brown, a minority concentration does not always lead to minority representation. In 1981 there were seventy-six Alabama towns between 25 and 50 percent black in which no blacks sat on city council. There were another twenty-four towns between 50 and 86 percent black without any black council representation whatsoever.⁴⁶ In Texas, there were 109 school districts in 1980 with a Chicano population above 50 percent in which no Chicano held an elective school board post.⁴⁷ In Mississippi, eight of twenty-two predominantly black counties had no black representation on their county boards of supervisors in 1981; blacks made up a majority on such boards in only two of the twenty-two.⁴⁸ While the lower median age of blacks and Mexican

Americans, combined with their typically lower turnout rates, may account for part of this underrepresentation, vote dilution is probably the main culprit.

When minorities are faced with almost total exclusion from the ordinary channels of political participation and deprived of any alternative means of exerting influence, their voter turnout and candidacy rates tend to drop.⁴⁹ In Abilene, Texas, minority candidates first ran for municipal office in 1970. In spite of several tries during the decade, none was able to win election without the endorsement of a powerful slating group dominated by the white Anglo business "establishment." By 1979, the black and brown communities had virtually stopped participating in electoral politics. In city council elections that year, only seventy-six Mexican Americans and thirty-one blacks voted, out of a minority population of approximately 19,000.⁵⁰

The case of Abilene points up a particularly disturbing development. In southern and southwestern communities, the passage of the Voting Rights Act brought about an initial surge of political participation by minorities, many of whom were able for the first time in their lives to overcome barriers to the voting and registration process. Dilution, however, has convinced newly enfranchised voters that the old system of racial dominance is still in place. Minorities can now vote—they just cannot cast an effective vote.

PROSPECTS FOR THE FUTURE

The future of vote dilution remains unsettled. While local minority leaders, attorneys, concerned citizens and national civil rights groups have worked diligently since the 1960s to eradicate it, conservative officials have attempted to maintain the status quo.

The three weapons available to minorities before July of 1982, when the Voting Rights Act was significantly amended, were the Fourteenth and Fifteenth Amendments to the Constitution, and Section 5 of the Voting Rights Act. (Section 2 of the act made illegal the denial or abridgement of the right of any United States citizen to vote on account of race, color, or inclusion in a minority language group. It also allowed citizens to challenge discriminatory laws or practices in federal court. However, proving vote dilution under Section 2, modelled after the Fifteenth Amendment, was equivalent to proving it under the Constitution.)

Section 5 was (and remains) by far the cheapest and easiest way to attack dilution. It gives the attorney general or the United States District Court for the District of Columbia the authority to review proposed electoral changes in covered jurisdictions, and either to disallow those which are discriminatory or to require other changes that compensate for their effects. Section 5 is especially important because, in the words of civil rights attorney Barbara Phillips, it provides "a quick, efficient way to halt new efforts in covered jurisdictions to discriminate against minority voters."⁵¹ Its usefulness is analyzed in Chapter 8 by Lani Guinier and former Assistant Attorney General for Civil Rights Drew Days. Problems with its enforcement are addressed in Chapter 9 by Howard Ball, Dale Krane and Thomas P. Lauth.

creature. Its enforcement strategies are inextricably linked to the president's policy priorities. Aggressive enforcement of Section 5, the most efficient way to fight new efforts to dilute votes in covered jurisdictions, depends on the enthusiasm and commitment of those charged with the duty of safeguarding minority voting rights—the Attorney General and the Assistant Attorney General for Civil Rights.

This truth has never been more obvious than during the Reagan administration, whose wide-ranging assault on the institutions created over the past quarter century to secure the rights of minorities in the United States has been devastating. The failure of Assistant Attorney General William Bradford Reynolds to aggressively enforce voting rights is particularly noteworthy. A review by the Washington Council of Lawyers of the Justice Department's Section 5 enforcement during Reagan's first twenty months in office concluded that "the difference in the level of activity is startling. . . . The [Voting] Section has simply not carried out the bipartisan commitment to vigorous enforcement of voting rights which has characterized its own past activities."⁶⁵ At this writing, the federal courts have struck down as dilutionary several redistricting plans—including one involving congressional districts—that Reynolds had approved under Section 5.

It would be a mistake to minimize the future potential of Sections 2 and 5 of the Voting Rights Act, as well as the Fourteenth and Fifteenth Amendments, as levers to pry open the tightly shut political systems of the South and Southwest. Yet the history of racial minorities in America, and in those areas in particular, is a troubling reminder of the the skill, the resourcefulness, the fierce tenacity, and, above all, the patience of privileged groups in fighting to uphold the social and political structures that guarantee their dominance.

NOTES

1. For accounts of similar disparities in city services, see Lawyers' Committee for Civil Rights Under Law, *Voting in Mississippi: A Right Still Denied* (Washington, D.C.: September 1981), 102–111.
2. 446 U.S. 55 (1980).
3. The facts about Taylor were gathered through the author's personal observation and interviews, and material in the files of the Legal Aid Society of Central Texas, Austin, Texas.
4. For recent examples of this in Alabama, see Jane Reed Cox and Abigail Turner, *The Voting Rights Act in Alabama: A Current Legal Assessment* (Mobile, Ala.: Legal Services Corporation of Alabama, 1981), 7–14.
5. On the use of such practices in Mississippi, see Lawyers' Committee, *Voting in Mississippi*, 6–7.
6. *Ibid.*, 14. For example, voter registration for persons living in Sunflower County, Mississippi, involves a round trip journey of one hundred miles to the county courthouse at Indianola, because registration is not allowed at precinct polling places or other locations.
7. The recent use of this practice in Texas is described in Jeannie Stanley, "Cultural Politics in an East Texas Community" (Paper delivered to the annual meeting of the Southwestern Political Science Association, San Antonio, 20 March 1982), 28.
8. For such practices in Mississippi, see Lawyers' Committee, *Voting in Mississippi*, 12–13.
9. Cox and Turner, *Voting Rights Act in Alabama*, 20, document this practice in Alabama. Lawyers' Committee, *Voting in Mississippi*, 82, describes this practice in Mississippi. For its use in Georgia, see Laughlin McDonald, *Voting Rights in the South: Ten Years of Litigation Challenging Continuing Discrimination Against Minorities. A Special Report from the American Civil Liberties Union* (Atlanta, Georgia, 1982), 46–50.
10. McDonald, *Voting Rights*, 111–112.
11. See Lawyers' Committee, *Voting in Mississippi*, 5, regarding the use of these measures in Mississippi.
12. Cox and Turner, *Voting Rights Act in Alabama*, 14, document the use of harassment in Alabama as late as 1981. For instances in Georgia, North Carolina, Mississippi, and South Carolina, see U.S. Commission on Civil Rights, *The Voting Rights Act: Unfulfilled Goals*, Typescript edition (Washington, D.C.: U.S. Government Printing Office, 1981), 146–148.
13. Robert R. Alford and Eugene C. Lee, "Voting Turnout in American Cities," *American Political Science Review* 62 (Sept. 1968): 799.
14. For an account of such a change in Houston, see Chandler Davidson, *Biracial Politics: Conflict and Cooperation in the Metropolitan South* (Baton Rouge: Louisiana State University Press, 1972), 65–66. See also McDonald, *Voting Rights*, 43–46.
15. Herbert H. Werlin, "The Victory at Slaton," *The Texas Observer* (9 September 1960), 5.
16. Roy E. Young, *The Place System in Texas Elections* (Austin: Institute of Public Affairs, the University of Texas, 1965), 21–22. While Young cautions against attributing the adoption of the place system solely to racial motives, he argues that "fear of one-shot voting has caused several Texas communities to adopt the place system." The Supreme Court in *City of Rome v. United States* 446 U.S. 156 (1980) affirmed the lower court's conclusion that numbered posts and residency provisions prevent blacks from electing candidates by single-shot voting.
17. Delbert Taebel, "Minority Representation on City Councils," *Social Science Quarterly* 59 (June 1978): 151.
18. 485 F.2d 1307.
19. 364 U.S. 339 (1960).
20. *Mobile Press*, 17 August 1981 p. 1, sec. D.
21. Standard accounts of the racial and class overtones of progressivism include James Weinstein, *The Corporate Ideal in the Liberal State, 1900–1918* (Boston: Beacon Press, 1968), chap. 4, and "Organized Business and the City Commission and Manager Movements," *Journal of Southern History* 28 (May 1962): 166–182; Samuel P. Hays, "The Politics of Reform in Municipal Government in the Progressive Era," *Pacific Northwest Quarterly* 55 (October 1964): 152–181; and Bradley Robert Rice, *Progressive Cities* (Austin: University of Texas Press, 1977). For an excellent account of progressive efforts at black disfranchisement in the South, see J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880–1910* (New Haven and London: Yale University Press, 1974), 229–231, 236–237, 260–261.
22. Young, *Place System*, 2–3.
23. Weinstein, "The City Commission and City Manager Movements," and Hays, "Politics of Reform." See J. Morgan Kousser, "Progressivism—For Middle-Class Whites Only: North Carolina Education, 1880–1910," *The Journal of Southern History* 46 (May 1980): 169–194 for an assessment of the effects of Progressivism in North Carolina. His finding is that Progressive disfranchisement of blacks led to greater discrimination against them in school expenditures and tax burdens. Similar findings for Louisiana are reported in Robert R. Margo, "Race Differences in Public School Expenditures," *Social Science History* 61 (Winter 1982): 9–34.
24. *The Strange Career of Jim Crow*, 2nd revised ed. (New York: Oxford University Press,

abled historians to be hired to research in detail the city's past. The Justice Department entered an amicus brief on behalf of plaintiffs, and brought its considerable resources to their aid. In addition, much had been written on Alabama and Mobile by historians, and relevant issues of newspapers and archival material were available.

The problems facing plaintiffs in Taylor, Texas, described at the beginning of this essay, were far more typical of those engendered by the Supreme Court decision in *Bolden*. Their legal aid lawyers were working on a limited budget. No relevant historical writings on the city existed. And the key archival materials—including the back issues of the newspaper—were missing. Frank Parker, a leading voting rights attorney, succinctly assessed the implications of the *Bolden* ruling in such jurisdictions:

In the absence of a 'smoking gun,' victims of discriminatory laws must resort to evidence producing what courts and legal scholars have called 'inferences,' 'suspicions,' and 'likelihoods' of discriminatory intent. Here, judges frequently disagree, sometimes strenuously, on what constitutes sufficient proof. The nine Justices of the Supreme Court in the Mobile case itself were unable to agree on the proper legal standard for proving discriminatory intent. And if a majority of the Justices can't agree on how discriminatory intent is to be proved, how does anyone know what is required?⁶²

Bolden was decided some two years before the Voting Rights Act's nonpermanent features, including Section 5, were scheduled to expire in August of 1982. By early 1981, civil rights forces had begun to lobby for an amendment to Section 2 of the act—a permanent feature—that would overcome the burden of proving intent.

The amendment would render illegal any electoral device whose intent or result denied or abridged the voting rights of racial or language minorities. The House of Representatives overwhelmingly passed it in September of 1981. And in spite of strong initial opposition by President Reagan, his attorney general, William French Smith, and Judiciary Committee Chairman Strom Thurmond of South Carolina, a similar bill was passed by the Senate in the summer of 1982, after the civil rights lobby, in a compromise with opponents of the measure, agreed to a twenty-five-year extension of the nonpermanent features of the act instead of making those features permanent, as the House bill had proposed. The result was a strengthened Voting Rights Act that should overcome the difficulties imposed by *Bolden*. (Armand Derfner provides in Chapter 7 an insider's account of events leading up to the passage of the amendment.)

Two days after the president signed the extension of the act, the Supreme Court, in *Rogers v. Lodge*,⁶³ eased the evidentiary standards in *Bolden* for proving intent to discriminate. In a six to three decision, the court ruled that circumstantial evidence, rather than a so-called smoking gun, was sufficient to prove intentional dilution in cases where unconstitutional abridgement of voting rights was alleged.

While these developments were applauded by foes of dilution, they did not represent a major step forward so much as a return to the status quo before *Bolden* had been rendered, for the language of *White* and *Zimmer* on evidentiary standards

had been incorporated into the revision of Section 2 or figured prominently in its legislative history.

To civil rights lawyers familiar with the difficulties of proving dilution even under the more lenient *Zimmer* standards, this was hardly a cause for rejoicing. The requirement that the courts address the "totality of circumstances" still necessitates collecting and analyzing great quantities of data to prove not only the existence of diminished voting power as a result of dilutionary laws and racial bloc voting—what seems to many observers to be the core elements in a dilution case—but also the local history of race relations in a community, the socioeconomic status of minorities compared with the majority, governmental nonresponsiveness in numerous areas of city services, the existence of unfair slating group practices, and patterns of election finance and campaign practices, among other things. Furthermore, the lack of guidance by the wording of the new Section 2 or by the courts on the relative importance of these complex factors continues to make any court challenge based on Section 2 an arduous, expensive, time-consuming, and ultimately risky enterprise.

What is badly needed, as James Blacksher and Larry Menefee argue in Chapter 10, is a much narrower set of evidentiary standards of dilution, which a) in the name of fairness conform in simplicity to the criteria of proof required in *Reynolds v. Sims*,⁶⁴ the major vote dilution case of the 1960s; b) are easily applied; and c) accord far less discretion to trial judges than does the "totality of circumstances" criterion.

This may sound like a tall order, if not a utopian one. But the carefully reasoned and elegant analysis of Blacksher and Menefee, plaintiffs' counsel in *Bolden* and its companion school board case, leads to an alternative standard of proof for unconstitutional dilution in cases that involve at-large elections which, if accepted, might well achieve all three goals. It is impossible to summarize their argument briefly here, but the essence of the proposal is worth quoting in full:

An at-large election scheme for a state or local multirepresentative body is unconstitutional where jurisdiction-wide elections permit a bloc-voting majority, over a substantial period of time, consistently to defeat candidates publicly identified with the interests of and supported by a politically cohesive, geographically insular racial or ethnic minority group.

It appears unlikely that the Supreme Court will be inclined to give this alternative serious consideration. If, against all odds, it were to do so, it is not clear how it would reconcile its intent standard enunciated in both *Bolden* and *Rogers* with what, in the Blacksher-Menefee formulation, is clearly a results standard. (On the other hand, Blacksher and Menefee demonstrate that the new intent standard, which the court is now requiring of minority plaintiffs, conflicts with the results standard of *Reynolds*, where whites—including suburban Mobilians—were the plaintiffs. So the court's problem is not whether but how to resolve the inconsistencies the intent standard has given rise to.) In the absence of a constitutional solution, Section 2's "totality of circumstances" criterion will continue to render vote dilution litigation expensive and inefficient.

What are the prospects for the future effectiveness of Section 5? Perhaps even more than the courts, the Justice Department is in significant respects a political

- 1966). 91. See also Dewey W. Grantham, "The Progressive Movement and the Negro," *South Atlantic Quarterly* 54 (October 1955): 465.
25. Rice, *Progressive Cities*, 78.
 26. Everett Carl Ladd, *Negro Political Leadership in the South* (Ithaca: Cornell University Press, 1966), 103; U.S. Commission on Civil Rights, *Political Participation* (Washington, D.C.: U.S. Government Printing Office, 1968), 21-25.
 27. *Election Law Changes in Cities and Counties in Georgia, May 1976*. Voter Education Project Report, Atlanta, Georgia, 1976. 6-8.
 28. Georgia Code, Section 34-1513 (1964) and Section 34-1015 (1964).
 29. Lawyers' Committee, *Voting in Mississippi*, 32-33.
 30. Young, *Place System*, 11-12. For similar trends in North Carolina, see Steve Suits, "Blacks in the Political Arithmetic after *Mobile*: A Case Study of North Carolina," in National Conference on Voting Rights Issues, *The Right to Vote* (New York: Rockefeller Foundation, 1981), 75.
 31. Cox and Turner, *Voting Rights Act in Alabama*, 19-21; for similar data on Mississippi, see Lawyers' Committee, *Voting in Mississippi*, v-vi, and 5.
 32. Cox and Turner, *Voting Rights in Alabama*, 21; McDonald, *Voting Rights*, 59-63.
 33. Cox and Turner, *Voting Rights in Alabama*, 21.
 34. *Ibid.*, 21-22.
 35. Lawyers' Committee, *Voting in Mississippi*, 5; McDonald, *Voting Rights*, 58-59.
 36. V. O. Key, Jr., *Southern Politics in State and Nation* (New York: Alfred A. Knopf, Inc., Vintage Edition, 1949), 417.
 37. Young, *Place System*, 22. Young, whose work is the only systematic treatment of the place voting system, refers to "the apparent concentration of the place system in the South," which "may be partially explained by its concern with attempts to limit the Negroes' political strength." (22) In Texas, "there seems no doubt that the growing political power of Negro and Latin-American citizens . . . has resulted in efforts to dilute or offset it. The place system has been one weapon available to those seeking this aim." (21) Young adds: "An informant well acquainted with Texas school districts believes that the recent trend toward use of the place system is found mostly in East and South Texas districts. In these sections of Texas is found the greatest concentration of Negroes and Latin-Americans. The 1963 statute granting a large number of school districts permission to use this mode of election was also co-sponsored by three South Texas legislators." (21)
 38. International City Managers Association, 1974 Survey: "Municipal Elections Systems: GOVT/74" (Washington, D.C.).
 39. Albert K. Karnig, "Black Representation on City Councils: The Impact of District Elections and Socio-economic Factors," *Urban Affairs Quarterly* 12 (December 1976): 229; Delbert Taelbe, "Minority Representation," 146.
 40. U.S. Commission on Civil Rights, *The Voting Rights Act: Unfulfilled Goals*, 107-108; Chandler Davidson and George Korb, Chapter 4 below.
 41. Joint Center for Political Studies, *National Roster of Black Elected Officials 1980* 10 (1981), 7.
 42. *Ibid.*
 43. Texas Advisory Committee to the United States Commission on Civil Rights, *Texas: The State of Civil Rights* (Washington, D.C.: U.S. Government Printing Office, 1980), 47.
 44. Cox and Turner, *Voting Rights in Alabama* 39.
 45. *Ibid.*, 44-45.
 46. *Ibid.*, 46-48.
 47. Rolando L. Rios, "The Voting Rights Act: Its Effect in Texas" (Paper prepared under the auspices of the Southwest Voter Education Project, San Antonio, Texas, for delivery to the Special Committee on Election Law and Voter Participation of the American Bar Association, Washington, D.C., 9-10 April 1981), 4.
 48. Lawyers' Committee, *Voting in Mississippi*, iv.
 49. One study suggests that the obverse is also true: that minority turnout in primaries, though not in general elections, increases when cities change from at-large to district systems. See Peggy Heilig and Robert J. Mundt, "Do Districts Make a Difference?" *The Urban Interest* 3 (Spring 1981), 62-75.
 50. Data collected by the author.
 51. Barbara Y. Phillips, *How to Use Section 5 of the Voting Rights Act* (Washington, D.C.: Joint Center for Political Studies, Third Edition, 1983), 2.
 52. McDonald, *Voting Rights*, 17.
 53. *Ibid.*
 54. 425 U.S. 130 (1976). For a discussion of *Beer* see Richard L. Engstrom, "Racial Discrimination in the Electoral Process: The Voting Rights Act and the Vote Dilution Issue," in *Party Politics in the South*, ed. Robert P. Steed, Lawrence W. Moreland, and Tod A. Baker (New York: Praeger Publishers, 1980), 207-209.
 55. Gayle Binion quoted in Engstrom, "Racial Discrimination," 209.
 56. Hiroshi Motomura, "Preclearance Under Section 5 of the Voting Rights Act," *North Carolina Law Review* 61 (1983).
 57. McDonald, *Voting Rights*, 68.
 58. 412 U.S. 755, 766 (1973).
 59. 485 F. 2d 1297 (5th Cir. 1973) (*en banc*).
 60. McDonald, *Voting Rights*, 74.
 61. "VRA Extension in the Senate: A Fact Sheet," *Focus* 10 (February 1982), 5.
 62. "Op-Ed," *New York Times*, 5 February 1982.
 63. 458 U.S. 613 (1982).
 64. 377 U.S. 533 (1964).
 65. Civil Rights Task Force, "Reagan Civil Rights: The First Twenty Months" (Washington, D.C.: The Washington Council of Lawyers, Mimeographed, 1983), 74, 79.