42 La. L. Rev. 851

Louisiana Law Review
Spring, 1982

Katharine I. Butler[a1]

Copyright 1981 by the Louisiana Law Review; Katharine I. Butler

CONSTITUTIONAL AND STATUTORY CHALLENGES TO ELECTION STRUCTURES: DILUTION AND THE VALUE OF THE RIGHT TO VOTE

Introduction

> *The importance of black participation in the politics, black leadership in the democratic process, and the contribution blacks can make to urban solutions all become academic if black hopes are cut off at the political pass by tactical devices. This is true whether the denial of blacks is calculated . . . or accidental, even incidental . . . .*

Richard Hatcher, Mayor[1]

Gary, Indiana, 1969

When Mayor Hatcher wrote the above words, he was one of only a handful of blacks occupying major elected positions in the United States. In the years that followed, black political participation increased visibily. The gains include a substantial increase in the number of black elected officials, and a recognition of blacks as an important interest group in national politics. Gone, ideally forever, are the days of white primaries, poll taxes, and grandfather clauses. Officially sanctioned racial restrictions on registration and balloting have not been prevalent even in the Deep South for years.

However, access to the ballot does not always provide meaningful political participation for blacks. Under certain circumstances, the presence of the "'tactical devices"' assailed by Mayor Hatcher can mean that even though blacks are allowed to register and vote, their votes will have no impact on the outcome of election contests. These devices are elements of the election structure and include at-large or multi-member election districts, majority vote, post, and full-slate requirements. With the exception of the latter, all of these devices serve legitimate state goals. Nevertheless, their presence can mean that the combined votes of even a substantial number of black voters will be cancelled out or diluted. Lawsuits attacking election systems that cancel out minority voting strength are called "dilution suits."D'

On the same day of the 1980 term, the United States Supreme Court handed down two decisions involving dilution claims. *City of* ***852** *Mobile v. Bolden*[2] involved a claim that Mobile's election structure diluted black voting strength in violation of the fourteenth and fifteenth amendments. A plurality of the Court held that the plaintiffs failed to establish that they were entitled to any relief. The plurality opined that blacks who register, cast ballots, and run for office without hindrance cannot claim a denial of the right to vote.[3] Dilution, reasoned the plurality, is nothing more than a claim that blacks have not achieved proportional representation. Since the constitution does not guarantee proportional representation to any group,[4] the plaintiffs cannot prevail unless they establish that the dilutioncausing devices were selected for a discriminatory *purpose.*[5] Thus, unlike Mayor Hatcher, the Constitution is concerned with blacks' hopes being cut off at the political pass only if the ambush was engineered with that in mind.

The *Mobile* plurality's narrow view of the scope of the constitutionally protected right to vote stands in striking contrast to the Court's view of the scope of protection provided by section 5 of the Voting Rights Act.[6] Section 5 prohibits certain covered political subdivisions from enacting election laws that have the *purpose or effect* of denying the right to vote because of race. In *City of Rome v. United States,*[7] handed down with *Mobile,* the Court held that Rome, Georgia could not adopt an election system very similar to Mobile's because the system decreased the chances of electing a black candidate, thereby having the effect of denying the right to vote on account of race.[8] *Mobile* was distinguished not on the facts, but rather on the basis of the different source for the claim. In *Rome* the Court reasoned that Congress can provide protection for minority voting rights beyond that provided by the constitution.[9] Because of the remedial nature of section 5, Congress can prohibit the adoption of election laws that affect blacks' chances for electing a candidate, even though the laws would be constitutional unless enacted for a discriminatory purpose.[10]

This article responds to the Supreme Court's treatment of minority entitlement and the right to vote in the dilution situation. It ***853** rejects the dualistic definition of the right to vote inherent in *Mobile* and *Rome.* Voting has the same functions and the same value regardless of whether the source for its protection is constitutional or statutory. Neither *Mobile* nor *Rome* gave proper consideration to the role the right to vote plays in a democratic society. Thus, both reached the wrong result.

For an individual voter, the value of the right to vote does not come from being guaranteed a representative of one's own race. Nor is the value always provided by being allowed to freely cast a ballot. Rather the right to vote fulfills the function ascribed to it by *Yick Wo. v. Hopkins,*[11] "to preserve all other rights,"' when it provides the voter with the means *to participate in governmental and societal decision making.* The right to vote is meaningful when a voter can join his vote with those of like-minded others in the pursuit of common goals. Properly conceived, the dilution plaintiffs' claim is that the election structure when superimposed upon racially oriented politics produces a situation that deprives them of the benefit of their numbers in the political process. They are thus deprived of the *value* of voting.[12]

Much of blacks' political gains of the last fifteen years can be attributed to the most effective civil rights law ever passed, the Voting Rights Act of 1965.[13] Not only did this Act guarantee blacks access to the ballot, but the portion of the Act involved in *Rome,* section 5, effectively prohibited the post-1965 adoption of election laws that contributed to dilution. Section 5 becomes ineffective August, 1982, unless Congress extends it. Expiration of section 5 will place the full burden of protection against dilution on the constitution and the Act's permanent provisions. Congress will base its decision about the extension of section 5 and also the stengthening of the Act's other provisions upon an assessment of the prevalence of dilution, and the adequacy of other remedies. This article provides that assessment.

Dilution suits are only the most recent attempt by blacks to gain meaningful political participation. Part I of this article sets the ***854** stage for these claims by briefly recounting the earlier struggles of blacks to gain access to the ballot. Part II explains how fully enfranchised blacks can be prevented from electing a candidate of their choice, and then presents empirical data evidencing the degree to which blacks are kept out of office by the election structure. Parts III and IV examine blacks' attempts to have dilutive devices outlawed by tracing the development of the dilution suit from its origins to its possible demise as a constitutional claim in *Mobile.* Part V provides the elements missing from these attempts: a definition of dilution and an explanation of why it robs blacks of the value of the right to vote. Recognizing that even questionable opinions of the Supreme Court must be followed, Part VI examines the availability of a constitutional claim after *Mobile* and considers alternatives.

Two clarifications are in order at the outset. First, much of the article focuses on the dilution of *black* voting strength. However, this emphasis is not to suggest that blacks are the only victims of dilution and other types of voting discrimination. Other minorities can be substituted where appropriate. Second, although this article refers most often to municipalities when discussing election structure, everything said here is fully applicable to other local government units such as counties and school boards.

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes

a1 Assistant Professor of Law, University of South Carolina.

1 Hatcher, *The Black Role in Urban Politics,* 57 Current Hist. 287, 306 (1969).

2 446 U.S. 55 (1980).

3 *Id.* at 65.

4 *Id.* at 76.

5 *Id.* at 66-67.

6 42 U.S.C. § 1973 (c) (1980).

7 446 U.S. 156 (1980).

8 *Id.* at 183-84.

9 *Id.* at 173.

10 *Id.* at 173-78.

11 118 U.S. 356 (1885).

12 The reader will have to be satisfied for the moment with this fairly vague description of dilution. A large part of the problem with dilution suits, and perhaps the cause of their possible demise as "voting"' suits, has been the failure of all concerned to adequately define dilution, and to explain why it results in the denial of the right to vote. The portions of this article that trace the development of the dilution suit present the definition as it evolved. Part V presents in detail the author's proposed substitute.

13 Pub. L. No. 89-110, 79 Stat. 437 (1965).

*855 I. The Politics of Disfranchisement

"*Those who cannot remember the past are condemned to repeat it.*"

George Santayana

A. Introduction

Until fairly recently, concern over the impact of election structures on black political participation was overshadowed by the far more pressing problem of virtual disfranchisement of the black population in much of the South. The history of blacks' frustrating attempts to gain access to the ballot is admirably documented elsewhere.[1] Thus, only a brief summary of that story will be recounted. Disfranchisement of blacks has been almost exclusively a problem in the South. Before the fifteenth amendment, only six states--all in the Northeast--allowed blacks to vote, but since 1870 very few incidences of denied access to the ballot have occurred outside the South.[2]

After ratification of the fifteenth amendment in 1870, Congress, intending to make black suffrage a reality, promptly passed the Enforcement Act of 1870.[3] The statute guaranteed the right to vote regardless of race in all state and federal elections. In addition, the Act made criminal the violation of state laws governing the election of federal officers. Furthermore, the statute prohibited the interference privately or officially with a citizen's right to vote, and the commission of fraudulent acts in connection with registration and balloting.[4]

Enforcement met with expected massive resistance. However, ***856** the most debilitating blow to the effort was dealt by the Supreme Court. In two 1876 opinions, *United States v. Cruikshank*[5] and *United States v. Reese,*[6] the Court effectively nullified the Enforcement Act. These decisions, coupled with the Court's restrictive interpretations of the Civil War amendments,[7] virtually dismantled the federal machinery designed to protect Negro voting rights.

Although the defects in the statutory scheme were seemingly correctable, the sympathetic Republicans lost control of Congress in 1875 and were not to regain it until near the end of the century. The Compromise of 1877 removed the remaining federal troops from the South. Any surviving Republican governments were soon toppled and Reconstruction was over. Federal involvement in civil rights was to be ended for nearly 80 years, and white Southerners began the unfettered, systematic elimination of blacks as a political, economic, or social force in the South.

White citizens' dissatisfaction with the corruption surrounding southern elections led to a search for a "permanent"' solution to replace the fraud and election day chicanery being employed to eliminate black influences.[8] Starting with Mississippi in 1890, virtually all the southern states adopted constitutional provisions requiring literacy tests and the payment of poll taxes as prerequisites of voting.[9] ***857** These devices resulted in the immediate, nearly total disfranchisement of blacks in the South. If administered fairly these devices still left open the possibility that blacks might ultimtely qualify to vote in threatening numbers. However, the other main vehicle for maintaining white supremacy--the all white primary--eliminated the possibility that, even if registered, blacks could cast a meaningful vote. The forces that produced the one party system in the South were more complicated than simply the desire to maintain white supremacy,[10] but for whatever reason, by the end of the nineteenth century the politics of the South had become the politics of the Democratic party. Thus, excluding blacks from the Democratic primary eliminated them from the only genuine political contest.[11]

Elimination of blacks from the political process in the South was accompanied by the Supreme Court's approval of segregation in *Plessy v. Ferguson.*[12] The adoption of the so-called Jim Crow laws soon followed, whereby "separate, and clearly not equal"' became the law in every phase of southern life from the cradle to the grave.[13] Shortly before *Plessy,* Congress had indicated its lack of interest in the matter by repealing most of the Reconstruction statutes and expressing the view: "Let the States of the great Union understand that elections are in their hands, and if there be fraud, coercion, or force used they will be the first to feel it."'[14]

Efforts to attack the disfranchising schemes on constitutional grounds were rejected by the Supreme Court. The Court upheld the poll tax in 1937,[15] the white primary not mandated by state law in 1935,[16] and the literacy test as late as 1959.[17] It outlawed only the grandfather clause,[18] and state mandated all-white primaries.[19]

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

***858** The first signal that the judicial tide might be turning came in 1941 in *United States v. Classic.*[20] In that case, the Court, overruling an earlier decision,[21] held that the primary election was an integral part of the procedure of choice and thus the Enforcement Act of 1870 protected registered Democrats from being deprived of their vote in the Congressional primary. Only a short step from *Classic* to the elimination of the white primary in *Smith v. Allwright*[22] four years later was necessary to extend the fifteenth amendment's protection to the only meaningful southern election. Efforts to evade the ruling by erasing all primary election statutes from the books were also thwarted.[23] The final demise of the white primary came in 1953 in *Terry v. Adams*[24] when the Court held that an all white preprimary conducted by a "private"' club unconstitutionally deprived blacks of the right to vote.

When easy evasion of *Smith* could not be accomplished, white supremacists' efforts were channelled to discriminatory application of complex registration requirements.[25] Typical of this form of discrimination were registration laws providing for "understanding and intrepretation tests,"' "good citizenship qualifications,"' "identification requirements"' and "no application form tests,"' all vesting unfettered discretion in the hands of local registrars. In addition, these officials frequently added their own informal obstacles.[26]

Responding to the pressure from civil rights groups, and to the national attention received by heightened efforts in the South to maintain the segregated way of life in the wake of *Brown v. Board of Education,* Congress passed the Civil Rights Act of 1957.[27] The Act, ***859** *inter alia,* reiterated the declaration from the Enforcement Act of 1870 that all qualified citizens shall be allowed to vote in all elections regardless of race,[28] and provided authority for the Attorney General to institute voting rights suits to secure injunctive relief.[29] The Civil Rights Act of 1960[30] added new remedies but after four years and many frustrating law suits, the inadequacy of litigation alone became apparent. The most glaring evidence of this deficiency was the negligible gain in registration in the three states where most of the successful suits had been brought. The increase in the percentage of the black voting age population registered was as follows: Alabama, from 10.2 percent in 1958 to 19.4 percent in 1964; Louisiana from 31.7 percent in 1956 to 31.8 percent in 1965; and Mississippi from 4.4 percent in 1954 to 6.4 percent in 1964.[31]

B. A New Era: The Voting Rights Act of 1965

In response to this history of endless litigation, of one form of discrimination being outlawed only to be replaced by another, Congress in the Voting Rights Act of 1965[32] undertook to involve the federal government in the very fabric of the political process in the South. Congress responded to the failure of litigation by legislatively determining the discriminatory effect of the most egregious of the disfranchising devices, and providing for their automatic suspension.[33] Although existing judicial remedies were strengthened,[34] the innovative portions of the Act--those designed to regulate registration and voting--were drafted to operate with federal administrative, rather than judicial, intervention.

***860** The heart of the Act, the coverage formula known as the trigger, determines the jurisdictions to be subjected to the more stringent provisions of the Act. These provisions apply in any state or part of a state which maintained a "test or device"' in 1964 and which in that year had either a voter registration or a voter turn-out in the presidential election of less than fifty percent of the voting age population.[35] In the covered jurisdictions the following provisions apply: (1) All literacy tests are suspended;[36] (2) To avoid future attempts to evade the Act, a very important provision, section 5, "froze"' election laws as of November 1, 1964. No change in election practice or procedure can be implemented until federally precleared (either by the Attorney General or the District of Columbia District Court). Preclearence is to be given only if the jurisdiction can demonstrate that the change is not racially discriminatory in purpose. *or* effect;[37] (3) Federal examiners may register qualified voters for local elections if local registrars are not complying with the Act;[38] and, (4) the Attorney General may in an appropriate situation, designate federal personnel to observe the entire election process.[39]

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

***861** The stringent provisions of the Act were held constitutional in *South Carolina v. Katzenbach,*[40] and by 1968 the effect on black registration was already phenomenal. By that year, the following percentage of voting age blacks were registered in the covered states: Alabama 56.7 percent; Georgia 56.1 percent; Louisiana 59.3 percent; Mississippi 59.4 percent; North Carolina 55.3 percent; South Carolina 50.8 percent; and Virginia 58.4 percent.[41]

In 1968 the Civil Rights Commission reported on it investigation into whether new strategies had been devised to evade the Voting Rights Act and to hinder black political participation.[42] The report notes that except in Mississippi, a massive resistance program similar to the southern reaction to *Brown v. Board of Education* had not occurred. However, the Commission did note many instances of practices and devices being adopted to *dilute* the black vote. Among those mentioned were: (1) the adoption of at-large elections to avoid the election of blacks from majority black wards; (2) consolidation of majority black counties with majority white counties in legislative districting plans and other forms of gerrymandering; (3) adoption or enforcement of full slate requirements.[43] In addition, other commentators noted the adoption of majority vote requirements, numbered posts, and staggered terms, all of which prevent blacks from taking advantage of white vote splitting to elect a black candidate.[44]

***862** The adoption of these devices after November 1, 1964, seemingly should have been prevented by section 5 (the preclearance provision) of the Voting Rights Act. However, section 5 was virtually ignored by the Department of Justice[45] until 1969 when the Supreme Court in *Allen v. State Board of Elections,*[46] established two important aspects of section 5. First, the Court determined that the provision requires the submission of *every* change affecting voting in even a minor way--specifically including redistricting.[47] Second, the Court held that private citizens can sue to enjoin unprecleared changes.[48]

Enforcement of section 5 began in earnest in 1970, and by 1975 the interposition of 163 objections by the Attorney General prevented the implementation of approximately 300 election law changes.[49] In addition to objections made to the practices and devices mentioned above, objections have been interposed to annexation bringing additional white voters into at-large election systems, to changes making election offices appointed, and to additions of residency requirements.[50]

The primacy focus of literature on the political participation of racial and ethnic minorities has been upon blacks in the South. Although no other group of Americans share the blacks' heritage of slavery, other distinctive ethnic minorities, most notably Mexican Americans and American Indians, have as a group been subjected to similar patterns of exclusion, oppression, and discrimination. Recognizing that other minorities have also been victims of discrimination in voting, Congress amended the Voting Rights Act of 1975 to extend the coverage of the special provisions to areas having high concentrations of certain "language minorities."'[51]

***863 II. Is the Ballot Enough: The Impact of Election Structure on the Election of Blacks to Municipal Office**

> "*Some circumstantial evidence is very strong; as when you find a trout in the milk.*"

Henry David Thoreau

Although discrimination in registration and balloting is largely a practice of the past, access to to the ballot has not erased over 100 years of racial discrimination in the electoral process. Political success depends upon more than simply the ability to cast a ballot. The degree to which access to the ballot has carried with it the "ability to preserve all other things"' is not measured easily. One barometer of whether blacks have achieved at least an intermediate goal--that of political participation--is the number of black elected officials. Although the gains since passage to the Voting Rights Act are impressive,[52] blacks, who are 11.87

percent of the nation's population, account for only 1 percent of the nation's elected officials.[53] This section considers the extent to which blacks' lack of proportionality among black officials can be attributed to impediments in the election structure.

The election structure consists of the unit of election, plus the devices which determine the percentage of the unit's vote needed for election. For local government, such as municipalities, school boards, and counties, the election unit is either the entire political subdivision (elections are said to be "at-large"")[54] or some segment of ***864** it (elections are said to be by "wards"' or districts).[55] The impact of the choice of election unit on the election of black candidates will be considered below, but first the operation of the other significant elements of the election structure--the devices that determine the percentage of the vote needed for election--must be explained.

A. The Operation of the Percentage-Determining Factors

When voting follows along racial lines a black candidate's chances for success depend upon whether the black percentage of votes in the election unit exceeds the number needed for election. Regardless of whether elections are conducted "at-large"' or by "wards,"' the operation of the percentage-determining devices is the same. The impact decreases, however, as blacks approach a majority of the election unit, which is more likely in the smaller "district"' unit.[56]

The percentage of the vote needed for election is determined by the following factors: (1) whether in order to be elected a candidate must receive a majority or a plurality of the votes cast; (2) whether there is a "post"' requirement (this provision requires each candidate to run for a specific, designated position on the governing board, rather than requiring all candidates to run against all other candidates with the winners declared from the field);[57] (3) whether there is a "full slate"' (anti-single shot) requirement (this provision operates only where there is no post requirement, and requires each voter to mark his ballot for the same number of candidates as there are offices to be elected).[58]

***865** The following hypothetical illustrates the impact on the election of black candidates of the various combinations of percentage-determining elements where voting is along racial lines. The situation contemplates a city with 1000 voters, 40 percent of whom are black, electing four at-large representatives.

1. *Majority Vote Required/Offices Elected by Posts.* The post requirement makes each office a separate election. Thus candidates in the hypothetical city file for positions one, two, three or four. Since a majority is required for election, 501 votes are needed. To be successful, a black candidate would have to receive all the black votes and at least 101 white votes. The number of opponents is immaterial. The majority vote requirement allows whites to campaign among themselves without fear that blacks can take advantage of a split in their ranks. Once this battle is over, a single white candidate emerges for a runoff with the black, and the whites unite to support the white candidate.[59]

2. *Majority Vote Required/No Post Designation/No Full Slate (anti-single shot) Requirement.* The four offices in this situation are filled from a field of candidates. In the hypothetical election some numbers of candidates run for the four offices, and the top four to receive a majority are elected. A voter may vote for fewer than four candidates[60] and fewer votes will be needed to equal a majority if some voters vote for fewer than 4 candidates. Theoretically the 400 black votes can constitute a majority. Consider the following situation:

1	Black candidate	400 votes	(all blacks vote only for this candidate)
12	White candidates	200 votes	(whites spread their 4 votes evenly among the white candidates)

A majority is calculated by totaling the votes cast and dividing by twice the number of offices and adding 1:

WESTLAW © 2022 Thomson Reuters. No claim to original U.S. Government Works.

2400/2x4 + 1 = 351.

***866** The black candidate would be elected on the first ballot. Nevertheless, even in the hypothetical, blacks who are 40 percent of the electroate must sacrifice three-quarters of their votes to elect possibly only slightly more than half their numerical proportion of the seats. Their other choice is not to run any black candidates and instead provide the margin of victory for some of the white candidates.

3. *Majority Vote Required/No Posts/Full Slate (anti-single shot) Rule in Effect.* This situation is identical to example 2 except that only those ballots marked for four candidates are counted. Under this arrangement, blacks cannot elect a candidate without white support. Moreover, unless blacks can run a full slate of four candidates, they must cast some votes against the black candidates to have their ballots counted. Therefore a black victory is impossible. For example, assume that two blacks and six whites reach the runoff election:

2 Black candidates	400 votes each
6 White candidates	400 votes each (600 white voters x 4 votes each, divided by 6 candidates)

The remaining 800 votes that the blacks must cast to have their ballot count assure that all the winners will be white.

4. *Plurality Vote/Post Requirement.* In this situation the chances of electing a black without white support depend on the number of white candidates.

Post #1:1 Black vs. 1 White	501 votes are needed
Post #2:1 Black vs. 2 Whites	black can be elected without white support if whites split their vote evenly

As the number of white opponents increases, the chance for 400 black votes to equal a plurality also increases.

5. *Plurality Vote/No Post/Full Slate (anti-single shot) Requirement.* This situation is similar to example 3, except that only a plurality is required. The possibility of electing four blacks, like that in example 4, depends upon the number of white opponents.

If blacks are unable to field a full slate of four candidates, election of a smaller number of blacks becomes unlikely without either white support or careful strategy. Consider:

2 Black candidates	400 votes each
8 White candidates	300 votes each *plus* each black has two additional votes which must be cast. If they also bloc vote for two specific white candidates, then the two blacks may be among the top four. Again, this strategy depends upon a fairly even split of white vote, plus careful coordination of the black vote.

As the total number of candidates decreases, the number of white votes needed for the election of a black increases. Blacks, less likely than whites to field a full slate, are forced to vote against their candidate, but whites are not. Even if blacks are a majority of those voting, they must field a full slate to avoid being defeated by the requirement.[61]

6. *Plurality Vote/No Post/No Full Slate Requirement.* This combination increases blacks' chances of electing one or more blacks even with fewer than four candidates, if black voters forego their privilege to cast four ballots. For example:

1 Black candidate	400 votes (blacks vote only for the black candidate)
8 White candidates	300 votes each

The likelihood of success improves with increasing numbers of white candidates, but any black "strategy"' can be defeated by a limitation of white candidates to the number of offices to be filled.

Another very important factor in determining the success of black candidates is whether elections are conducted on a partisan or non-partisan basis. The influence of a genuine two-party system may override the other elements of the election structure. Ostensibly, partisan politics increases the possibility that one or both parties will support a black as a part of their slate of candidates to secure the bloc of black votes for other party candidates. Only if elections are non-partisan or are dominated by one party can racial bloc voting safely exist, thus allowing the election structure to exclude black votes.

B. The Unit of Election: At-Large vs. District Elections, A Descriptive Study

Although courts have criticized all of the percentage-determining elements because of their impact on the election of minority candidates, ***868** [62] apparently only the full slate requirement has been the subject of a constitutional suit.[63] Nor has the impact of these devices received much attention in the political science literature.[64] However, the election unit (frequently called the "method of election"') has received considerable attention.

If blacks are a majority of the electoral unit, then the remaining elements of the electoral structure are less important.[65] Because blacks are not a majority of the voting age population in many American cities, when elections are conducted at-large a black candidate must receive white support to be elected. When a city is divided into wards or districts, some districts can be expected to have a black majority or at least a greater proportion of black residents than the city as a whole. Not surprisingly then, most studies of the two systems find that more blacks are elected to city councils when all or some of the seats are elected by districts.[66]

***869** While blacks are generally numerically under-represented regardless of the method of election,[67] most studies have concluded that they are more under-represented in at-large cities.[68] An early, comprehensive study of the impact of the election structure reported that in 1972 blacks received only 46 precent of their numerical representation in at-large cities, compared with 77 percent in district cities.[69] (Blacks have 100 percent of their numerical representation or "proportional representation"' when the precentage of blacks elected to the governing board equals the black percentage of the city.) Comparable findings were reported in a 1976 study.[70] A comparison of regional studies reveals that the impact of the election structure is stronger in those areas with a history of racial prejudice. For example, a 1977 study of municipalities in the Deep South found the average black representation ratio to be .68 in district cities and .18 in at-large cities[71] (1.0 is equal to proportional representation). In contrast a 1974 study of New Jersey municipalities concluded that the election structure was not an important variable in black candidate success.[72]

***870** All of the above studies are based upon some notion of "proportional numerical representation."' Finding a difference in the degree of proportionality depending upon the method of election suggests the obvious: more blacks are elected in ward cities because there they need little or no white support. Proportional representation is a useful tool for comparative analysis, but the meaning of finding a *lack* of proportionality, regardless of election structure, is not entirely clear. Even in ward cities, drawing districts that would produce proportional representation without deliberate gerrymandering may not be feasible. Moreover, regardless of the election structure or the attitudes of the white electorate, the black community may not produce a

proportional number of candidates with characteristics, race aside, that correlate highly with success at the polls. Thus numerical underrepresentation, for the present time, seems inevitable.

Recognizing the inability to place a meaningful interpretation on the finding of lack of proportionality, the author undertook a different kind of study. This study examined the nation's municipalities to discover whether the election of any substantial number of current black office holders has taken place under circumstances suggestive of white support. Contributions by whites to the election of significant numbers of black officials, regardless of proportionality, is some indication that a black candidate's race is not an absolute barrier to election. If the election of blacks is widespread, perhaps the absence of proportionality is better explained by circumstances other than the racial attitudes of the electorate. Conversely, the pervasive absence of black elected officials in municipalities with substantial black populations suggests the racial attitudes of the electorate as the most logical causative factor.

Much has been made of blacks' political gains since 1965. A recent news article noted that the number of municipal black officials ***871** has tripled in the past ten years.[73] One researcher optimistically noted that “black candidates have received white support in all sections of the country and in a variety of electoral systems. . . . White voters, previously skeptical, now have less hesitancy to vote for blacks. Heightened black political consciousness joined by increased white tolerance have become keys to contemporary black electoral success.'”[74]

Evaluation of these contentions required examination of the kinds of municipalities in which blacks currently hold municipal office. This examination was undertaken with two questions in mind: Is the election of blacks to municipal office widespread? If so, can the prevalence of black office holders be attributed to white support for their candidacy? A complete breakdown of electing municipalities by region, population, and percentage black is found in Table A in the Appendix.[75] Blacks apparently are being elected in municipalities from all regions of the country, of all sizes, and with full percentage range of black populations. In the West and Central regions the electing cities are larger and have smaller black populations than those in the South.[76] Those differences, however, may be largely demographic.

Existence of a white majority in nearly three-quarters of all the electing municipalities suggests whites are contributing to the election of blacks, although the magnitude of the contribution cannot be determined without additional information about the election structure. Outside the Voting Rights Act states, the existence of an election structure favorable to blacks is itself an indication of whites' political tolerance, since the majority controls the selection of the structure.[77]

***872** Table B of the Appendix presents the number of electing and non-electing municipalities by region for all municipalities of at least 5,000 with black populations of at least 20 percent. Regional differences appear that are not explainable by demographics. Only 21 percent of the Central, 23 percent of the Northeast and 25 percent of the West regions' cities are currently without a black elected official. But in the South and Border regions the percentages increase to 43 percent and 41 precent respectively.[78] The regional differences cannot be solely attributed to the prevalence of ward elections outside the South; a majority of all municipalities conduct at-large elections.[79]

Despite marked regional differences, blacks are being elected in majority white cities even in the South. A further examination was undertaken of the municipalities of four Deep South states--Louisiana, Mississippi, South Carolina, and Alabama--to determine whether inter-state and intra-state differences could be explained.[80] The table below shows the number of electing and non-electing municipalities by states.

Municipalities with Populations of 5,000 or More, at least 20 Black

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

	ALL MUNICIPALITIES			MUNICIPALITIES WITH LESS THAN 55		
				BLACK POPULATION		
	ELECTING	NOT ELECTING	TOTAL	ELECTING	NOT ELECTING	TOTAL
Louisiana	45 (95.7)	2 (4.3)	47	42 (95.5)	2 (4.5)	44
Mississippi	21 (60.0)	14 (40.0)	35	15 (51.7)	14 (48.3)	29
S. Carolina	17 (44.7)	21 (55.3)	38	16 (43.2)	21 (56.8)	37
Alabama	14 (35.9)	25 (61.1)	39	10 (28.6)	25 (71.4)	35
TOTALS	97 (61)	62 (39)	159	83 (57.2)	62 (43.8)	145

The dramatic difference in the percentage of electing municipalities between Louisiana and Alabama can be explained by the difference in methods of election, as the table below demonstrates.

Methods of Election for Municipalities with Populations of at least 5,000, 20-55 Black

		WARDS			AT-LARGE	
	ELECTING	NOT ELECTING	TOTAL	ELECTING	NOT ELECTING	TOTAL
Louisiana	40 (100)	0	40	2 (50.0)	2	4

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

Mississippi	13 (72.2)	5	18	2 (18.2)	9	11
S. Carolina	4 (100)	0	4	12 (36.4)	21	32
Alabama	4 (100)	0	4	6 (19.4)	25	31
TOTALS	61 (92.4)	5 (7.2)	66	22 (27.8)	57 (72.2)	79

***873** Clearly, in these four states, black candidates' success is strongly influenced by the method of election. This fact is demonstrated further in Louisiana where a substantial changeover from at-large to ward elections within the last several years was accompanied by a dramatic increase in black elected officials.[81]

Although additional information is needed to determine whether electing and non-electing at-large municipalities in these states can be distinguished on the basis of differences in their use of percentage-determining devices, some tentative observations can be made. Except for Louisiana, South Carolina has the greatest percentage of electing at-large municipalities, followed by Alabama and finally Mississippi. Missisippi has a full slate requirement[82] and numbered posts are prevalent in Alabama.[83] Alabama and Mississippi have non-partisan elections and both require candidates to receive a majority to win without a runoff.[84] On the other hand, South Carolina has neither a full slate nor a post requirement.[85] South Carolina municipalities may choose between partisan and non-partisan elections,[86] and a majority vote requirement is optional.[87]

North Carolina, only partly covered by the Voting Rights Act, presents an interesting contrast to the four Voting Rights Act states studied. In terms of percentage of municipalities electing, North Carolina's Voting Rights Act cities are similar to cities in the border states: 61 percent have at least one black elected official. The remaining non-Voting Rights Act cities resemble those in the Northeast, ***874** with 75 percent electing at least one black. Even more unlike the Voting Rights Act states studied, North Carolina's electing and non-electing cities cannot be distinguished on the basis of differing election structures. All but six of the fifty-six North Carolina municipalities in the sample have at-large elections. The percentage-determining factors are present in various combinations in electing and non-electing cities. About half of both groups utilize plurality, non-partisan elections.[88]

The inability to correlate the election of blacks in some North Carolina municipalities and not others with a difference in election structure suggests that the race of a candidate is less significant there--at least in the electing cities--than in the other four states studied. Because the method of election is uniformly at-large in the non-electing cities, the structure in combination with racial bloc voting can explain the absence of black elected officials. However, the data are insufficient to explain why some North Carolina cities appear to be more racially oriented in their politics than others.[89]

When voting is along racial lines, election structure determination of a black candidate's chances for success logically follows: racial bloc voting plus an election structure in which the number of votes needed for election exceeds the number of black voters equals no black office holders. As with other equations, a change in one of the left side variables is necessary to produce a change in the right side result. Unlike mathematics, however, one cannot conclude ab solutely that the observed result (the absence of black office holders) proves the existence of the unobserved variable (racial bloc voting). Other potential explanations include the following: blacks have not run for office; blacks voted for whites when faced with a black-white choice, or did not vote at all; blacks lacked sufficient resources to run a successful campaign in an at-large election system. The substantial number of blacks elected when the election structure allows this to be accomplished without white support negates the first two explanations. The third explanation, while having some validity, is negated by the presence of black elected officials in large majority black at-large cities and by their absence in small nonmajority black ***875** at-large cities. The observed result (no black elected officials) plus the observed variable (the election structure) at least suggests the existence of the unobserved variable (racial bloc voting).

Moreover, independent evidence of racial bloc voting is abundant. Virtually all challenges to election structure on dilution grounds have relied in part upon proof of racial bloc voting,[90] usually in the form of expert testimony based on examination of precinct level election data. One recent study of precinct data in five southern cities concluded that:

> First, voting in large southern cities tends to follow racial lines. Blacks typically give strong support to a particular candidate and that candidate usually gets only a minority of white votes. Second, when blacks run as candidates, these patterns are accentuated. Virtually all blacks vote for the black candidate; very few whites do so. Finally, racially polarized voting rose rapidly in the 1960's and continues at a high level to the present.[91]

This study and the data presented here strongly suggest that the prevalence of racial block voting continues in the South. While this practice remains true, blacks' chances for electing black candidates to municipal office are dependent almost entirely upon the election structure. The dramatic impact of structures--particularly, of the choice of election unit--is demonstrated by the fact that of the seventy-nine non-majority black municipalities holding at-large elections in the Deep South, only twenty-two (27.8 percent) have even one black office holder, although among the sixty-six municipalities holding ward elections sixty-one (92.4 percent) have at least one black official.

A most important caveat is in order at this point. Neither black political participation and black political influence nor more elusive notions of "black representation"' can be measured solely by whether blacks are being elected to office. The Joint Center for Political Studies' report on the 1976 election indicates that the bloc of black votes received by Jimmy Carter was crucial to his victory in thirteen states.[92] In contested Senate races, black voters in nine of the fifteen monitored elections supported winners,[93] with the black vote supplying the margin of victory in two cases. Black votes also provided the margin of victory for eight white congressional ***876** candidates.[94] Whether this ability to deliver a bloc of votes translates into genuine political influence over candidates once elected must be decided on a case-by-case basis.

III. Judicial Response to Structural Impediments: A History of the Dilution Suit

> "*Such cases, involving the right to vote and the right to litigate, share with the first amendment and due process cases . . . a core structural idea that the right at stake is really one to equal participation in government and societal decision-making.*"

Lawrence Tribe

American Constitutional Law

Racially oriented politics coupled with election structures unfavorable to the election of minority candidates often prevented newly enfranchised blacks from utilizing the ballot as a means to participate in the political process and, thus, in governmental and societal decision-making. Blacks seeking judicial relief from this situation utilized two approaches. The first approach claimed that the election structure was the product of intentional, race-conscious gerrymandering,[95] and was an extension to the voting area of the suspect classification doctrine espoused in *Brown v. Board of Education.*[96] The second approach claimed that the election structure operated to *dilute* minority voting strength and was derived from the rationale of the malapportionment cases in which the Supreme Court first recognized that a citizen's assignment to a voting district can diminish the value of his vote. Although both approaches often were utilized in a single case, properly conceptualized they sought protection of overlapping, but nonetheless different interests. The former approach asserted a right to be free from state action based on race while the latter claimed a right to effective political participation derived from the right to vote.

In the recent decision of *City of Mobile v. Bolden*[97] a plurality of ***877** the Supreme Court in effect refused to recognize a claim of dilution by interpreting all the previous cases challenging election structure as based upon *intentional* racial discrimination. This section will distinguish the intentional racial gerrymandering cases from those in the dilution line, and will discuss the evolution of dilution as a separate constitutional claim.

A. Racial Gerrymandering

In *Gomillion v. Lightfoot,*[98] the Supreme Court's initial and most celebrated case involving a claim of racial gerrymandering, petitioners challenged an Alabama law that changed the city boundaries of Tuskegee, Alabama from a square to a twenty-eight sided figure and excluded virtually all the city's black residents. The Court did not address the fourteenth amendment claim and rested its decision solely on the fifteenth amendment.[99] Reversing the lower court's dismissal of the complaint, the court concluded:

> [I]f the allegations are established, the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore voting rights.[100]

The issue in *Gomillion* was whether an allegation of racially motivated districting stated a claim for relief. The evidence necessary to establish racial motivation in districting was first considered in *Wright v. Rockefeller.*[101] The complaint in *Wright* alleged that Manhattan's four congressional districts had been drawn to create racially segregated districts by concentrating black voting strength in a single district.[102] The plaintiffs demonstrated that the *effect* of the lines as drawn was to create strangely shaped districts, one of which contained most of Manhattan's black and Puerto Rican ***878** population.[103] The defendants denied the racial gerrymandering allegations, but offered little evidence of the rationale underlying the districting plan.[104] The Supreme Court affirmed the District Court's finding[105] that the plaintiffs had failed to establish racial motivation. The Court refused to accept the segregative effect as either sufficient in and of itself to establish a constitutional violation, or as prima facie evidence of a discriminatory intent.[106] The Court reasoned that even if the effects of the line-drawing supported an inference of an improper motive, such inference was insufficient to establish a prima facie case unless other legitimate inferences were negated.[107]

Gomillion and *Wright* are cases that challenged state action specifically on the basis of an impermissible racial classification.[108] Because of the procedural posture of *Gomillion,* the Supreme Court had to decide only if a claim for relief had been stated. The Court concluded that the plaintiff's allegations, if uncontroverted, admitted of but one inference--intent by the state to deprive Negro citizens of their pre-existing municipal vote.[109] Since *Wright* came to the court after a full hearing on the merits the issue was whether the plaintiffs had met their burden of proving the districting unconstitutional. The plaintiffs relied upon the effects of the action to establish the discriminatory intent. However, unlike the *Gomillion* situation, plausible non-racial grounds for the state action could be inferred from the facts.[110]

***879** *B. The Malapportionment Cases: One Man--One Vote*

While these cases were progressing through the courts, a widely publicized line of voting cases was developing in a nonracial setting. Following in the wake of the Supreme Court's decision in *Baker v. Carr*[111] that removed malapportionment cases from the restrictions of the political question doctrine,[112] *Reynolds v. Sims*[113] and its companion cases[114] mandated equal population districts for both houses of bicameral state legislatures.[115] The holding was based on equal protection grounds:

> [A]n individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantive fashion diluted when compared with votes of citizens living in other parts of the state.[116]

The malapportionment cases were pure numbers cases--an equal number of representatives for an equal number of voters--but the reasoning suggests that the right to vote goes beyond the right to cast a ballot, and might require equal political participation for all citizens of all races.[117] These decisions recognized that the political process could not be expected to correct the underrepresentation of voters in overpopulated districts, because those benefiting from existing ***880** apportionment were not likely to vote themselves out of office. As one astute observer of the interrelationship between the judiciary and the political process noted:

> The ultimate rationale [of the reapportionment decisions] is that when political avenues for redressing political problems become dead-end streets, the judicial intervention in the politics of the people may be essential in order to *have* any effective politics.[118]

Two cases decided shortly after *Reynolds* indicated the Court's willingness to consider more qualitative aspects of representation. In *Fortson v. Dorsey,*[119] residents of Georgia challenged their assignment to a multi-member state senatorial district on non-racial grounds. The Court declared that multi-member districts are not *per se* unconstitutional. But in doing so Justice Brennan observed:

> It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. When this is demonstrated it will be time enough to consider whether the system still passes constitutional muster.[120]

This language was quoted approvingly in *Burns v. Richardson,*[121] another unsuccessful challenge to multi-member districts on nonracial grounds. However, the majority added a caveat that no presumptions would be made that a particular multi-member scheme "effects an invidious result. . . . Speculations do not supply evidence that the multi-member districting was designed to have or had the invidious effect necessary to a judgment of . . . unconstitutionality . . . . "[122] ***881** The Court enumerated three contributing factors to a showing of an "invidious effect"': (1) large districts in relation to the total number of legislators, (2) no residential sub-districts, (3) multi-member districts in both houses of the legislature.[123]

C. Dilution Clarified: Whitcomb v. Chavis

Following these decisions, a few cases in the lower courts challenged multi-member districts primarily on the basis of intentional race-conscious gerrymandering,[124] but occasionally on a "dilution"' theory.[125] Since dilution beyond the pure numerical situation had not been defined by the Court, attempts to prove a case were "shots in the dark."' The first substantial dilution claim based on detailed proof to reach the Supreme Court was *Whitcomb v. Chavis.*[126] The plaintiff, black residents of an Indianapolis ghetto area, challenged a multi-member district that met all the *Burns* factors: large, non-residential sub-districts, from which both the county's senators and representatives were to be elected. The District Court reasoned that dilution could be established by proof that the ghetto residents were a cognizable racial or political element of the population and that their voting strength was minimized by the use of multi-member districts. Minimization required a showing that the group would be able to

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

elect a member of the group if single member districts were utilized but were less likely to do so in a multi-member situation. A further indication of minimization would be evidence that none of the legislators elected by the multimember district were accountable to the group for their legislative record. Finding all these conditions established, the District Court ruled that the plaintiffs had been deprived of equal protection.[127]

The hopes of civil rights groups and the praise of commentators ***882** [128] that finally a formula for dilution had been derived were short-lived. The Supreme Court reversed, finding no allegation of purposeful discrimination that would bring the case within the *Gomillion* line of decisions, and no evidence that petitioners had been denied access to the political process:

> Nor does the fact that the number of ghetto residents who were legislators was not in proportion to ghetto population satisfactorily prove invidious discrimination absent evidence and findings that ghetto residents had less opportunity than did other . . . residents to participate in the political processes and to elect legislators of their choice. We have discovered nothing in the record or in the court's findings indicating that poor Negroes were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when legislative candidates were chosen. Nor did the evidence purport to show or the court find that inhabitants of the ghetto were regularly excluded from the slates of both major parties, thus denying them the chance of occupying legislative seats.[129]

Thus the Court rejected the conclusion that a cognizable minority plus numerical underrepresentation equaled dilution. Furthermore, the Court saw the absence of ghetto legislators not as a function of their minority status, but rather as a consequence of their party affilitation--the Democrats had lost four of the five elections during the period considered by the district court.[130]

Because *Whitcomb* is one of only two cases before *Mobile* to be decided by the Court on a dilution theory, several points deserve emphasis. First, had the Court considered the plaintiffs' claim of dilution to be a shorthand expression for "the effects of the districting are evidence of discriminatory intent"' (the *Gomillion--Wright* rationale) the opinion would have been very short because the plaintiffs conceded that a claim of discriminatory intent had no basis.[131] The plaintiffs lost not because the effects of multi-member districts were unintended, but because the effects did not constitute dilution.

***883** Second, the record indicated that voting in the county had proceeded along *party* rather than *racial* lines. For example, in 1968 three blacks Republicans were elected county-wide with approximately the same number of votes as white Republicans. However, they ran well behind their white Democratic opponents in the ghetto.[132] The black ghetto residents' exclusion from office was thus a function of their being Democrats rather than of their race.[133]

D. The Standardbearer: White v. Regester

In 1973, the Supreme Court for the first time affirmed a lower court's determination that a multi-member districting plan unconstitutionally diluted the voting strength of a cognizable racial minority. The relevant portion of the case concerned challenges by blacks and Mexican-Americans to the use of multi-member districts in two counties as part of the 1970 Texas House reapportionment scheme. Plaintiffs and the lower court carefully distinguished *Whitcomb* and concentrated on the issue of exclusion from the political process.[134] The lower court found *Whitcomb* distinguishable on the following grounds:

1. *The election structure.* In addition to multi-member districts, Texas had a majority vote requirement in the primary[135] and candidates were required to run from posts, called "places"' in Texas. The post provision accentuated black/white contests, and because the requirement was not tied to residency, all the county's representation ***884** theoretically could live in the same apartment complex.[136] The disadvantage to the minority was exacerbated further by the size of the districts.[137]

2. *History of racial discrimination.* Texas had a long and fairly recent history of public and private discrimination against both blacks and Mexican-Americans[138] in contrast to the record of Indiana which had been examined in *Whitcomb.* Both Texas goups qualified as cognizable minorities on the basis of the internal group interest and, perhaps more importantly, on the basis of the treatment afforded group members by the majority because their group status.[139]

3. *Access to the political process.* Unlike Indiana, where blacks played a crucial role in party politics, minorities in the two Texas counties were not effective participants in party politics. In one county, a political committee controlled the primary slating process. While some blacks had been slated, the choice was made without consulting the black community. Thus blacks were permitted to enter the political process only through the "grace"' of the white majority.[140]

In the other county, bloc voting by whites in the Democratic primary, which was tantamount to election, precluded any realistic possibility of Mexican-Americans being elected because even though a numerical majority of the county, they represented only 30 percent of the registered voters.[141] The Court viewed this low participation ***885** to be a result of past discrimination, particularly the language and cultural incompatibility fostered by a deficient education system:

> This cultural and language impediment, conjoined with the poll tax and the most restrictive voter registration procedures in the nation have operated to effectively deny Mexican-Americans access to the political processes in Texas even longer than the Blacks were formally denied access by the white primary.[142]

4. *Responsiveness of elected representatives.* Whereas unresponsiveness experienced by the plaintiffs in *Whitcomb* had been a function of their party affiliation, unresponsiveness in Texas resulted from racial and ethnic discrimination. One county delegation consistently favored segregating legislation. In addition, racial campaign tactics were still prevalent, suggesting that people elected on such a platform were unlikely to represent the black community.[143] The white representative of the other county could not identify any legislation sponsored by that county's delegation to relieve adverse conditions in the Mexican-American community.[144]

These factors led the district court to conclude that the dilution standard of *Whitcomb* had been met; thus it ordered the multimember districts replaced by single-member districts. The Supreme Court unanimously affirmed.[145] The Court stated the vague dilution "standard"' from *Whitcomb:*

> The plaintiffs' burden is to produce 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 processes and elect legislators of their choice.[146]

The Court then summarized the lower court's findings and concluded as to one county that they were sufficient to sustain the judgment. As to the other, the Court deferred to the district court:

> [F]rom its own special vantage point, [the district court] concluded that the multi-member districts as designed and operated ***886** . . . invidiously excluded Mexican-Americans from effective participation in political life . . . . On the record before us, we are not inclined to overturn these findings, representing as they do a blend of history and an intensely local appraisal of the design and impact of the Bexar County multi-member district in the light of past and present reality, political and otherwise.[147]

Although evidence in the record would have supported the lower court's judgment on a *Gomillion* rationale,[148] the Court relied entirely upon the dilution claim, citing only those cases in the dilution line--*Whitcomb, Burns* and *Fortson.*[149]

E. The Lower Courts Respond

White provided the needed authority for pursuing dilution claims, but the case provided little guidance for the pursuit. In the years after *White* dozens of cases challenged multi-member and at-large election systems. The task of further defining dilution and explaining why it was unconstitutional fell to the lower courts, primarily those of the Fifth Circuit.

The Fifth Circuit, sitting en banc, concluded in *Zimmer v. McKeithen*[150] that dilution could be established upon proof of some combination of factors gleaned from *White.* This so-called "totality of the circumstances doctrine,"'[151] posited a set of "primary"' factors and a set of "enhancing"' factors. The primary factors enumerated were: (1) lack of minority access to the slating of candidates; (2) unresponsiveness ***887** of legislators to the particularized interests of minorities; (3) a tenuous state policy underlying the preference for multi-member, at-large districts; *or* (4) a history of past discrimination in general that precludes the effective participation in the election system. Proof of dilution could be "enhanced"' by showing the existence of large districts, majority vote requirements, anti-single shot voting provisions, and the lack of residency subdistricts.[152] The court failed to explain, however, what combination of these elements would be sufficient to establish dilution or why all or any group of them would constitute dilution.[153]

The Supreme Court affirmed the Court of Appeals order mandating single member districts for the parish, but expressly "without approval of the constitutional views expressed by the Court of Appeals."'[154] Instead the Court based its decision on its announced preference for single-member districts in court-ordered plans.[155]

***888** Taking seriously the notion that dilution could be established by an "'aggregate of factors,"' the district courts and appellate panels of the Fifth Circuit for a while employed a "Chinese menu"' approach to dilution: two from column A (primary factors) plus one from column B (enhancing factors) equal dilution, but a change in the choice of items could yield a different result.[156] Initially the looseness of the standard seemed to benefit the challenger, who by establishing little more than judicially noticeable, past racial discrimination plus atlarge elections was able to obtain relief.[157] These early successes prompted one scholar to question "whether a per se rule against atlarge systems [applies] in the six Southern states."'[158] Subsequently, however, this comment proved to be too optimistic an evaluation of the plaintiff's position. In a series of cases not clearly distinguishable from *Zimmer* and other cases plaintiffs had won, the Fifth Circuit reversed the district courts' determinations of dilution.[159] The most frequently cited reason for reversal was an insufficient factual record to support the decision.[160]

***889** After the Supreme Court's declaration in *Washington v. Davis*[161] that discriminatory impact alone is insufficient to state a claim under the equal protection clause, a major issue in dilution cases became the "need"' to prove intentional discrimination. The Fifth Circuit first addressed the issue in *Kirksey v. Board of Supervisors.*[162] *Kirksey* involved a single-member district plan that divided a Mississippi county's black population among five councilmanic districts. The court first noted that in the past blacks had been intentionally excluded from participation in the political process.[163] Even though the challenged plan had not been drawn for a discriminatory purpose, it did not present the county's 40 percent black population with a realistic opportunity to elect a single black to the council.[164] Therefore, the court concluded that the plan would perpetuate the effect of the prior intentional exclusion of blacks from the political process, and thus the intent requirement had been met.[165]

Although the Fifth Circuit en banc broached the subject of intent in *Kirksey,* the next two panel decisions returned to the "aggregate of factors"' analysis.[166] The intent issue received full attention the following year in a group of cases decided together. Perhaps because the relationship between the basis for a dilution claim and the dilution formula had never been precisely defined, the Fifth Circuit was unable analytically to distinguish dilution from other equal protection cases. Thus after five years of using an "effects"' test, the court declared in *Nevett v. Sides*[167] that dilution which states a claim must result from a racially discriminatory *purpose.* However, the court further concluded that the presence of the *Zimmer* factors is circumstantial evidence of a discriminatory purpose.[168]

This retreat from the effects standard by the Fifth Circuit--the Circuit that had developed most of the law in dilution cases--may ***890** have influenced the reasoning of the six members of the Supreme Court who in *City of Mobile v. Bolden* agreed that discriminatory intent is a necessary element of a dilution claim. Had the Fifth Circuit developed and adhered to a standard for dilution based upon the denial of the right to vote, the outcome in *Mobile* perhaps would have been different.

IV. *City of Mobile v. Bolden:* An Untimely Default on the Promise of Meaningful Political Participation

> "*The theoretical foundations [for the American approach to government] are shattered where . . . the right to vote is granted in form, but denied in substance.*"

Justice Thurgood Marshall, dissenting, *City of Mobile v. Bolden*

In 1975 black citizens of Mobile, Alabama challenged the city's form of government on the grounds that the system diluted their voting strength and thereby violated the fourteenth and fifteenth amendments and section 2 of the Voting Rights Act of 1965.[169] Although blacks by 1970 constituted over one-third of Mobile's population, no black had ever been elected to the city's governing body.[170] The district court held for the plaintiffs; a panel of the Fifth Circuit affirmed;[171] the Supreme Court reversed.[172]

A. The Lower Courts

In a detailed opinion following the guidelines of *White* and *Zimmer,* the district court concluded that the city's election structure diluted black voting strength. Since 1911 the city had been governed by a three-member city commission, elected at large, in a nonpartisan election, from numbered posts,[173] with a majority vote required ***891** for election.[174] The district court found the city to be very racially polarized. Virtually all public desegregation had been pursuant to court order.[175] Because of racially polarized voting no black-supported candidate had ever been elected to public office in a majority white district in any election involving city voters.[176] Blacks as a group lacked the political clout to insure that elected officials considered their particularized needs.[177]

The distirct court rejected the city's argument that the *Washington v. Davis* requirement of discriminatory intent in equal protection cases applied to dilution. The court noted that the record supported a finding of discriminatory purpose under a tort theory of intent,[178] but based its decision on the theory that *Washington* was ***892** distinguishable: "Initial discriminatory purpose in employment and in redistricting is entirely different from resulting voter dilution because of racial discrimination."'[179] The court then concluded that participation in the processes leading to nomination and election in Mobile were not equally open to blacks and that the plaintiffs had therefore established dilution in accordance with the totality of the circumstances standard of *White* and *Zimmer.*[180]

The Fifth Circuit Court of Appeals, which had concluded in a companion case[181] that *Washington* required a showing of intentional discrimination in dilution cases, affirmed on the grounds that proof of the *White-Zimmer* criteria amounted to circumstantial evidence that the at-large system had been maintained for a discriminatory purpose.[182] The appeals court felt that even if the statute had been adopted for a neutral purpose in 1911, the record established that the law had been *maintained* for a discriminatory purpose. The circumstantial inference of purpose from proof of the *White-Zimmer* criteria was bolstered by evidence that the Alabama legislature was aware of the consequences of the city's election procedure and refused to change it. This inaction, the court concluded, constituted direct evidence of a discriminatory motive in the maintenance of the plan.[183]

B. The Case in the Supreme Court

After months of consideration and two rounds of oral arguments the Supreme Court, speaking through six opinions, reversed the lower courts. The plurality, comprised of Justice Stewart, the Chief Justice and Justices Powell and Rehnquist, concluded that nothing short of proof that the at-large system had been selected or reaffirmed because of, not merely despite, its adverse effects on the minority group would suffice to show the system discriminatory.[184] ***893** They rejected the plaintiff's equal protection claim for failure to prove purposeful discrimination as required by *Washington, Arlington Heights v. Metropolitan Housing Development Corp.,*[185] and *Personnel Administrator of Massachusettes v. Fenney,*[186] and thus refused to view political participation as fundamentally different from employment and housing. The plurality reconciled this holding with *White v. Regester* by insisting that *White* was a standard equal protection case, consistent with the principle that "“the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.” DD"[187] The *White* criteria were relevant for the very reason that disproportionate impact alone is insufficient to prove discrimination.

Although the Court of Appeals had recognized the importance of “intent"' to prove an equal protection claim, the plurality found misplaced the court's reliance on the so-called *Zimmer* criteria as evidence of a discriminatory purpose. First, although no black had been elected to the Mobile City Commission, this fact could not support the conclusion that blacks were excluded from the political process because undisputed evidence showed that they registered and voted freely. Second, evidence of unresponsiveness of elected officials might well support another sort of lawsuit, but it said little about the validity of the system under which the unresponsive officials had been elected. Third, the past history of racial discrimination could not condemn present, lawful governmental action. Finally, the mechanics of the at-large system and the majority vote requirement could not supply the requisite proof of racially discriminatory purpose because the requirement was disadvantageous to any voting minority.[188]

The plurality also found lacking the plaintiffs' claim that Mobile's election system violated the fifteenth amendment: “[A]ction by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose.”'[189] The ***894** Court refused to read the “right to vote"' language of the amendment to mean anything more than the right to "“register and vote without hindrance.”DD"[190] Because the district court had found no impediments to these activities, the fifteenth amendment was not violated.[191] The plurality also rejected the argument that section 2 of the Voting Rights Act should have a broader prohibition than the fifteenth amendment.[192]

The remainder of the plurality opinion refutes the dissent's theory, which it strains to characterize as a claim for a minority group's right to “‘proportional representation,”' the impairment of which can be established without proof of intent. The plurality concluded that the constitution secures no such right, and thus there is no need to subject the alleged dilution-causing legislation to anything more than a “‘settled mode of constitutional analysis.”DD"[193] It further concluded that no such right flows from *Reynolds v. Sims,* which held that the right to have an equally effective voice in the election of representatives was denied by malapportioned districts, because malapportionment cannot be a problem in a unitary electoral district. Any attempt to expand an individual voter's right to cast an equally weighted vote to a group's right to representation cannot be based on *Reynolds.* Such a theory would have no reasonable basis for containment.[194]

WESTLAW © 2022 Thomson Reuters. No claim to original U.S. Government Works.

C. Criticism of the Plurality Opinion

The plurality opinion in *Mobile,* which refused to recognize dilution as a constitutional claim without proof of discriminatory purpose, cannot easily be reconciled with *White,* which found a constitutional violation on similar facts. Consequently, one must conclude that *Mobile* in effect overrules *White* and thus severely restricts the scope of the constitutional right to vote.

The plurality's characterization of *Whitcomb* and *White* as standard equal protection cases involving intentional discrimination is clearly revisionism; neither relied upon such a theory.[195] Even if ***895** *White* is seen as an intentional discrimination case, the difference in outcome between it and *Mobile* is difficult to justify, especially in light of the plurality's approving citation of the standard developed in *Whitcomb* and *White* for a prima facie case of dilution.[196] Under that standard the plaintiff must "produce evidence to support the finding that the political processes leading to nomination and election were not equally open to participation by the group(s) in question.'"[197]

Reconciliation of *Mobile* with *White* and retention of this standard can only be accomplished by interpreting *White* as having required intentionally discriminatory state action. If this interpretation is accepted and a finding of the requisite intent in *White* is assumed, reconciliation further requires the assumption that application of a different rule to at-large elections from that applied to multi-member districts[198] is not needed. Moreover, reconciling the two decisions requires acceptance of at least one of the following propositions.

1. *Evidence in White established that blacks had been denied meaningful political participation but failed to establish a similar denial in Mobile.* Finding factual support in the two opinions for this distinction is difficult. In both *White* and *Mobile,* a substantial minority group had been singled out by the majority for discriminatory treatment on the basis of an unavoidable group characteristic. Not only had the groups historically been subjected to public and private discrimination, but the majority's voting behavior showed that discrimination also continued. A candidate's identification with a racial group was the chief characteristic that distinguished candidates supported by the group from those not receiving support. ***896** Given this predictable majority voting stance, the multi-member/at-large election structure eliminated any possibility that a minority-supported candidate could be elected.

Factual distinctions between the cases on the issue of apparent political participation are of questionable significance. In *White* evidence indicated that the minority groups recently had been denied access to the ballot and to the candidate slating process, whereas the trial court in *Mobile* found that blacks could register and vote freely and that no slating process existed. If, however, state-constructed barriers to balloting and running for office had been the gravamen of the complaint in *White,* the remedy was certainly out of line with the offense; these barriers could easily have been removed without dismantling the election structure. Surely the *White* court had more in mind when it referred to "participation in the political process."D'

The evidence in *Mobile* indicated that blacks were as effectively excluded from participation as if they had been denied the ballot. Clearly the election of their proportion of favorable candidates is not the only indication of a group's equal political participation. The ability to deliver a "bloc"' of votes in support of a candidate as a bargaining chip in political negotiations may well constitute meaningful political access. Arguably, in the political arena blacks are no different from other political groups if they can form alliances with these groups and if their votes must be courted by competing candidates with promises of concern for black interests. However, the district court found no such situation in *Mobile,* where blacks were unable to form alliances. Moreover, any candidate who demonstrated concern for black interests and actively solicited black votes was likely to lose enough white support to be defeated.[199]

The general rule of candidates elected to ignore black interests provided additional evidence of the lack of impact blacks had on Mobile's political process.[200] While the Court in *White* viewed similar unresponsiveness as evidence of denied access,[201]

the *Mobile* plurality discounted it completely. The solution to discrimination by city officials proposed in *Mobile* was a suit to outlaw the discrimination, rather than to replace the election system with one compelling greater responsiveness.[202] Regardless of the theoretical possibilities ***897** for the political influence of a cohesive minority, when a concrete situation is presented where the group cannot elect a candidate, is not able to join with other groups to influence election outcomes, and poses no political threat to officials who ignore its interest, the net effect of the minority's "participation"' is zero.

2. *Denial of access in White was the product of intentional discrimination, whereas in Mobile, any limitation on political participation was a mere consequence of legitimate state action.* If no meaningful distinctions may be made in the degree of political participation by the affected groups in *White* and *Mobile,* the next possible ground for reconciliation is that the denied access in *White* was intentional while the same denial in *Mobile* was incidental. Again, a basis for this distinction is difficult to find in the opinions. If the evidence in *White* supported an unarticulated premise that the circumstances indicated an intent to discriminate, a similar conclusion in *Mobile* is difficult to avoid.[203]

Even if denial of access to registration, balloting and slating in *White* is seen as evidence of a continuing scheme to discriminate, the absence of these tactics in *Mobile* should not negate a discriminatory purpose in the maintenance of a similar election structure. The majority vote requirement coupled with the at-large election feature and predictable racial bloc voting by the white majority adequately prevented the election of black supported candidates. Addition of other discriminatory tactics was unnecessary and would have jeopardized elections needlessly.

3. *Evidence sufficient to infer discriminatory intent in the selection of the multi-member districting plan in White was insufficient to establish a similar implication in the maintenance of the at-large plan in Mobile.* The multi-member districts in *White* had been adopted recently, whereas the at-large plan in *Mobile* had been ***898** adopted years ago under circumstances not suggestive of a discriminatory purpose. Finding this distinction important implies the following: evidence that is sufficient to establish a discriminatory purpose in the *adoption* of an election system is insufficient to establish a discriminatory purpose in the *maintenance* of a similar system. This distinction is neither suggested by the plurality nor logically supportable. Arguably, the refusal to change the system in *Mobile* actually provides stronger evidence of a discriminatory motive because more blatant discriminatory tactics were no longer feasible and the effect of the at-large system was clear. In *White,* political participation by minorities was effectively stymied by other tactics, and the effect of multimember districts could only be anticipated. Furthermore, this reasoning suggests that a political subdivision with the foresight to select a system many years ago that now nullifies minority political participation can maintain this system with little fear of challenge.

Because the factual distinctions between *White* and *Mobile* fail to provide a satisfactory basis for the difference in their outcomes, the plurality's decision apparently has overruled *White.* After retrospectively defining *White* and *Whitcomb* as "intentional"' discrimination cases and holding that the Constitution does not protect against the voting dilution alleged in those cases absent an illicit motive, the plurality predictably rejected Justice Marshall's argument that the racial dilution case had its genesis in the malapportionment cases:

> The dissenting opinion erroneously discovers the asserted entitlement to group representation within the "one person one vote"' principle of *Reynolds v. Sims* . . . . There can be, of course, no claim that [this] principle has been violated in this case, because Mobile is a unitary election district . . . . It is therefore obvious that nobody's vote had been "'diluted"' in the sense in which that word was used in the *Reynolds* case.[204]

Instead of recognizing the lack of "group representation"' as merely evidence that members of the group--individually and collectively--are being fenced out of the political process, the plurality framed "group representation"' as the interest being proclaimed. Thus characterized, one might easily agree that no such interest is entitled to protection under the *Reynolds v. Sims* rationale.

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

Justice Marshall's position, however, is quite different. He ***899** argued that the interest involved is not the right to proportional representation, but rather the right to an equally effective vote in the election of representatives, the right to full and effective participation in the political process. Any alleged deprivation of this fundamental right should be subjected to strict judicial scrutiny without a showing of discriminatory intent.[205] This right is identified and protected in *Reynolds.* The difference between racial dilution and malapportionment is not, maintained Marshall, a difference in the interest being asserted but rather in the means by which the interest is being infringed. In *Reynolds,*

> [t]he Court determined that unequal population distribution . . . was one readily ascertainable means by which this right was abridged. The Court certainly did not suggest, however, that violation of the right to effective political participation mattered only if they were caused by malapportionment. The plurality's assertion to the contrary in this case apparently would require it to read *Reynolds* as recognizing fair apportionment as an end in itself, rather than as simply a means to protect against vote diultion.[206]

Although the cases decided between *Reynolds* and *White* referred to racial dilution as if a group right were being asserted[207] and the malapportionment decisions spoke in terms of an individual right,[208] the interests are very similar. In the racial dilution situation, a combination of circumstances deprives individual voters of an effective political voice because they are members of an insular minority. In the malapportionment situation, individual voters are deprived of an equally effective vote because they live in an overpopulated district. For the individual voter, the result of racial dilution is worse than that of malapportionment. Whereas the malapportionment victims' votes count less than those of other voters, dilution victims' votes do not count at all. Mobile could be compared to a city with a district of 60,000 people having no representative in the city government.

The voters in the malapportionment districts are denied full numerical representation by lines and numbers. The voters in racial dilution situations are denied representation because their numbers ***900** do not count in the political process. In both situations, a political solution is available only through the "grace"' of the elected officials who are unlikely to "graciously"' jeopardize their own political position. In short, in both situations the political process is not working for a substantial portion of the population. The causes of the malfunction are different, but the resulting deprivation is similar.

V. Dilution as an Infringement on the Value of the Right to Vote

> "*[D]emocracy is largely measured in terms of the ability of all groups to participate in the process of alliance building. Surely the purest theories of majoritarian democracy presuppose fair representation for minorities so they may participate in majority making.*"

Robert Dixon

Democratic Representation

A. Introduction

The plurality opinion in *Mobile* cannot be reconciled with *White,* nor with the principles suggested by its predecessors, *Reynolds v. Sims, Fortson* and *Burns;* however, those cases may represent a mode of analysis no longer justified. Perhaps, in light of changed social and political reality, the discriminatory impact test of *White* should be abandoned for the more legislature-respecting discriminatory purpose test. In 1970 judicial intervention in the political process was clearly necessary to

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

assure effective political participation for impotent minority groups that recently had been the object of blatant and pervasive discrimination.

On the other hand, in 1980, fifteen years after the passage of the Voting Rights Act, cases of blatant discrimination are rare. Black office holders are prevalent throughout the nation, including the South. Blacks votes frequently provide the margin of victory in important elections. In the face of this evidence of political power, one might ask how can blacks continue to view themseslves as "wards of the court,"' free to seek insulation from the uncertainties inherent in politics. The political process is trusted to accommodate the competing interests of Republicans and Democrats, liberals and conservatives, urbanities and farmers, why not blacks and whites?

The answer is easy. If the political process is accommodating the interests of minority groups, leave it alone; where "Black Power"' is a reality (or alternatively, where it is as meaningless as "Smith Power"') judicial intervention is not justified. The political exclusion ***901** of blacks that was the rule in 1970 may be the exception in 1981. But when the exception is proved, a remedy should be provided. The conspicuous absence of black elected officials in a substantial number of municipalities of the Deep South, particularly those having election structures frequently associated with dilution, may indicate the "exception"' is still prevalent.

This portion of the article answers the questions not adequately addressed by *White* and its progeny: What should be protected in a dilution suit and why? In the first section dilution from a factual standpoint is defined. The second section explains why dilution deprives minorities of the value of the right to vote. Mechanisms for judicial review are examined in the third section, and appropriate remedies for dilution are considered in the final section.

B. Dilution Defined

Mr. Justice Frankfurter, dissenting in *Baker v. Carr,* challenged the majority to explain why "dilution"' was bad:

> Talk of "debasement"' or "dilution"' is circular talk. One cannot speak of "'debasement"' or "dilution"' of the value of a vote until there is first defined a standard of reference as to what a vote should be worth.[209]

In this writing the concern is not precisely with the value of a *vote,* but rather with the value of the *right to vote.* Although the right to vote may have inherent symbolic value, for the individual its practical value comes from the ability to join a vote with those of others to influence election outcomes and ultimately the legislative process. If in political reality a particular group's chances of influencing the outcome of elections are predictably slim, the combined votes of the group will be given little weight in the legislative balancing process.

Dilution is a shorthand expression for the exclusion from the political process of a substantial portion of a governmental unit's qualified electors. For an individual voter, dilution is brought about by the interaction of several factors.

(1) *Involuntary membership in a cognizable minority group.* A "group"' for purposes of the proposed dilution definition is defined both by internal and external recognition of its existence. The group members "are viewed as a group; they view themselves as a group; their identity is in large part determined by membership in the group; their social status is linked to the status of the group; and ***902** much of our action, institutional and personal, is based on these perspectives."'[210] Generally, membership in the group, and the continuation of the group status, is not a matter of choice. The members' shared concerns, including political ones, are also a function of group status, and as such are largely involuntary. (As a group blacks are concerned, for example, with police brutality, substandard housing, unemployment, etc., because these problems fall disproportionately upon the group). That blacks in the South in the past have been a cognizable minority should require no proof.

Justice Stewart suggested in *Mobile* that any notion of "group representation"' could not be cabined. He questioned how a "political group"' would be defined. However, his question misses the point. A cognizable minority group for purposes of dilution is only *secondarily* a political group. A cognizable minority group is a political group only because the predominant group-defining characteristic prevails over all other labels the individual group members may have in the minds of the majority.[211] At any rate, finding a cognizable minority is only the *beginning* of the inquiry.

(2) *A pervasive antigroup attitude on the part of the minority which is manifested in anti-group behavior, particularly political behavior.* Membership in certain groups is undoubtedly a benefit in many situations. However, blacks receive few advantages from their group status. In the past, the anti-black attitude of the majority had been translated into discriminatory behavior which has had lingering effects on the ability of blacks to participate in the political process on the same basis as other citizens.[212] Discrimination has ***903** isolated the group members thereby limiting their informal contacts with others with whom they might discover common interests, and form alliances. In short, the group still exists largely (and for the most part not through choice) as a separate society, with few business, social, or family ties outside the group.

However, the majority's anti-group attitude does not necessarily mean that the group is not a force with which to be reckoned by those trying to create a political majority. Even if the group has negative status, its size and vote potential may be such that antigroup political behavior cannot take place realistically. Unfortunately, however, single party politics and non-partisan elections often allow race to be a unifying factor, and anti-black attitudes can be translated into anti-black political behavior.

(3) *An election structure which insulates the processes leading to election from the impact of the group's vote.* A permanent minority in the political process can be created only if (a) the non-minority interest groups are united in their opposition to the group and candidates sympathetic to its interest; and (b) the election structure is such that the group's numbers are insufficient to elect a candidate of their choice without support from outside the group. When the election structure allows for black votes to be ignored, contestants are unlikely to seek black support or to wish to the identified with black interests. Legislatures elected without black support are not beholden politically to the black community, nor need they fear that ignoring their interest will result in defeat in the future.

(4) *An election structure which insulates as well those elected by the system from the influence of the group.* The most difficult part of a dilution suit from an evidentiary perspective, and in terms of finding an appropriate standard, is determining whether the legislators elected are immune from the minority's influence. If the group's interest can be agreed upon, then perhaps a showing that they are in fact being ignored is possible, but the problems of proof are obvious. The other elements of dilution--a cognizable minority, subject to abuse by the majority, rendered powerless by an election system which maximizes the majority's antigroup behavior--should lead to the presumption that legislators elected by such a system will ignore, if not treated adversely, the interests of the group. This presumption should shift the burden of proof to the state to show that despite the appearance of exclusion, the group is receiving the benefit of its numbers in the political process. A truly interested ***904** legislator should be able to identify the predominant interests of such a substantial group of his constituents and explain how he has responded to their needs.[213] The ultimate proof of exclusion comes from a demonstration that the group's needs and interests are not receiving attention and consideration in the legislative process to the same degree as those of other voters.

Despite the problems of proof, responsiveness is crucial. The most often accepted rationale for finding the right to vote fundamental is its centrality in assuring the benefits of citizenship to the voters; people who have a hand in selecting those who make the laws and who dole out government services are not likely to be victims of government action, or shortchanged on the benefits. If the group and its members are, for whatever reason, receiving as many of the benefits of citizenship as are other citizens of the governmental unit, they are receiving the full value of their right to vote. If they are not, the value of their right is zero, even if their votes are counted like everybody else's.

True, responsiveness is an illusive but not unworkable concept; the difficulty of proof is partially alleviated for the plaintiff by shifting the burden of proof to the defendant. The test is an objective rather than subjective "in the eyes of the voter"' standard. Responsiveness must be evaluated in terms of the functions the particular city government performs. Slightly over-simplified

the government's primary roles are (1) to make policy through ordinances, zoning decisions, etc., and (2) to implement policy and keep the city functioning by spending money.

The city should be required to demonstrate that the group's interests are being considered when policies are made and implemented. Some evidence of black involvement in the process is the number of blacks in policymaking positions, typically advisory boards and high level city jobs. (The latter is particularly important because many important policies are made administratively in the daily functioning of the city.) The city should also demonstrate that the policies actually implemented reflect concern for the group's interest. The *decision* to build more art museums rather than health ***905** centers may be more important than the *number* of art museums built in black and white neighborhoods. The position most favorable to black interests must not always prevail; rather, the legislature should demonstrate that the group's interest was understood and weighed with those concerns of others.

One of the most important decisions a government makes is to choose the method of its own election. When that selection consistently denies a large segment of the city its choice, some justification should be required. One might ask whether at-large elections may be justified. The justification that when the entire city votes for all of the lawmakers “rotten boroughs”' are avoided because all representatives must be responsive to all areas fails if *none* of the legislators are responding to the needs of a large segment of the city's electorate. The justification of a desire to have a majority of the voters elect all the representatives is also not persuasive if it has resulted in a permanent minority. However, the choice of method of election is a single legislative decision. When the minority's interest in electing “some of its own”' is balanced against other interests, perhaps the legislature can justify the choice. Furthermore, proof of responsiveness in other areas may sufficiently compensate for a decision against minority interest in the selection of the election procedures.

The argument that responsiveness should be evidence of influence only if it comes in response to the actual power of the group instead of by virtue of the grace of the legislature also must fail. Finding the motives of legislators is a speculative endeavor when the sought-after motive is supported by action which would be consistent with that motive (discriminating impact/discriminatory motive). How much more speculative will it be to try to ascribe “bad”' motive for having reached a desirable result? If “responsiveness”' is found is it not just possible that blacks have decided to forego supporting candidates who would like their support and would consider their needs in order to pursue a different goal--that of electing a black candidate? That situation perhaps then resembles a claim, not for effective political participation, but for proportional representation.

When the first three factors have been established, and the city is unable to demonstrate responsiveness, the political process can be declared “‘malfunctioning.”' A significant group of the electorate has been deprived of the benefit of their collective vote in a way which others who are political losers have not. In short the group has been “fenced out”' and are left without a political solution to their dilemma.

***906** Changing the election system to assure the election of minority candidates admittedly will not guarantee responsiveness. So long as a majority of those elected remain antagonistic toward the minority, the minority's elected officials may be unable to further the representational interest of the group. In the face of a clearly unresponsive government, however, the group's position is improved by having considerable influence over even a minority of the legislators rather than no influence over any. Even a single group spokesman will have more influence over legislative thought and action than no group spokesman. If, however, the government can establish that the elected officials are in fact giving due respect to the group's interest changing the method of election by judicial fiat may be no more than speculative tampering.

The view expressed here of the underlying evil of dilution is not original. From the dicta in the pre-*White* cases through *Mobile* the underlying premise was that the votes of the group were being cancelled out. Missing, however, was an explanation of why the evidence in the cases did or did not equal a cancellation. The *White-Zimmer* factors relied upon by the courts of the Fifth Circuit, while relevant to the inquiry, should be re-examined to see where they fit in the dilution formula proposed here: A past history of discrimination is indicative of the group's status as a cognizable minority, as well as the anti-group attitude of the majority. Many of the factors (large districts, majority vote and anti-single shot requirements) are evidence that the election

system will allow racial bloc voting to eliminate the influence of the group on the election process. Lack of access to the slating process and/or racial bloc voting are indicative of the majority's anti-group attitude translated into anti-group political behavior. Unresponsiveness is proof that the system has succeeded in cancelling out the votes of the group.[214] A cognizable minority, racial bloc voting (or an evidentiary equivalent) and unresponsiveness are crucial to the determination. The various components of the election system are more fungible, and their influence in the exclusion process is determined by the degree of racial polarization, and the minority's percentage of the electorate.[215] Thus the Fifth Circuit view that some "'aggregate of factors"' proved dilution was incorrect. The particular aggregate *is* crucial.

907** ***C. Dilution As A Denial of The Right To Vote

In addition to failing to define dilution, the cases following *White* did not satisfactorily explain the constitutional basis for the claim. The assumption was that dilution infringed upon the right to vote, but the basis for the assumption was not articulated.

With the exception of the reapportionment decisions, most cases raising the issue of the denial of the right to vote presented no question as to the scope of the right. These decisions involved actual restrictions on the franchise, either total exclusion of certain people as potential voters,[216] requirements that had to be met before anyone could qualify as a voter,[217] or limitations on who could be a voter in a particular election.[218] Thus if there is a "right to vote,"' it clearly was infringed in those cases.[219] The focus of most decisions instead was upon the source of the right, or upon the state's interest in the infringing legislation. Despite the lack of a clear constitutional basis for providing protection (aside from the fifteenth amendment) the Supreme Court since *Baker v. Carr* has subjected to *strict scrutiny* anything it recognized as an infringement on the "right."'[220] The *Mobile* plurality avoided following these cases by declaring the right to vote not to be involved.

***908** Ironically, in the apportionment cases, where no claim of denied franchise could be made, the Court recognized the right to vote as a "preferred freedom"' under the equal protection clause of the fourteenth amendment.[221] Even in these opinions the Court avoided answering Mr. Justice Frankfurter's challenge to define "the value of a vote."' Emerging from these cases, however, is a principle that any device which impairs the *value of voting* impairs the right to vote. Through voting all other rights are preserved. If the ultimate value of voting is to secure the full rights and benefits of citizenship, anything which prevents this for a cognizable group of voters infringes upon the "value"' of the right.

A voter in an overpopulated district has the value of his "right"' diminished because his influence over the election of his representative is only a fraction of that of voters in other districts. An individual member of a minority group, however, has no influence over the election of his nominal representatives, because his vote, along with those of others in the group, has been fenced out of the election process by the dilution factors. In the legislative process, the group's interests are not being afforded the benefit of their numbers. Thus, not only are their particularized needs (those not shared by the majority of non-group members) not attended, but when their interests conflict with those of other segments of the population, they lose more often than other groups of equivalent numerical strength.

The consequences of being the permanent minority in the political process is worse for blacks and other cognizable minorities than for residents of over-populated districts, or even other perrenial losers in politics. City dwellers of over-populated districts suffered when their interests were persistently out-voted by rural representatives. This outcome was likely when there was a perceived conflict between urban and rural interests. In terms of critical legislative expenditures, the urban areas whose legislators had less clout were no doubt significantly short-changed. On other issues, however, the possibility of the rural dominated legislature passing legislation which impacted disproportionately upon city dwellers was diminished by the overlap in rural and urban interests. The people elected to ***909** the legislature looked and thought more like urbanites than they looked and thought *unlike* them.

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

Similarly, individual Republicans are seldom significantly disadvantaged by having an all-Democratic legislature. Political philosophies aside, the difference between individuals who vote Democrat and those who vote Republican are not such that they can be singled out by the legislature. Action benefiting Democrats will probably benefit their Republican neighbors. Since the Republican voters look so much like the Democratic legislators it is very unlikely that any legislation (other than that perpetuating partisan advantages) will have a negative impact on the Republicans.

Qualitatively the injury suffered by blacks at the hands of an allwhite legislature was of a different magnitude. Blacks in urban areas in the South did not have their children sent to segregated schools because they were living in malapportioned districts, nor were they relegated to sitting in the back of the bus because they were not members of the Democratic party. Blacks were discriminated against because they were black and because the lawmakers were white. Even if today white legislators are restrained from passing discriminatory laws, they can continue to be insensitive to the needs of minorities and to the negative impact of certain legislation with no fear of suffering adverse personal consequences (the law will not impact negatively on them) or adverse political consequences (most of their supporters will not be affected).

Thus, the actual impact of dilution on the minority voter is far greater than the impact of malapportionment on the city dweller. Unless the Court is intent upon exalting form over substance, it must recognize that sometimes casting an equally weighted ballot does not preserve the value of the right to vote. Likewise, victims of dilution are not like others whose candidates did not win. These voters lose much more than the election.

D. The Mechanisms of Judicial Review

The choice of the form of government and the method of electing that government are certainly matters better left to the legislature. Why, then, should it ever be acceptable for the judiciary to second guess such a sensitive legislative decision? Much has been written recently about the proper role of judicial review in a democratic society.[222] To consider all the bases currently being suggested ***910** for determining the appropriate level of judicial review and to examine their application to the legislative action being questioned in a dilution suit is beyond the scope of this article. Instead what follows is a consideration of the appropriateness of using heightened judicial scrutiny in dilution cases, first as an application of fundamental rights analysis, and second under the "respresentation-reinforcing"' model of judicial review, proposed by Constitutional theorist John Hart Ely. Next the inappropriateness of the intent requirement of dilution cases is discussed, followed by a suggestion for refocusing the search for intent, if the element is seen as essential.

Fundamental Rights Analysis. The *Mobile* plurality recognized that "a law that impinges upon a fundamental right explicitly or implicitly secured by the Constitution is presumptively unconstitutional.'"[223] The plurality agreed that voting is a fundamental right, citing with approval cases so holding,[224] and accepted that "the Equal Protection Clause confers a substantive right to participate in elections on an equal basis with other qualified voters.'"[225] However, it avoided the application of strict scrutiny in *Mobile* by declaring the right to vote not to be involved in this case because the trial court found "Negroes in Mobile 'register and vote without hindrance." DD"'[226]

Clearly the Court's decisions in the voting area are less than a seamless web, and *Mobile* compounds the confusion. While apparently conceding no need to show intent when a fundamental right is involved, and arguably that the right to vote is fundamental, the plurality made an interesting analysis of the fifteenth amendment: "[The] Amendment prohibits only purposefully discriminatory denial or abridgment by government of the freedom to vote 'on account of race . . . . '"[227] For support Justice Stewart cited *Wright v. Rockefeller*[228] as a fifteenth amendment case requiring intent. *Wright,* in fact involved a claim of intentional racially discriminatory districting. However, no claim was made that anyone, black or otherwise, ***911** was being denied the right to cast a ballot for some congressman. If the plaintiffs had established a discriminatory motive then presumably they would have prevailed. Thus even though districting (at-large elections are a form of districting) does not involve the right to vote (*Mobile*), discriminatory districting will violate the fifteenth amendment (*Wright*), which by its

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

very language applies only to denials or abridgments of the right to vote. If taken literally, the plurality's holding in *Mobile,* its apparent approval of *Reynolds* and the voter qualification cases, its discussion of the fifteenth amendment, plus the holding of *City of Rome v. United States,*[229] decided the same day as *Mobile,* establish three different "rights to vote,"' all having a different scope and all afforded different "protection."' First is the "right"' which is fundamental, afforded the highest protection. Second is the "right"' under the fifteenth amendment which is protected only against intentional discrimination (the scope is broader, but the protection more limited than the first). Third is the "right"' under section 5 of the Voting Rights Act which is protected against both discriminatory intent and effect (here the scope is the broadest and the protection the greatest, but the "right"' is only available under a limited set of circumstances).

Despite the *Mobile* plurality's less than lucid treatment of the proper degree of judicial protection to be afforded the right to vote, strict scrutiny should be available under traditional fundamental rights analysis, or if race were involved, under the fifteenth amendment. Thus, the more difficult task is not to convince a majority of the court that voting is fundamental, but that dilution actually exists, and robs the right of its value.

Representation-Reinforcing Review. Probably no further "justification"' for heightened judicial review is needed if one agrees that the dilution can infringe upon the right to vote. Confusion over the interest asserted in *Mobile* was evident, however, not only in the plurality's opinion, but also in those opinions of other members of the Court who believe "intent"' to be an essential element of a dilution suit.[230] Perhaps the appropriate question is not can the right to vote encompass the dilution plaintiff's interest, but rather, when dilution is present, is the democratic process so broken that judicial repair is needed? Instead of focusing on whether the choice of election ***912** structure is denying certain voters the right to vote, perhaps the operation of the system that produces the legislature should be examined. If the system is not working properly, maybe correcting the system, rather than monitoring its abuse (as suggested by the *Mobile* plurality),[231] is the proper solution.

Professor Ely in his recent book *Democracy and Distrust: A Theory of Judicial Review*[232] proposes as an alternative to the judicial role of protecting "'fundamental values"' that the judiciary act as guardian of the process of representation. Ely draws heavily upon two of Justice Stone's categories from the famous *Carolene Products* footnote.[233] More exacting judicial scrutiny is proper when: (1) the legislation involved "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation,"'[234] or (2) the legislation is based on "prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."'[235] Professor Ely reformulates these ideas to suggest that judicial policing is needed when a democratic malfunction occurs. This result occurs when the process is undeserving of trust:

> (1) [T]he ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudicial refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.[236]

Ely does not deal specifically with racial dilution, and in fact seems to suggest that as a group blacks possess political power.[237] ***913** By reference to the "ins"' choking out the "outs"' he has in mind the malapportionment cases[238] and the voter qualification cases: "We cannot trust the ins to decide who stays out, and it is therefore incumbent on the courts to ensure not only that no one is denied the vote for no reason, but also that where there is a reason (as there will be) it had better be a very convincing one."'[239] Ely would provide heightened judicial concern even if a minority group appeared to have political power, if that group were the object of widespread hostility and if the legislation in question fell more heavily upon the group than upon the group to which the majority of the legislators themselves belonged.[240]

Despite his failure to address the subject, dilution under Ely's theory packs a double punch. The legislation involved assures that the outs will stay out (even if some ins trade places with the other ins). Furthermore, those who are being kept out are the very people for whom the legislature is least likely to have any genuine concern. They are the people upon whom the action of the legislature had impacted negatively in the past. They are, by the proposed dilution definition, objects of widespread hostility. This particular legislation (choice of the method of election) interacts with the hostility for the group to make them permanent outsiders in the political process. The decisions (including the one concerning the rules governing their own selection) of a legislature which has insulated itself from the influence of a cognizable segment of the electorate lack legitimacy, and can be subjected to judicial scrutiny without concern that this review will be inconsistent with the American system of representative democracy.[241] If the government is to be a representative democracy, the rules of the political process must be fundamentally fair. This fairness must be judged in the context of the political and social reality of the rules' application. Rules that assure the persistent exclusion of a significant group of voters fail the fairness test.

The reasons for requiring intent in other equal protection cases are not appropriate in a dilution case. In *Washington v. Davis*[242] the Court explained why a discriminatory purpose is essential to an equal protection case. If disproportionate impact alone were sufficient to suggest the legislature's use of a suspect classification, thus triggering strict scrutiny, a whole range of legislation would lose its ***914** presumption of constitutionality.[243] Facially neutral, otherwise reasonable acts of legislators burdening one race more than another will lose their presumption of constitutionality only upon proof of a racially discriminatory purpose.

This reasoning is simply not applicable to dilution claims. Properly conceptualized, a dilution claim is not a claim that legislation has a discriminatory impact on minorities. Rather it is a claim the political process itself is illegitimate. Chief Justice Warren in *Kramer v. Union Free School District No. 15*[244] explained succintly the reason for potent judicial review:

> The presumption of constitutionality and the approval given “rational”' classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality.[245]

To ask the winners of the election about the fairness of the contest simply makes no sense.

A refocusing of the intent requirement. If a majority of the Court refuses to interpret the illusive right to vote to include the dilution situation and rejects all other reasons to avoid the intent requirements, at least it should look for a discriminatory intent that has more relevance to the fact of dilution than does the subjective motivation of those who selected the method of election under attack. In *Mobile* Justice Stewart rejected the Fifth Circuit view that presence of *White-Zimmer* factors is circumstantial evidence of a racially discriminatory intent:

> [Unresponsiveness is] only . . . the most tenuous and circumstantial evidence of the constitutional invalidity of the electoral system under which they attained their offices. . . . [P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful. The ultimate question remains whether a discriminatory intent has been proved in a given case. . . . [E]lection features that cancel out Negro votes] tend naturally to disadvantage any voting minority. . . . They are far from proof that the at-large electoral scheme represents ***915** purposeful discrimination against Negro voters.[246]

To the extent that these factors tend to prove that whoever selected or maintained Mobile's election structure did so with a subjective motive to exclude blacks, Justice Stewart's assessment is no doubt correct. However, the problem with his approach

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

and that of the court of appeals is that they are looking for intent in the wrong place. Unlike *Washington v. Davis* and *Arlington Heights,* where a single decision (or at most a set of decisions) produced the complained of harm, dilution is *not* the product of a single legislative act. Furthermore, a determination of who made the decision as to the method of election might not even be possible. Could the city completely immunize the process from judicial review by allowing the voters to select the election method? If the method of election is mandated by local legislation enacted by the state legislature is it the motives of that body which count, or those of the local legislative delegation, or those of the city governing body which requested the legislation?[247]

Dilution plaintiffs attack at-large elections as responsible for the problem, but such arguments are made largely because the non-structural dilution factors are not easily remedied by court action. When the Supreme Court "added"' the intent requirement to equal protection claims, it was natural to look for the discriminatory intent in the adoption or maintenance of the method of election. The method of election is, however, only one of the factors that produces exclusion from the political process. "But for"' the other factors, both the group and its members would receive the same benefits and suffer the same disadvantages as everyone else. If state originated or fostered intentional discrimination can be found in the remaining factors essential to the proposed dilution definition--and surely it can[248]-- dilution should not be justified because one of the causative ***916** factors cannot be proved to be the product of a discriminatory motive. A possible neutral motive for selecting and maintaining all or part of the election system should not be permitted to "'sanitize"' from heightened judicial review the exclusion effected by all the dilution factors in concert.[249]

E. Remedies for Dilution

The remedy adopted upon proof of dilution should eliminate those aspects of the election process which promote the exclusion of blacks. Thus the solution must generally address one of the structural dilution factors, since an end to racial bloc voting cannot be mandated. The relief typically requested in a dilution suit is a change of the method of election to single member districts. The assumption underlying the selection of this remedy is that single member districts in combination with segregated housing patterns, almost inevitably produce some black legislators.

Whether all single member districts, a mixed plan, or some other modification will best cure dilution must be determined on the particularized facts of the case. A geographically dispersed minority is not helped by single member districts, but may be by the elimination of election features which increase the member of votes needed for election (such as the majority vote and post requirements). Depending upon the degree of racial animus of the electorate, a mixed plan (some officials elected at-large, others by districts) may be preferable ***917** because of the incentive for coalition-building in electing the at-large seats. The mixed plan provides each group (blacks and whites) with a certain number of representatives where a black/white choice is unlikely, and thereby eliminates a voter's fear that his only representative may be someone of the "opposite"' race. Perhaps this assurance would decrease the importance of race for the remaining at-large seats, and allow for coalition-building across racial lines. Both "groups"' then would have a specific representative who is clearly politically beholden to the group, in addition to representatives over whom the group can exercise some influence. However, in any given situation chances for coalition-building may be so slight that creating any at-large seats becomes the equivalent of creating additional "sure"' majority seats.[250]

The plaintiffs in *Mobile* lost Justice Blackmun's vote because the remedy sought went beyond changing the method of election, to changing the form of government as well. Why a less drastic remedy was not considered is not entirely clear from the district court opinion. Although many commission forms of government call for each commissioner to perform a specific city-wide function, in *Mobile* the commissioners were fungible.[251] Having such a small number of officials elected by single member districts is unusual, but not otherwise objectionable. Even leaving the at-large elections intact, eliminating the majority vote and post requirements would have substantially increased the impact of the black vote, even to the point of being able to hypothesize election day facts which would allow the election of a black supported candidate without white votes.[252] Perhaps Justice Blackmun was correct when he noted: "In failing to consider such alternative plans . . . the District Court was perhaps

overly concerned with the elimination of at-large elections ***918** *per se,* rather than with structuring an electorial system that provided an opportunity for black voters in Mobile to participate in the city's government on an equal footing with whites.'"[253]

VI. Epilogue: the Future of the Dilution Suit

Previous sections of this article argue that *Mobile* was decided wrongly and urge reconsideration of the dilution issue. Correctness notwithstanding, *Mobile* has for the moment replaced *White* as the dilution suit's standard bearer. Whether dilution remains a viable claim for constitutional relief after *Mobile* will depend largely upon the position courts adopt concerning the evidentiary showing necessary to establish a discriminatory motive. The first portion of this section considers the views expressed by the various members of the Court on what constitutes discriminatory motive in the context of a voting case, and also examines the lower court cases applying *Mobile.* The next portion examines dilution claims under section 5 of the Voting Rights Act. It presents a critical analysis of the Supreme Court's treatment of dilution in its most recent section 5 decision, *City of Rome,* in which the Court reached a result strikingly different from that of *Mobile.* A final subsection considers whether section 2 of the Voting Rights Act can fill the gap left between *Mobile* and *Rome* by allowing a dilution claim to be maintained without a showing of discriminatory intent.

A. The Constitutional Suit

Regardless of whether the basis for challenge is the fourteenth amendment or the fifteenth amendment,[254] only two members of the Court (Justices Brennan and Marshall) agree that in a dilution suit the motives of those selecting or maintaining the election structure are immaterial. Two others (Justices Blackmun and White) agree that a discriminatory motive is a prerequisite but would find it established by proof of the *White-Zimmer* factors.[255]

***919** Justice Stevens, while rejecting the *Mobile* plurality's focus on the subjective motives, imposes in his "objective effects"' analysis possibly an even more difficult standard. He would find an election scheme unconstitutional only if it were manifestly not the product of a routine political decision, had a significant adverse impact on minorities and was unsupported by any neutral justification.[256] Under Stevens' test, the many legitimate purposes for adopting an at-large system, particularly if coupled with a legitimate reason to change the existing one, would shield the action from attack.[257]

The plurality's theory of intent almost requires proof of an actual subjective, discriminatory motive on the part of those selecting the election system.[258] "Effects"' alone will be sufficient evidence of intent only when they are so dramatic as to negate any other explanation, or when the plaintiff has negated all other explanations. The plurality expressly rejected the notion that a "tort theory"' of intent would suffice, quoting from *Feeney:*

> "Discriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences . . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of' not merely 'in spite of,' its adverse effects upon an identifiable group.'"[259]

***920** The plurality does indicate that subjective discriminatory intent may be established by circumstantial evidence, but provides no guidance as to what this evidence would be.[260] Two clusters of cases decided recently by different panels of the Fifth Circuit Court of Appeals demonstrate the disparity of possible views on the meaning of *Mobile.* The decision for plaintiffs in three of six cases, on two seemingly different theories, indicate that the dilution suit is not completely dead.

In *McMillan v. Escambia County, Florida,*[261] plaintiffs attacked at-large election systems for several local governing bodies. The Court of Appeals characterized the plaintiffs' complaints as alleging "that the at-large [[[election] systems operate to preclude the black population . . . from electing a member of its own race to any of the three governing bodies."'[262]

The Court recognized the intent requirement and analyzed the plaintiff's "'vote dilution"' claims by utilizing the factors suggested by the Supreme Court in *Arlington Heights* for finding improper motive: (1) The historical background of the action, particularly if a series of actions have been taken for an invidious purpose; (2) the specific sequence of events leading up to the challenged action; (3) any procedural sequence; (4) any substantive departure from normal procedure, *i.e.,* whether factors normally considered important by the decisionmaker strongly favor a decision contrary to the one reached; and (5) the legislative history, especially where contemporary statements by members of the decisionmaking body exist.[263]

***921** The difficulty of applying this analysis to "old"' legislation was apparent when the Court considered the county commission's at-large system, adopted in 1901. The district court found that blacks were already disfranchised by that time. Thus no further device to dilute voting strength was needed.[264] It was then faced with applying the *Arlington Heights* analysis to the legislature's inaction in failing to change the at-large system. Substituting "inaction"' for action in the *Arlington Heights* analysis is almost nonsensical. Nonetheless, the district court found the necessary evidence of discriminatory motive in the finding that the County Commission twice rejected the recommendation of its own government committees for a change to single member districts and from the commissioners' admission that their rejection of single member districts was motivated by the desire to maintain their incumbency. From this the district court interpolated that their concern was that they not be replaced by blacks in subsequent elections.[265] The Court of Appeals, reversing, disagreed with this interpolation: "[T]he desire to retain one's incumbency unaccompanied by other evidence ought not to be equated with an intent to discriminate against blacks *qua* blacks."'[266]

The *Arlington Heights* analysis was more helpful in the school board case. From 1907 until 1945 primary elections for the board were conducted by single member districts, while the general elections were at-large. Immediately after all-white primaries were outlawed in Florida, the legislature adopted at-large elections for the primary as well. This sequence of events, coupled with the unexplained change in the policy of favoring single member districts was sufficient justification, though the appellate court, for the conclusion that the change was racially motivated.[267]

As to the city council's at-large system, direct evidence of some of the participants' motives was found. The at-large system was adopted in the face of rising black political participation, and much direct evidence was presented that indicated the motive behind the adoption was to avoid the election of a black.[268]

***922** Thus, where the method of election in question has been adopted after the need to "dilute"' black voting strength exists, finding a smoking gun may be possible. The Court of Appeals opinion viewed the gravamen of the complaint to be the existence of a "discriminatory motive."' The value of the right to vote was not important to its analysis. Of the three governmental bodies involved, the evidence recounted by the court suggests that the County Commission (the only one found to be constitutional) was the least likely to afford black citizens consideration commensurate with their numbers in the electorate. County elections were characterized by extreme racial bloc voting, and no black had ever been elected. Before the trial neither of the other bodies had elected blacks, but one black was elected to the school board after the trial, and two black council members initially appointed to the council were reelected.[269] Furthermore, these defendants argued that whites campaigned actively for black votes and those elected were responsive to the needs of the black community. The panel found these arguments irrelevant. As to the city's argument that the system was no longer being maintained for invidious reasons, the court noted: "If the system was unconstitutional at its inception and if it continues to have the effect it was designed to have, then the pure hearts of the current council members are immaterial."'[270]

Another panel of the Fifth Circuit applied the reasoning of *Mobile* quite differently in *Lodge v. Buxton.*[271] This panel concluded that the use of the *Zimmer* factors as circumstantial evidence of subjective discriminatory intent survived *Mobile,* but with modification. The *Zimmer* criteria are to be applied "only to the extent that they are relevant to the factual context at hand and, to the extent they are not so relevant, to employ other criteria.'"[272] Furthermore, reasoned the appellate court, the Supreme Court implicitly concluded ***923** that absent proof of unresponsiveness, a prima facie case cannot be established.[273] Unresponsiveness is crucial because effective political participation, which is protected by the fourteenth and fifteenth amendments, means

> that the system of government that serves the interest of the people must serve the interests of all the people; at least to the extent that one group's interests are not invidiously discriminated against. Therefore, a racially definable group may challenge an electoral system on dilution grounds only if it can be shown that the system invidiously operates to the detriment of their interests.[274]

Unresponsiveness, while essential, is insufficient alone to establish intent, or even to shift the burden of proof.[275] Intent must still be discerned from the totality of the circumstances.

The court then applied this modified *Zimmer*/unresponsiveness/toality of the circumstances approach to affirm the district court's finding of unconstitutional motivation. The evidence as recounted by the Court of Appeals established that the plaintiffs, black residents of a large, rural Georgia county, were not effectively participating in the electoral process. In short, "'dilution"' as described in Part V was established.[276] The conclusion that the dilution was the product of ***924** unconstitutional motivation is only slightly more problematic. While the evidence in *Lodge* did not differ in kind greatly, if at all, from that found insufficient by the *Mobile* plurality, it was more extreme and as such presented a more sympathetic case, regardless of the theoretical basis for the claim. None of the evidence directly implicated the statute mandating at-large elections, but the inference is easily drawn: a government that discriminates against blacks at every opportunity probably retained a method of election that immunizes its behavior from the impact of its victim's vote because it does just that.[277]

Whether these two cases be reconciled depends upon the *Lodge* court's reason for requiring unresponsiveness. If the court is saying proof of unresponsiveness is necessary because without it there is no discriminatory impact, then the cases are clearly at odds. The *McMillan* court viewed the effect of the at-large systems on the ability of blacks to elect a candidate of their own race as racially discriminatory without any further showing of exclusion from the political process.[278]

***925** On the other hand, if the *Lodge* court is saying, as it appears to be, that proof of responsiveness is crucial when one must rely upon circumstantial evidence for proof of a continuing discriminatory motive,[279] then the two cases are less far apart. If this latter interpretation is the correct one, the court's imperative on unresponsiveness should be read to say "except when there is a smoking gun.'"[280] When there is a smoking gun, the process analysis of *Arlington Heights* is available. For changes adopted soon after the demise of the white primary or other disfranchising devices, this may be adequate.[281]

Without the smoking gun, however, the route to discriminatory intent is necessarily more circuitous. If the inquiry is truly directed toward finding that the legislature had a racially discriminatory purpose, the *Lodge* court may have over-emphasized unresponsiveness. If the gravamen of the complaint is that the method of election is the product of a racially discriminatory motive, direct evidence of that motive should establish a constitutional violation (assuming the intended impact is discriminatory), even if on every other matter of interest to the black community the legislators were totally responsive. Regardless of the implications of its absence, however, unresponsiveness in conjunction with the other "dilution factors"' is strong circumstantial evidence of racial motivation.

If the Supreme Court is to avoid overstepping its role in a democratic society, *Lodge,* regardless of the motive of those responsible for retaining the system, presents a more compelling case than *McMillan.* Superficially, *McMillan* is not objectionable as an application of the suspect classification doctrine. Legislators ought not to select or maintain an election system because of its impact on the election of blacks. Nevertheless the motive may be found objectionable ***926** because it strongly suggests that blacks will not be represented by anyone (black or otherwise). But what if, as the city argued in *McMillan,* the discriminatory reasons for the adoption of at-large elections twenty-five years earlier have long been replaced by legitimate good government ones? And furthermore, blacks are now as fully "represented"' as other citizens? Should we insist upon replacing a system where blacks have some influence over all the officials, with one where they will have great influence over a few?[282] Setting aside legislation which accomplishes perfectly legitimate ends because of the motives of some of its adopters (most of whom may no longer be on the scene) is a far more serious intrusion upon the "democratic process"' than in correcting a system which is *not* functioning in a democratic way.[283]

B. Section 5 of the Voting Rights Act of 1965

As noted earlier,[284] section 5 of the Voting Rights Act has been a very effective weapon in combating the enactment of election laws which interfere with protection minorities' participation in the political process. However, section 5 is of limited assistance because (1) it applies only in certain states and political subdivisions;[285] (2) its preclearance provisions are triggered only by "changes"' in the election process after its effective date,[286] and thus it has no impact on laws and practices adopted before that time; (3) as interpreted by the Supreme Court, the provision will be helpful only if the election scheme or device adopted is more repressive than the scheme or device it replaces, although the submission requirement itself probably is an additional deterrent;[287] and (4) the provision will expire in 1982 unless extended by Congress.[288]

***927** So long as the law is effective covered jurisdictions must obtain federal preclearance of any change in practice or procedure affecting voting in even a minor way.[289] Thus all potentially dilutive devices such as multi-member districts, at-large elections, majority vote requirements, etc., adopted after the effective date the Act are subject to preclearance.

Section 5 provides two routes for preclearance.[290] The one most commonly chosen by covered jurisdictions is to submit the change to the Attorney General who then must object within sixty days of his receipt of a completed submission to prevent implementation of the change.[291] The alternative route, usually only selected after the jurisdiction has been unable to secure preclearance from the Attorney General, is to obtain a declaratory judgment from the District of Columbia District Court that the change is not discriminatory in purpose or effect. The burden of proof on the issue of discriminatory purpose or effect is on the submitting authority. Thus if either the Attorney General, or, alternatively, the District Court is unable to conclude the burden has been met, preclearance must be denied.[292] Even when the election devices predate the effective date of the Act, their presence may result in a denial of preclearance to other changes. For example, an annexation to an existing municipality of a large number of new white voters may be denied preclearance on the grounds that the percentage of black voters is thereby diminished, thus lessening their impact in an at-large election system.[293] In order to obtain preclearance the submitting authority may have to agree to adopt single member districts to compensate for the "dilution."'[294]

The standard for judging whether a change is not discriminatory in purpose or effect and thus is entitled to preclearance was set out by the Supreme Court in *Beer v. United States.*[295] If a change is not retrogressive, it does not violate section 5 unless "the [newly ***928** adopted law] itself so discriminates on the basis of race or color as to violate the Constitution."'[296] The Court saw Congress' interest in enacting section 5 as insuring that changes in voting procedures would not lead to *retrogression* in the position of racial minorities in their exercise of the electoral franchise.[297] Thus whether a newly adopted law is discriminatory depends largely upon what it replaces.[298]

© 2022 Thomson Reuters. No claim to original U.S. Government Works.

One consequence of the retrogression standard is that jurisdictions which had more repressive election systems on the effective date of the Act may be rewarded by easier preclearance because any slight improvement will be sufficient to qualify as amelorative. Strangely, this result may be entirely consistent with congressional interest to "freeze"' election laws in covered jurisdictions as of the effective date of the Act in order to prevent further retrogressive tactics. Furthermore the effect of a section 5 objection is to prevent the implementation of the new law. The provision provides no further remedy; therefore if an ameliorative change were to be denied preclearance, the more repressive system would be resurrected.[299]

***929** The Court in *Beer* indicated that even an ameliorative change should be denied preclearance if the plan is unconstitutional. After *Mobile,* a districting plan is unconstitutional on racial grounds only if adopted for a discriminatory purpose. But election laws adopted for such purposes are by the express language of section 5 not entitled to preclearance. Thus the *Beer* Court reference to the Constitution as part of the preclearance standard is puzzling unless, of course, the Court did not yet have *Mobile* in mind. At any rate, section 5 places the burden of proof of the issue of discriminatory purpose on the submitting authority, which means in close cases preclearance should be denied.[300]

Because section 5 applies only to election law *changes,* the retrogression standard is consistent with the Congressional purpose for its enactment--to prevent the adoption of new obstacles to effective political participation by the minorities who would soon be enfranchised by other provisions of the Voting Rights Act. Unfortunately, the Supreme Court in its most recent section 5 decision, *City of Rome v. United States*[301] adopted a short-sighted definition of retrogression. The new definition appears to see Congress' goal of full minority participation exclusively in terms of the minority group's ability to elect a minority candidate, and thus views "any"' theoretical dimunition in this ability as retrogressive.

In 1979, the City of Rome, Georgia, sought district court preclearance of a number of election changes enacted by the Georgia legislature in 1966, but inadvertently not submitted until 1975.[302] ***930** Rome had a 1970 population of 30,759, 76.6 percent white, and 23.4 percent black. The black percentage of the voting age population was 20.6 percent.[303] Prior to the 1966 changes, the City's charter provided for a nine-member city commission to be elected at-large by a plurality of the vote, with one member residing in each of the city's nine wards. A five member board of education was also elected by a plurality at-large, without a residency requirement. In 1966, the number of residency wards for the city commission was reduced to three, with three commissioners to be elected at-large from each ward by designated posts. The terms were to be staggered, and a majority was required for election. The school board was expanded to six members, with two members to be elected at-large from each ward by designated posts.[304] In essence, then, the change in the city commission was from an at-large system with posts (a residency requirement is the equivalent of a post) and only a plurality needed for election to an at-large system with different posts and a majority vote requirement. In the case of the school board the change was from an at-large system without a post requirement and only a plurality required for election, to an at-large system with posts and a majority vote requirement.

The Supreme Court agreed with the district court's conclusion that when those changes were combined with racial bloc voting, the effect was dilution of the black voting strength. The Court reasoned that under the previous plan, blacks could take advantage of vote splitting by the whites, and perhaps elect a candidate of their choice by "single shot voting"' in his favor.[305] This would not be possible under the submitted plan. Thus, concluded the Court, the change "'would lead to retrogression in the position of racial minorities with respect to their effective exercise of the electoral process."DD"[306]

The *Rome* majority is as remiss as the *Mobile* plurality in not ***931** considering the underlying value of the right to vote--the only right protected by section 5--when determining whether that right has been denied or abridged. If the *Mobile* plurality's view of the right as encompassing little more than the right to register and cast a ballot freely is unnecessarily narrow, then the *Rome* majority, speaking through Justice Marshall, has made an unwarranted and arguably unwise leap in the opposite direction by equating "'retrogression in the theoretical ability of the minority group to elect a candidate of its choice,"' with "retrogression in their effective exercise of the electoral process."'[307]

Even if retrogression in the group's ability to elect a candidate of its choice should be equated with retrogression in the group's political strength, the district court's finding of "retrogression"' was based on highly unlikely conjecture. The Court's suggestion that under the old system minorities could take advantage of vote splitting and single-shot voting to select a candidate does not appear to be accurate. The old system required one commissioner to be elected from each of the nine residency wards, thus single shooting could not be utilized effectively.[308] Since the Board of Education was elected at-large, without a residency requirement, single shot voting would have been possible, but only theoretically helpful.

True, the added majority vote requirement makes election of a black candidate more difficult in both the commission and the board elections. However, even without this requirement, a black candidate could not be elected to the commission without white support unless whites split their vote fairly evenly among a relatively large ***932** number of other candidates for a particular post.[309] With the fewer votes needed for a plurality, and with careful use of single shooting, blacks' chances for electing a black to the board were better, but still slim without substantial white support.[310]

While the evidence of retrogression--even in the ability to elect a candidate of their choice--was mostly theoretical, evidence that Rome's black citizens were effective participants in the political life of the city was quite concrete. Justice Rehnquist dissenting, pointed out:

> The lower court found . . . [no] barriers to black voter registration . . . to black voting or black candidancy . . . that white elected officials have encouraged blacks to run for elective posts . . . and are "responsive to the needs and interests of the black community."' The city has not discriminated against blacks in the provision of services and has made efforts to upgrade black neighborhoods.
>
> It was also established that although a black has never been elected to political office in Rome, a black was appointed to fill a vacancy in an elective post. White candidates vigorously pursue the support of black voters. Several commissioners testified that they spent proportionately more time campaigning in the black community because they "needed that vote to win."' The Court concluded that "blacks often hold the balance of power in Rome elections."'[311]

Thus it appears that a constitutional challenge to Rome's election system would not have been successful under the "old"' dilution standard of *White* and *Zimmer,* and clearly, given the absence of evidence of intentional discrimination in the record, would not pass muster after *Mobile.*

For better or worse, it seems clear that the Court has found in ***933** section 5's "effect of denying the right to vote on account of race"' language a strange entitlement for minority voters--the right to be free from election changes which even theoretically reduce their chances of electing a candidate of their choice, regardless of how successfully they are participating in the political life of the covered jurisdiction. Even if Congress has the authority to ordain such a result in the name of affirmatively providing greater protection for a previously excluded minority, one may question its desirability. In light of the specific finding by the trial court that blacks played a key role in Rome's politics and that they played it well enough to secure for themselves the full benefits of the "right to vote,"' forcing the city to abandon a fully functioning election system represents unwarranted judicial tampering. Although in the case of *Rome,* blacks were elected to both bodies under the "revived"' plan (notably with considerable white support)[312] whether the black community will receive greater "value"' from their vote remains to be seen. The Court may have negotiated a "trade"' of political clout for a token representative.

This criticism of the result in *Rome* does not mean that changes such as those involved should never be denied preclearance. Had the record demonstrated that Rome's black citizens were not effective participants--that racial bloc voting was prevalent,

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

that white voters were unwilling to form political alliances with blacks, that they were unable to make their numbers count in the decision-making process of city government--then any further weakening of their position by *potentially* discriminatory election laws should not be allowed under section 5. If the only opportunity for any political voice is through the remote possibility of electing a candidate, then this possibility should be preserved.[313] This simply was not the case in *Rome.* The increased difficulty of electing a black candidate should have been sufficient to imply retrogression in the group's ability to participate effectively in the political process. This implication, however, was more than adequately rebutted by the district court's finding of full black political participation.

Other supporters of minority voting rights are likely to view the *Rome* result more favorably than the writer. *Rome* practically ***934** eliminates any possibility that any of the devices traditionally associated with dilution can successfully be adopted by covered jurisdictions, regardless of whether they acutally result in dilution as defined in Part V. Undoubtably, in most situations where a change makes the election of black candidates theoretically more difficult, it also renders black political power less effective. Any harm to minorities is more likely to come from increased resentment on the part of covered jurisdictions engendered by the questionable logic of the decision and the increased clout it provides the Attorney General in the section 5 submission process.[314] Furthermore, the decision supplies ammunition for those who argue that section 5 is being used to guarantee blacks and other minorities proportional representation, and therefore should be allowed to expire.

Rome is also important because, together with *Mobile,* it indicates serious divisiveness among members of the Court on the meaning of the right to vote, with none of the “camps”' consistently heeding the underlying value of voting. Presumably, those members who voted with both the *Mobile* plurality and the *Rome* majority did so on the basis the different statutory standard,[315] but the cases cannot rationally be reconciled on that basis. Even under section 5's “‘effects”’ standard it is still the right to vote which must be affected.

C. Section 2 of the Voting Rights Act

In addition to the fourteenth and fifteenth amendment claims, the complaint in *Mobile* alleged that the city's at-large election system violated section 2 of the Voting Rights Act, which unlike section ***935** 5, is national in application and is not limited to “changes.”' The trial court and the parties apparently treated the *Mobile* case as a “dilution”' case without separately considering the statutory and constitutional bases for the claim. Neither the district court nor the Court of Appeals opinion based their decision on statutory claims. In just three paragraphs, the plurality disposed of this claim by concluding that section 2 was merely a restatement of the fifteenth amendment, and thus added nothing to the plaintiff's argument. Only Justice Marshall's dissent[316] addressed the issue.

Nor did section 2 receive extensive treatment in the briefs filed by the *Mobile* parties. The appellees (plaintiffs below) maintained that the substantive standard for section 5 should also apply to section 2. Otherwise, it is necessary to assume Congress intended to prohibit new election laws under section 5, even if those same laws would be immune from attack if they predated section 5, or were in jurisdictions not subject to its provisions. Thus, reasoned the appellees, a more logical interpretation is that section 2 and section 5 both prohibit election laws which have the *purpose or effect* of denying the right to vote on account of race. Only the method of enforcing the prohibition is different, with the political subdivision having the burden of proof under section 5, and those attacking the law having the burden under section 2.[317]

Section 2 received little attention prior to *Mobile,* probably because it was generally believed that “dilution”' claims were maintainable under the fourteenth amendment, regardless of the motives of those responsible for the dilution.[318] With only Justice Brennan and Marshall expressing the view that “discriminating effects”' alone can constitute a constitutional violation, section 2 may be receiving heightened attention. Since a majority of the Court has not specifically stated a position--indeed there may be some question as to whether the issue was actually before the Court in *Mobile*[319]-- efforts to present the issue again more persuasively would seem worth-while.

WESTLAW © 2022 Thomson Reuters. No claim to original U.S. Government Works.

***936** The statutory argument is particularly appealing because of the demonstrated willingness of members of the plurality to find that Congress had the power to pass legislation going beyond the expressed prohibitions of the fourteenth and fifteenth amendments. In the *Rome* case, a majority of the court agreed that the enforcement provision of the fifteenth amendment allows Congress to prohibit practices that in and of themselves do not violate section 1 of the amendment, and thus upheld the "effects"' standard of section 5, regardless of whether the amendment itself prohibits only "intentional"' discrimination.[320] Likewise, a majority of the court has been willing to find similar congressional authority under the fourteenth amendment.[321]

Congress may constitutionally enact prohibitions that exceed the fifteenth amendment in an effort to secure its guarantees, but has it in fact attempted to do so in section 2? If section 2 is to be an available alternative to the Constitution for dilution claims, three questions must be answered: 1) Did Congress intend for section 2 to prohibit voting practices that have the *effect* of denying or abridging the right to vote; 2) Did Congress believe the right to vote could be violated by procedures that do not affect access to the ballot; and 3) Did Congress see election structures that contribute to "dilution"' as devices that have the effect of denying or abridging the right to vote?

937 1. *Did Congress intend for Section 2 to prohibit voting practices that have the effect of denying or abridging the right to vote?

A logical starting place for discerning Congress's purpose for section 2 is the language of the section and its function in the overall congressional scheme to be implemented by the Voting Rights Act.

The 1965 Voting Rights Act is an incredibly complicated statute. Many of its nineteen sections are intertwined and careful dissection is needed in order for it to be comprehensible. One sentence in section 5, for example, is forty-two lines long and makes six references to other sections of the Act. By contrast, section 2 contains a simple imperative:

> No voting qualifications or prerequisites to voting, or standard, practice, or procedure shall be imposed or applied by any state or political subdivision to deny or abridge the right . . . to vote on account of race or color. . . .[322]

In its simplicity the language of section 2 is ambiguous. The provision says nothing about "intent,"' "purpose,"' or "effect,"' and much could be made of the omission. However, when the section is read as the *introduction,* the *preamble,* to a comprehensive scheme designed to insure the right to vote and to remedy past discrimination, the omission of this language is understandable.

Section 2 is the first substantive section of the Act. It is the allencompassing statement of what is prohibited by the entire Act. All that follows represents Congress' method of carrying out section 2's imperative. This is highlighted by the fact that section 2 is 42 U.S.C. 1973 with no subparagraph description. The remaining sections of the Act are subparagraphs of section 2. The subparagraphs represent particular *ways* that discrimination in voting is to be barred. Other imperatives appear throughout the remainder of the Act, but none as broad as section 2, and like section 2, none of these "'imperative"' statements contain the "purpose or effect"' language.

For example section 4 states in part: "[N]o citizen shall be denied the right to vote in any . . . election because of his failure to comply with any test or device . . . . "[323]

***938** Other sections of the Act provides means for guaranteeing the non-abridgement of the rights protected, and delineate the remedy to be employed upon certain findings of fact. In these sections--those dealing with *findings* to be made rather than with prohibitions--the "purpose or effect"' language appears. For example, section 3(b) provides, in part:

> If in a proceeding instituted by the Attorney General or any aggrieved person under *any* statute to enforce the voting guarantees of the fourteenth or fifteenth amendment . . . the *court finds* that a test or device has been used for the *purpose* or *with the effect* of denying or abridging the right . . . to vote on account of race or color, . . . it shall suspend the use of tests and devices . . . .[324]

Section 3(c) provides that courts may as a part of the relief in a voting case suspend voting law changes in the offending political subdivision until the *court determines* that the change . . . "does not have the *purpose* and will not have the *effect* of denying or abridging the right to vote . . . . "[325]

Section 4,[326] which contains the trigger provisions for coverage, makes six references to "purpose or effect"' and always in the context of a "finding"' or "determination"' to be made. Likewise, the all important section 5, discussed in detail elsewhere, requires the District of Columbia District Court to determine that election changes in jurisdictions subject to its provisions "'[do] not have the *purpose* and will not have the *effect* of denying or abridging the right to vote . . . . "[327]

***939** Finally in section 10[328] Congress set out findings which imply that it believed that the constitutional rights sought to be protected by the Act could be violated without regard to the purpose of the violators. In that section Congress authorized the Attorney General to bring suit against the enforcement of any requirement of payment of a poll tax as a precondition to voting because of its findings that, inter alia . . . "in some areas [the poll tax] has the *purpose* or *effect* of denying persons the right to vote because of race or color. Upon the basis of these findings, Congress declares that the *constitutional right* of citizens to vote is denied or abridged . . . . "[329]

Viewing the Act as a whole, clearly Congress intended to outlaw racial discrimination in voting regardless of the vehicle for the discrimination, and, in the words of President Johnson, to "establish a simple, uniform standard which cannot be used however ingenious the effort, to flout our Constitution."'[330] Where Congress was certain as to the evil, it was specifically outlawed. But being well aware that discrimination can be subtle as well as obvious, Congress in section 2 outlawed any and every thing that could be demonstrated to deny or abridge the right to vote on account of race, leaving open for future determination what those things might be. Since Congress by outlawing known evils--literacy tests, poll taxes, and unprecleared election changes in covered states--expressed the view that these devices could have the *purpose* or *effect* of denying or abridging the right to vote, an assumption that Congress believed any other "voting qualifications or prerequisite to voting, or standard, practice or procedure"' could only deny or abridge the right to vote if enacted or maintained for the *purpose* of discriminating would be illogical. In short, no basis exists for assuming Congress intended one standard for outlawing known evils, but another for evils not readily apparent.

Had the "purpose or effect"' language appeared only in connection with the preclearance provisions, which apply only in areas with a legislatively determined history of fifteenth amendment violations, a different interpretation might be placed upon the absence of this language in section 2. Congress could have anticipated that after literacy tests--the chief vehicle for disfranchisement in the covered jurisdictions--were abolished, new devices would be ***940** adopted to take their place.[331] Recognizing the difficulty of proving "purpose,"' and in light of those regions' past history of racial voting discrimination, Congress could have concluded that these newly enacted devices justified a conclusive presumption of discriminatory purpose when a discriminatory effect was proved. Alternatively, Congress could have concluded that in regions with a history of discrimination, a neutrally motivated voting change could perpetuate the effect of prior intentional discrimination, and that to outlaw this perpetuation constitutes legitimate remedial legislation.[332]

These arguments are negated for two reasons. First, "purpose or effect"' language is also found in the provisions applicable nationwide, including jurisdictions for which no prior history of discrimination existed. Second, whatever justification exists for

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

treating Rome, Georgia, differently from Indianapolis, Indiana, on the basis of the former's discriminatory past will not support a similar distinction between Rome and Mobile. If a change to an election system that has a discriminatory impact gives rise to a presumption of a discriminatory purpose under section 5 in Rome, understanding why the maintenance of a similar system in Mobile would not give rise to a similar presumption is difficult. Furthermore, the maintenance of a system with a discriminatory impact perpetuates the effects of past intentional discrimination as effectively as would the adoption of that same system.

Since section 2 was not a controversial provision in 1965, records of debates over its substantive standards are scarce, if not non-existent. During the Senate hearings on the original bill, there was some discussion of the meaning of the word “procedure”' in section 2. Attorney General Katzenbach, as spokesman for, and chief draftsman of, the Administration's bill, explained: “I had thought of the word ‘procedure’ as including any kind of practice if its purpose or effect was to deny or abridge the right to vote on account of race.”'[333] Several other references to the section's substantive standard are found in dicta in the legislative history of the 1970 and ***941** 1975 extension hearings. In 1970, the Administration proposed a bill that would have eliminated section 5 and as a “fair trade,”' according to the Administration spokesman, Attorney General Mitchell, would have strengthened section 2. Mitchell testified:

> Under the present law outside of the seven covered states, the Attorney General is limited in voting rights cases to a claim of constitutional violation. Under our proposal, he could institute a lawsuit any place in the country based on a broader statutory protection of a discriminatory “purpose or effect”' of a particular voting law or set of voting laws.[334]

The Administration's bill was passed by the House,[335] but was never enacted. The bill that became law, the 1970 Voting Rights Amendment,[336] extended the operative provisions of section 5 for an additional five years. Section 5 was recognized as the heart of the Voting Rights Act, and any suggestion that it could be “replaced”' by a provision allowing the Attorney General to bring “purpose or effect”' suits could not have been taken seriously. However, during the discussion of the Administration's bill, proponents of extension noted several times that the Attorney General already possessed the authority to bring these suits, and thus the proposal presented no “tradeoff.”'[337] Typical of the comments is the following statement, adopted from the Civil Rights Commission, by the sponsors of the substitute bill ultimately enacted:

> S. 2507, after eliminating the simple enforcement procedure (of section 5) would substitute a section authorizing the Attorney ***942** General to sue the Federal Court whenever he believes a State has enacted or is administering any voting procedure with the purpose or effect of denying the francise on grounds of race. *But the Attorney General already has the authority to bring such suits (under Sections 2 and 12(d) . . . . Thus, the new section would give the Attorney General no new powers in addition to those granted by the Voting Rights Act and its predecessors.*[338]

Likewise, during the 1975 extension debate, an opponent of simple extension, Senator Scott of Virginia, proposed a change in the coverage provision which would have effectively repealed section 5 for all the jurisdictions covered in 1965. In support of his bill, Senator Scott noted: “Substantially all the rights that are in the temporary legislation are in the permanent legislation . . . . The principal difference relates to the burden of proof . . . . ”[339] Senator Scott further described these permanent provisions: “There is a general law . . . that does not require extension, that protects the rights of all citizens to vote, and that is title 1, sections 2 and 3 . . . .[340]

2. *Did Congress believe the right to vote could be violated by procedures, devices, etc. that do not affect access to the ballot?*

If section 2 is to be a viable option to a constitutional suit, it is also necessary to address Justice Stewart's assertion that the fifteenth amendment, and thus section 2, applys only to denial of access to the ballot.[341] As originally drafted, section 2 included a prohibition against any "'qualifications or procedure."' During Senate hearings on the bill, concern was expressed that the word "procedure"' might not reach all the potentially discriminatory practices. To give the Act the broadest possible scope, the language was expanded to include "voting qualification or prerequisite to voting, or standard, practice, or procedure."'[342] The Supreme Court in *Allen v. State Board of Education,*[343] utilized this change in the language of ***943** section 2[344] to support its interpretation that the identical langauge in section 5 was broad enough to include a change from district to at-large elections: "The Voting Rights Act was aimed to subtle, as well as obvious state regulations which have the *effect* of denying citizens their rights to vote because of their race."'[345] The Court continued: "[T]he Act gives a broad interpretation to the right to vote, recognizing that voting includes 'all action necessary to make a vote effective.' . . . See *Reynolds v. Sims* . . . . "[346]

Thus the Court, in its first opportunity to rule on the breadth of the Act, adopted the position that the legislative history supports the notion that Congress believed districting--an act which in no way affects registration or balloting--could deny the right to vote. Unless the Court is prepared to believe that the "right to vote"' in section 2 is different from the "right to vote"' in section 5, the *Mobile* plurality's view of section 2 must be seen as inconsistent with *Allen.*

3. *Did Congress see election structures that contribute to "dilution"' as devices that have the effect of denying or abridging the right to vote?*

The legislative history is consistent with the view that "dilution"' is a denial of the right to vote within the meaning of the Act. Clearly the sponsors of the 1965 Act were concerned primarily with removing barriers to registration and balloting.[347] In an era when mass disfranchisement of blacks was the norm in southern states, the possibility of the election structure diluting black voting strength probably did not receive much attention. By the time the ***944** temporary provisions were on the verge of expiring in 1975, however, "'dilution"' was much more a concern. The Senate Hearings are replete with testimony about the discriminatory effects of multimember and at-large districts.[348] Numerous section 5 objections to the adoption of these practices were noted.[349] The Assistant Attorney General for Civil Rights, J. Stanley Pottinger, was questioned about the Justice Department's litigative efforts to have these devices enjoined.[350] At no point was the suggestion made that the Act needed to be strengthened to allow this type of litigation. In light of other suggestions for increasing the effectiveness of the Act,[351] a reasonable presumption may be made that the Act's supporters believed dilution was already prohibited by the permanent provision of the Act.

Concluding that section 2 prohibits election structures that contribute to dilution, regardless of the purpose of their enactment, solves the problem of *Mobile,* but not the problem of how to define dilution. By the 1975 extension hearings Congress should have been aware of *White, Zimmer,* and numerous other dilution cases, and reasonably could have considered them to be definitive of the issue. The inadequacy of the definition derived from those cases was discussed in Part II, and the substitute proposed there is equally appropriate for claims brought under section 2.

Alternatively, section 2 may be seen as prohibiting election laws, which, although neutral themselves, have the effect of continuing the harm caused by past intentional violations of the fifteenth amendment. This view is similar to the intent standard for constitutional voting cases suggested by the Fifth Circuit in *Kirksey v. Board of Supervisors.*[352] *Kirksey* reasons that minorities have not been fully compensated for past blatant denials of the franchise until ***945** they are full participants in the political process. Any state-imposed device which perpetuates the effects of past disfranchisement is in essence a substitute for the previous intentional denial. Regardless of whether the neutral maintenance of such devices states a claim under the

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

Constitution as suggested by *Kirksey,* it is entirely consistent with the remedial nature of the Voting Rights Act to recognize such a claim under section 2.

The legislative history of the Voting Rights Act amply supports the notion that Congress intended not only to bar future discrimination, but to remedy the effects of past discrimination. As noted by Senator Javitts:

> "[T]here is one fundamental concept about this bill . . . . This bill was designed not only to correct an active history of discrimination, the denying of Negroes of the right to register and vote, but also to deal with the accumulation of discrimination . . . . But to assume that this bill has only one dimension and to say, 'I am not discriminating now' is neither the background nor purpose of the bill.'[353]

The purpose of the Voting Rights Act is to enforce the guarantees of the fifteenth amendment. The fifteenth amendment is not truly being enforced until all effects of its past abridgment which can be eradicated have been.[354]

The difference between this standard and pure effects standard is obviously the necessity of proving past disfranchisement. Thus, in jurisdictions where there has been no history of disfranchisement, no claim for relief could be stated even though minorities were currently being effectively precluded from meaningful political participation. As a practical matter, however, the kind of exclusion from the political process suggested in Part V as the appropriate factual basis for dilution is unlikely to be found in jurisdictions that have never experienced fifteenth amendment violations.

***946** In summary, section 2 should be reviewed as a viable alternative to the constitutional dilution suit.

Conclusion

So, what can one say to Congress about the need for additional protection of minority voting rights beyond that provided by the Constitution and the permanent provisions of the Voting Rights Act?

First, the figures on black elected officials in Part II, while certainly not conclusive, suggest that black political participation is still depressed in some of the regions subject to the Act's special provisions. In fact, the figures are probably too optimistic because they deal solely with municipalities. Other studies of county and state governments find evidence of even less black participation. If Congress is concerned about genuine political participation, the words of Howard Glickstein are as appropriate today as they were when, as director of the Notre Dame Center for Civil Rights, he testified in the 1975 extension hearings: "When black voting power is evaluated not for its news worthiness but in the more realistic light of black participation and power in the political system . . . blacks have made only a start toward full political equality."'[355] Criticisms of *Rome* aside, extension of section 5 will decrease the possibility that the progress made will be wiped out by neutral election law changes.

Second, after *Mobile,* the Constitution provides little protection for minorities from dilution caused by existing election systems. In a sense, the Court is not protecting the first right of citizenship by defining the right to vote without regard for the value of voting. But, by this unnecessarily broad reading of section 5's "purpose or effect standard"' in *Rome* the Court has invited Congress to "fill the gap."D'

Congress should accept the invitation by coming down clearly on the side of the right to vote. That value comes not from proportional representation, nor is it always assured by the right to cast a ballot. Rather it comes from the ability to join together with others to make one's numbers felt in the political process and, therefore, in societal decision-making. It comes from being able to form alliances to further common goals. It comes from being able to participate in the "pluralist's bazaar"' of politics. Congress can assure minorities ***947** they will receive the value of the right to vote by rejecting the extremes of both *Mobile* and of *Rome.* To do this they should define "discriminatory effect"' to reflect the right value--not balloting, not proportional

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

representation--but effective political participation. Although this article argues that section 2 already provides this protection, Congress should not risk such precious rights on so slender a reed. A clarifying amendment is advisable.

Perhaps the Supreme Court's reluctance to protect minorities from the disproportionate impact of laws they had no part in making and are powerless to change is justified. But when the Court does not act to correct a denial of access to the law-making process itself, it relegates minorities to permanent outside status--fully dependent upon the benevolence of the majority. Congress should not make the same mistake.

1 *See generally* V. Key, Southern Politics in State and Nation (1949); J. Krousser, The Shaping of Southern Politics (1974); S. Lawson, Black Ballots, Voting Rights in the South 1944-1969 (1976); C. Vann Woodward, The Burden of Southern History (rev. ed. 1968); Derfner, *Racial Discrimination and the Right to Vote,* 26 Vand. L. Rev. 523 (1973).

2 *See* U.S. Dept. of Justice, Protection of the Rights of Individuals (1932), *cited in* U.S. Commission on Civil Rights Report, Voting (1961).

3 Ch. 114, 16 Stat. 140. Earlier Congress had passed the Reconstruction Act of 1867, [ch. 153, 14 Stat. 428 (1867)], which Act provided, *inter alia,* that before a state would be entitled to representation in Congress: (1) Negroes be admitted to suffrage when elections for delegates to the state constitutional coventions were held; (2) the new constitutions provide permanently for Negro voting; and (3) the fourteenth amendment be ratified.

4 Ch. 114, §§ 19, 20, 16 Stat. 140. The Act was amended in 1871 to establish a system of federal supervision for elections. Ch. 99, §§ 2-14, 16 Stat. 433 (1871).

5 94 U.S. 542 (1896). In *Cruikshank,* three men who were part of a mob that had murdered a group of blacks in Louisiana were convicted of conspiring to hinder citizens in their enjoyment of rights guaranteed by federal law or the Constitution. The Supreme Court reversed, finding that Congress could only protect the right to vote in federal elections and the right to be free of racial discrimination. Since neither right was asserted in the indictment no offense was stated.

6 92 U.S. 214 (1876). In *Reese,* two Kentucky election “inspectors"' were convicted for refusing to receive a black man's vote. The Supreme Court voided the sections of the Enforcement Act under which the convictions were obtained because they could be read as applying to cases not based on race.

7 *See, e.g.,* Civil Rights Cases, 109 U.S. 3 (1883); Slaughter-House Cases, 83 U.S. 394, 16 Wall. 394 (1883).

8 An additional motivation for change was fear that the federal government, again controlled by Republicans, might renew its efforts to protect the black vote. This fear heightened when in 1890 Senator Lodge introduced a bill to extend the federal Supervisory Act of 1870 to provide scrutiny over every phase of the election process, thus potentially exposing the widespread fraud. The measure was narrowly defeated. J. Krousser, *supra* note 1, at 29-30.

9 The literacy test required an applicant for registration to read and write any section of the state or federal Constitution. To avoid disfranchising illiterate whites, some states provided alternative means of qualifying. Most popular were “the understanding test,”' the “grandfather"' and “fighting grandfather"' clause, “good character tests,"' and the property ownership exception. Literacy tests were not confined to the South. Between 1889 and 1913, nine nonsouthern states made the ability to read English a qualification for voting. *Id.* at 57.

10 *See generally id.,* and the sources cited therein.

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

11 Report of the United States Commission on Civil Rights 35 (1959) [[[hereinafter cited as CRC Report 1959].

12 163 U.S. 537 (1896).

13 *See generally* C. Woodward, The Strange Career of Jim Crow (2d rev. ed. 1966).

14 H.R. Rep. No. 18, 53d Cong., 1st Sess. 7 (1893). Many of the remaining acts were repealed in 1909. Ch. 321, 35 Stat. 1088 (1909). The sole remaining statute, section 1 of the Enforcement Act, is codified today as Enforcement Act, 42 U.S.C. § 1971(a)(1) (1979). Derfner, *supra* note 1, at 526.

15 Breedlove v. Suttles, 302 U.S. 277 (1937).

16 Grovey v. Townsend, 295 U.S. 45 (1935).

17 Lassiter v. Northhampton County Bd. of Elections, 360 U.S. 45 (1959).

18 Guinn v. United States, 238 U.S. 347 (1915). A replacement for the statute struck down in *Guinn* was held to violate the fifteenth amendment in *Lane v. Wilson,* 307 U.S. 268 (1939). In was in *Lane* that Justice Frankfurter penned his frequently quoted phrase, “The Amendment nullifies sophisticated as well as simple-minded modes of discrimination.”' *Id.* at 275.

19 Nixon v. Herndon, 273 U.S. 536 (1927).

20 313 U.S. 299 (1941).

21 In *Ex parte Yarbrough,* 110 U.S. 651 (1884) and *Ex parte Siebold,* 100 U.S. 371 (1880), the Court recognized that Congress had the authority to protect one's right to vote in federal elections but the Court ruled in *Newberry v. United States,* 256 U.S. 232 (1921), that primaries were not part of the electoral process.

22 321 U.S. 649 (1944).

23 *See* Elmore v. Rice, 72 F. Supp. 516 (E.D.S.C.), *aff'd,* 165 F.2d 387 (4th Cir. 1947), *cert. denied,* 333 U.S. 875 (1948).

24 345 U.S. 461 (1953).

25 Details and case studies of the era can be found in Note, *Federal Protection of Negro Voting Rights,* 51 Va. L. Rev. 1053 (1965) [hereinafter cited as *Negro Voting*].

26 Popular devices were slow-downs, where blacks had to stand in long lines for many hours, or could only register one at a time. The registrar would not make his hours public, or blacks arriving to register would often find the office closed. Registrars might also withhold notification of rejection from applicants until time passed for appeal. *See* cases cited in *Negro Voting, supra* note 25, at 1079.

27 Pub. L. No. 83-315, 71 Stat. 634.

WESTLAW © 2022 Thomson Reuters. No claim to original U.S. Government Works.

28 42 U.S.C. § 1971(a)(1) (1976).

29 42 U.S.C. § 1971(c) (1976).

30 Pub. L. No. 86-449, 74 Stat. 86. For background see D. Berman, A Bill Becomes a Law (2d ed. 1966).

31 Registration of voting age whites ran roughly fifty percent ahead of blacks. *See* South Carolina v. Katzenbach, 383 U.S. 301, 313 (1966).

32 Pub. L. No. 89-110, 79 Stat. 437.

33 Interestingly, Congress did not prohibit the poll tax outright. Instead it directed the Attorney General to sue to invalidate the poll tax as a precondition to voting. 42 U.S.C. § 1973h(a)(b) (1976). The twenty-fourth amendment abolished the poll tax for federal elections, and the Supreme Court in *Harper v. Virginia State Board of Elections,* 383 U.S. 663 (1966), held that the imposition of the poll tax as a prerequisite to voting in state elections violated due process.

34 The Act proscribes private action to intimidate voters in federal or state elections, 42 U.S.C. § 1973i(b) (1976); provides criminal sanctions for violations, 42 U.S.C. § 1973j(a) (1976); and provides civil remedies at the initiation of the Attorney General, 42 U.S.C. § 1973j(d) (1976).

35 42 U.S.C. Section 1973(b) (1976). The covered jurisdictions were the states of Alabama, Georgia, Louisiana, Mississippi, South Carolina and Virginia, forty counties in North Carolina, and a smattering of counties in non-southern areas. The determination of the existence of a “test or device”' is made by the Attorney General, and the Director of the Census determines the voting and registration figures.

36 The ban was initially for five years. 42 U.S.C. § 1973(b)(a) (1976) [Pub. L. No. 89-110, § 4(a), 79 Stat. 437 (1965)]. It was extended to ten years in 1970, 42 U.S.C. § 1973(b)(a) (1970) [Pub. L. No. 91-285, § 3, 84 Stat. 314 (1970)] and applied nationwide for the following five years (Pub. L. No. 91-285, § 201(a), 84 Stat. 315 (1970)). 42 U.S.C. § 1973aa (1970). It was made permanent in 1975. Pub. L. No. 94-73, § 102, 89 Stat. 400 (1975), 42 U.S.C. § 1973(a)(a) (1976).

37 42 U.S.C. § 1973(c) (1976). This preclearance provision, discussed in detail in Part V, is based on the freezing doctrine, developed by the judges of the Fifth Circuit in voting cases under the earlier statutes. “Freezing”' involves the suspension of state voting qualifications so that blacks can be registered under the old standards under which whites had been registered. An excellent discussion of those cases, and others from which the wisdom was gleaned for the Voting Rights Act's special provision is found in *Negro Voting, supra* note 25, at 1137-49.

38 42 U.S.C. §§ 1973d-e (1976). As of 1974, seventy-three counties had been designated as examiner counties. Approximately 319 examiners were utilized. *Extension of the Voting Rights Act of 1965: Hearings on S.407, S.903, S.1297, S.1409, and S.1443 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary,* 94th Cong., 1st Sess. 535 (statement of J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division) [[[hereinafter cited as Pottinger].

39 42 U.S.C. § 1973(f) (1976). From 1966 to 1974, 7,823 observers were utilized in 81 elections in 5 states. Pottinger, *supra* note 38.

All of these special provisions can be applied to noncovered jurisdictions on a traditional case-by-case basis. 42 U.S.C. § 1973a (1976).

40 383 U.S. 301 (1966).

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

41 Voter Education Project, Voter Registration in the South (Summer, 1968), *cited in Hearing Before the Subcomm. on Constitutional Rights of the Senate Comm. of the Judiciary,* 91st Cong., 1st Sess. 61 (1970). White registration rates ran from nine percentage points ahead in Virginia to thirty-three points in Mississippi.

42 A Report of the U.S. Comm. on Civil Rights, Political Participation (1968).

43 *Id.* at 171-74. The report summarizes other problems of the era. The Commission received complaints against the following measures which had the purpose or effect of preventing Negroes from obtaining office: (a) abolishing the office sought by the Negro candidate; (b) extending the terms of white incumbent office holders; (c) raising the filing fee for offices for which Negroes were expected to run; (d) otherwise increasing the requirements for getting on the ballot; (e) making elective offices appointive; (f) withholding information from would-be Negro candidates about filing, etc.; (g) refusing to certify nominating petitions for Negro candidates; (h) imposing barriers to assumption of office by successful candidates. Discrimination against Negro registrants took the following form: (a) preventing Negroes from attending party precinct meetings and conventions; (b) omitting the names of registered Negroes from the voter lists; (c) failing to provide adequate voting facilities in areas where registration had increased; (d) harassing Negro voters; (e) refusing to provide or permit assistance to illiterate Negro voters; (f) giving inadequate or erroneous voting instructions; (g) disqualifying Negro ballots on technical grounds; (h) establishing polling places in areas where Negroes were reluctant to go; (i) maintaining racially segregated voting facilities and voting lists. *Id.* at 172-73.

44 *See, e.g.,* Derfner, *supra* note 1, at 553-55.

45 *See* D. Garrow, Protest at Selma 192 (1978).

46 393 U.S. 544 (1969).

47 *Id.* at 566.

48 *Id.* at 554-57.

49 Pottinger, *supra* note 38, at 582.

50 *Id.* at 598-600.

51 42 U.S.C. §§ 1973 to 1973bb-1 (1976). The 1975 amendments extended section 5 for an additional seven years and added new parts of the country to the coverage of the special sections. 42 U.S.C. § 1973b(f)(3) (1976). The 1975 Act is discussed in Hunter, *The 1975 Voting Rights Act and Language Minorities,* 25 Cath. U. L. R. 250 (1976).

52 A recent compilation indicated 4,912 black officials in the country in 1980, 18 times the number serving in 1964. 10 Joint Center for Political Studies, National Roster of Black Elected Officials 1 (1980).

53 *Id.* at 1, 9. There are no black United States senators, and only 17 representatives, none elected from a state in the Deep South. In state government, blacks hold 4.2 percent of the legislative seats across the nation. In Georgia, Mississippi, and South Carolina where the population is more than 25 percent black, less than 10 percent of the legislators are black. Furthermore, blacks hold only 1.7 percent of all municipal offices nationally, and a substantial number of these officeholders are from small, predominantly black towns. *Id.* at 9.

54 At-large elections on a local level are often analogized to a state multi-member legislative district, from which more than one legislator is elected by all the voters of the district. In terms of the potential within the district for submerging minority voting strength, the

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

system is equivalent to an at-large method of election for city government, but the consequences for the representation of minority interests in the legislature may note be as severe. For example, blacks may be a numerical minority of one multi-member district, and as a consequence lose all the seats, but a majority in a multi-member district elsewhere in the state (or for that matter in several single member districts) and elect all the seats. Thus black "numerical"' representation may even out for the state as a whole. In municipal government where the entire city is the electoral and the representational unit, the loss is total.

55 Typically, one municipal legislative office is elected from each district in the city. Having two or more offices elected per district is not uncommon.

56 Because of segregated housing patterns some districts almost inevitably have a higher concentration of blacks than the city as a whole.

57 The post requirement is often called a "place"', "position"' or "numbered seat"' rule. Providing for "staggered terms"' can have a similar effect if only one office is elected in any given election. Sometimes the posts are connected with a residency requirement, which again produces a one-on-one election situation but is somewhat more advantageous to blacks. If the residential districts conform to the segregated housing pattern, potential white candidates may be scarce in predominantly black residential districts.

58 For example, if four council positions are to be filled from a field of sixteen candidates, only ballots marked for exactly four candidates will be counted.

59 This does not mean that white voters are intentionally voting against the black candidate. The majority of whites may simply be oblivious to the presence of a black on the ballot. If the black makes the runoff, whites may take more interest.

60 The majority vote requirement eliminates any advantage to running a full slate. The 400 black votes may be sufficient for all four blacks to make the run-off, but their opponents will be the top four vote-getters among the white candidates. Whites unite in support of the white candidates, all of whom win. The better strategy is to run less than a full slate and vote only for the black candidates.

61 The antidemocratic nature of the full slate requirement was noted by the court in *Dunston v. Scott,* 336 F. Supp. 206, 212 (E.D.N.C. 1972):

We are inclined to believe that the right to vote includes the right of the voter to refuse to vote for someone he does not know, may not agree with, or may believe to be a fool, and under the Fourteenth and Fifteenth Amendment, we doubt that the state may constitutionally compel a voter to vote for a candidate of another race or political philosophy in order to get his vote counted.

62 See the discussion of the requirements as "enhancing factors"' in dilution suits in Part III, *infra.* All of these devices have been denied preclearance under section 5 of the Voting Rights Act. *See* Pottinger, *supra* note 38, at 581.

63 The Alabama full slate provision was found to be constitutional in *Alsup v. Mayhall,* 208 F. Supp. 713 (S.D. Ala. 1962). In *Boineau v. Thornton,* 235 F. Supp. 1975 (S.C. 1964), *aff'd,* 379 U.S. 15 (1964), the Court upheld the South Carolina requirement on the grounds that dilution was not inevitable--voters could "write in"' a full slate, and the state had a legitimate interest in full participation by the electorate. The statute in *Boineau* was subsequently overturned in *Stevenson v. West,* C.A. 72-45 (So. Car. App. 1972), in which the court concluded that the provision could not withstand the strict scrutiny required by recent cases and all legitimate state interests could be achieved by using posts instead. *See also* Dunston v. Scott, 336 F. Supp. 206 (E.D.N.C. 1972) (full slate requirement overturned); Amedee v. Fowler, 275 F. Supp. 659 (E.D. La. 1967) (anti-single shot statute upheld). Some jurisdictions in which the requirement was upheld dropped it or replaced it with numbered posts, leaving Mississippi as the only state where the requirement is mandated by statewide legislation. Miss. Code Ann. § 21-11-15 (1972).

64 *But see,* Cotrell, *The Effects of At-Large Elections on the Political Access and Voting Strength of Mexican-Americans and Blacks in Texas, published in* the *1975 Senate Hearings, supra* note 38, at 501. *See also* D. Hunter, The Shameful Blight 128 (1972) and

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

Young, The Place System in Texas Elections (Austin, Texas Institute of Public Affairs, 1965), *referred to in* Cotrell, *supra,* at 498. Hunter notes that electoral results in North Carolina in 1968 and 1970 reflect the impact of the numbered post requirements and the anti-single shot law. Fifty-six percent of the blacks in election contests not covered by either requirement were victorious, but only thirteen percent of those in contests where one or the other device was in effect were successful. D. Hunter, *supra,* at 128.

65 To the extent that a black majority bloc votes against whites, the results of the foregoing hypothetical are somewhat reversed, but whites in a minority situation are seldom disadvantaged to the same degree as are blacks.

66 *See, e.g.,* Latimer, *Black Political Representation in Southern Cities,* 15 Urb. Aff. Q. 65 (1979). The drawing of the district lines determines the percentage of blacks in each district. Black voting strength can be diffused by splitting black neighborhoods into several districts, thus keeping any district from having a majority black electorate. Alternatively, the number of candidates blacks can potentially elect can be decreased by "packing"' as many blacks as possible into a few districts, thus eliminating their influence in other districts.

67 In cities where racial bloc voting is extreme, blacks are unlikely to achieve "proportional"' representation even with district elections. In highly residentially segregated cities, gerrymandering to create enough predominantly black districts to afford proportional representation would require careful manipulation of the ward lines.

68 It is generally accepted that at-large election systems were not adopted initially for the purpose of excluding black officeholders. Over half of the cities in the United States emply at-large elections. Int'l City Management Ass'n, The Municipal Yearbook 99 (1979). This method of election had generally been associated with the "reform movement"' in municipal government. Berry & Dye, *The Discriminatory Effects of At-Large Elections,* 7 Fla. St. U. L. Rev. 85, 92 (1979).

69 Karnig, *Black Representation on City Councils: The Impact of District Elections and Socioeconomic Factors,* 12 Urb. Aff. Q. 233, 229 (1976).

70 Robinson & Dye, *Reforming and Black Representation on City Councils,* 59 Soc. Sci. Q. 133 (1978). This study is also reported in Berry & Dye, *supra* note 68, at 85. *See also* Engstrom & McDonald, *The Election of Blacks to City Council: Clarifying the Impact of Electoral Arrangements on The Seat/Population Relationship,* 75 Am. Pol. Sci. Rev. 344 (1981); Taebel, *Minority Representation on City Councils: The Impact of Structure on Blacks and Hispanics,* 59 Soc. Sci. Q. 142 (1978).

71 Latimer, *supra* note 66, at 65, 72.

72 Cole, *Electing Blacks to Municipal Office: Structure and Social Determinants,* 10 Urb. Aff. Q. 17-39 (1974). Berry & Dye, *supra* note 68, found, contrary to other studies, that the northeast regions produced higher black underrepresentation than even the South. *Id.* at 113-20. This difference may be explained on the basis of the sample chosen and the states placed in the "'southern"' region. The study undertaken for this article indicates that of the twenty-one cities in the Deep South (Alabama, Georgia, Louisiana, Mississippi, and South Carolina) with populations in excess of 50,000 at least fifteen percent black (1980 preliminary census data), thirteen have ward elections and thus are more "proportionally representative."' Two of the at-large cities are majority black. Of the six remaining at-large cities, only one has even a single black elected official. Data on file with author.

73 "Blacks and Politics: Steady Gain in a Decade of Disappointment,"' N.Y. Times, Mar. 6, 1978, § A, at 12, col. 5.

74 Cole, *Comments on 'Black Representation,'* 12 Urb. Aff. Q. 243, 247 (1976).

75 The municipalities having at least one current black office holder were determined primarily from the National Roster of Black Elected Officials *supra* note 52, although a few additional cities were discovered through phone surveys conducted in June through

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

September, 1981. The population and black percentage for the municipalities are those reported in the Preliminary 1980 Census Reports. Bureau of the Census, U.S. Dept. of Commerce, 1980 Census of Population and Housing: Preliminary Reports (1980).

76 The nation's municipalities were placed into five regions for purposes of the compilation. The regions are West, Central, Northeast, Border and South. The states contained in each region are set out in the Appendix.

77 In the Voting Rights Act states, changes in the election structure are monitored by the Attorney Geneal under section 5. Therefore, less benevolence can be attributed to the majority by the absence of obstacles in the South.

78 A number of black elected officials whose names did not appear in the Roster were discovered by a telephone survey of four of the southern states (see text accompanying notes 80-81, *infra*). The gap between the South and the remainder of the country thus may actually be larger than reported because of the more substantial reliance on the Roster for information outside the South.

79 *See* The Municipal Yearbook, *supra* note 68, at 99.

80 Information about election structure was obtained for Louisiana from Louisiana Officials, 1980 Roster; for South Carolina from 1980 Directory of South Carolina Municipal Officials; for Alabama from Legal Service Corporation of Alabama, The Voting Rights Act in Alabama (1981); and for Mississippi from information collected by the author. The other states that make up the South region in the tables are Georgia, Texas, Virginia, and the portion of North Carolina covered by the Voting Rights Act. Georgia and Texas, both of which have a low percentage of electing municipalities (52 percent and 47 percent respectively) were eliminated from the more detailed examination because of the large number of cities involved and the difficulty of obtaining accurate information on election structure. North Carolina is discussed separately in the text accompanying notes 90 & 91, *infra.*

81 Information was obtained from city clerks. Louisiana is the only state where wide discrepancies were noted between the present survey and the Roster.

82 Miss. Code Ann. § 21-11-15 (1972).

83 Ala. Code §§ 11-46-25(f), 11-46-96(f) (Supp. 1980).

84 Nonpartisan elections: Ala. Code § 11-46-3 (1975). Majority vote: Ala. Code §§ 11-46-55(a), 11-46-126(a) (Supp. 1980).

85 S.C. Code §§ 5-15-63, 5-15-120 (Supp. 1980).

86 *Id.* §§ 5-15-60, 5-15-70 (Supp. 1980).

87 *Id.* §§ 5-15-61, 5-15-62, 5-15-63, 5-15-120 (Supp. 1980).

88 Information on election structure was obtained from Institute of Government, The University of North Carolina, Forms of Government of North Carolina Cities (1979).

89 One possible explanation may be differing degrees of urbanization. All of the nonelecting municipalities have populations of less than 20,000. Fifty percent of the Voting Rights Act cities, 10,000-20,000 population, have an elected black official. Only one of six in the 5,000 to 10,000 group has a black official. Among the non-Voting Rights Act cities, two of five in the 10,000-20,000 group, and six of nine in the 5,000-10,000 group are electing cities.

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

90 *See* the cases cited in Part III, *infra.*

91 Murry & Vedlitz, *Racial Voting Patterns in the South: An Analysis of Major Elections from 1960 to 1977 in Five Cities,* 439 Annals, AAPSS 29, 33 (1978).

92 Joint Center for Political Studies, The Black Vote Election '76 10 (1977).

93 *Id.* at 13.

94 *Id.*

95 Gerrymandering is "discriminatory districting which operates unfairly to inflate the political strength of one group and deflate that of another."' Engstrom, *The Supreme Court and Equipopulous Gerrymandering: A Remaining Obstacle for Fair and Effective Representation,* 1976 Ariz. St. L. J. 277, 279 (citation omitted).

96 347 U.S. 483 (1954).

97 446 U.S. 55 (1980).

98 364 U.S. 339 (1960).

99 Mr. Justice Frankfurter probably chose this ground to avoid the possibility that a fourteenth amendment decision could undercut the "political question"' doctrine. The case fell easily within the suspect classification doctrine of *Brown,* and subsequent Supreme Court decisions have treated *Gomillion* as if it had been decided on fourteenth amendment grounds. *See* Whitcomb v. Chavis, 403 U.S. 124, 149 (1971).

100 364 U.S. at 347.

101 376 U.S. 52 (1964).

102 This claim is the opposite of that maintained by minority plaintiffs in more recent litigation, where the complaint is that to spread their voting strength among districts results in their losing to the majority in all the districts. *See, e.g.,* Kirksey v. Board of Supervisors of Hinds County, Miss., 554 F.2d 139 (5th Cir.), *cert. denied,* 434 U.S. 968 (1977).

103 376 U.S. at 54.

104 "Appellees presented no oral testimony but did offer historical maps, a table from the Bureau of the Census and a message from the President to the Congress on the subject of congressional apportionment."' 376 U.S. at 55.

105 Wright v. Rockefeller 211 F. Supp. 460, 462 (S.D.N.Y. 1962).

106 376 U.S. at 56-57.

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

107 An equally plausible explanation was that the Republican legislature had created a "safe"' Republican district to avoid a Democratic sweep of the four Manhattan districts. To further complicate the case, black parties and intervenors on both sides made difficult an assessment of whether black representational interests were adversely affected by the districting plan. *See* R. Dixon, Democratic Representation: Reapportionment in Law and Politics 466 (1968).

108 Some commentators have seen *Gomillion* as being an "effect"' case. *See, e.g.,* Note, *Chavis v. Whitcomb: Apportionment, Gerrymandering and Black Voting Rights,* 24 Rut. L. Rev. 521, 524 (1970). The Court itself in *Palmer v. Thompson,* 403 U.S. 217 (1971), said of *Gomillion,* "the focus . . . was on the actual effect of the enactment, not upon the motivation . . . . " 403 U.S. at 225. This seems to be an incorrect reading of the opinion.

109 364 U.S. at 341.

110 *Wright* could not have proceeded as a purely fifteenth amendment case unless "deprivation of the right to vote"' was seen as something more than previously recognized. Unlike the de-annexed blacks in *Gomillion* who could not vote in Tuskegee city council elections, no minority voter was denied the right to vote for *some* congressman in the Manhattan district. Thus *Wright* impliedly recognized that racially motivated districting presents a denial of equal protection.

111 369 U.S. 186 (1962).

112 The Supreme Court held in *Baker v. Carr* that federal courts had jurisdiction over claims that state legislative apportionments violated the fourteenth amendment; that residents of malapportioned districts had standing to assert such claims; and that such claims were justiciable despite previous "'political questions"' precedents. 369 U.S. 186 (1962).

113 377 U.S. 533 (1964).

114 WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964); Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964); Davis v. Mann, 377 U.S. 678 (1964); Roman v. Sincock, 377 U.S. 695 (1964); Lucas v. Colorado Gen. Assembly, 377 U.S. 713 (1964).

115 In *Gray v. Sanders,* 372 U.S. 368 (1963), the Court held that the right to cast an equally weighted vote applied to election of statewide executive officers as well. In another pre-*Reynolds* case, *Wesberry v. Sanders,* 376 U.S. 1 (1964), the Court held that article I, section 2 of the Constitution requires the states to apportion congressional representatives according to population. Subsequent cases extended the rule to local governments. Hadley v. Junior College District, 397 U.S. 50 (1970); Avery v. Midland County, 390 U.S. 474 (1968).

116 377 U.S. at 533, 568.

117 *Id.*

118 R. Dixon, *supra* note 107, at 8.

119 379 U.S. 433 (1965). In a companion case to *Reynolds, Lucas v. Colorado General Assembly,* 377 U.S. 713 (1964), the Court affirmed the constitutionality of multi-member districts and at-large elections, but noted several undesirable features: (1) they require long and cumbersome ballots; (2) voters have difficulty making intelligent choices among candidates; (3) elected representatives lack identifiable constituencies within populous districts; (4) there is an absence of any individual member elected specifically to represent residents of more populous counties. *Id.* at 731 n.21. That these features are merely "undesirable"' rather than "unconstitutional"' was affirmed in *Whitcomb v. Chavis,* 403 U.S. 124 (1971). There the Court held constitutional a multi-member plan for Marion County, Indiana, where in the 1962 primary the ballot was 90 names long. Data gathered after the election indicated that voters chose

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

candidates on the basis of party endorsement and by the alphabet. *See* Hamilton, *Legislative Constituencies: Single Member Districts, Multi-Member Districts, and Floterial Districts,* 20 West. Pol. Q. 321, 323 (1967).

120 379 U.S. at 439.

121 384 U.S. 73, 88 (1966).

122 *Id.* at 88.

123 *Id.*

124 *See, e.g.,* Smith v. Paris, 257 F. Supp. 901 (M.D. Ala. 1966), *modified and aff'd,* 386 F.2d 979 (5th Cir. 1967); Sellers v. Trussell, 253 F. Supp. 915 (M.D. Ala. 1966); Sims v. Baggett, 247 F. Supp. 96 (M.D. Ala. 1965).

125 Kilgarlin v. Martin, 252 F. Supp. 404 (S.D. Tex. 1966), *aff'd in part and rev'd in part,* Kilgarlin v. Hill, 386 U.S. 120 (1967).

126 403 U.S. 124 (1971).

127 Chavis v. Whitcomb, 305 F. Supp. 1364, 1385 (S.D. Ind. 1969). Most of the evidence in the case was statistical data directed toward proving the ghetto residents a "cognizable minority,"' differing racially and socio-economically from the remainder of the county. Because of these differences, the ghetto residents had a "compelling interest in such legislative areas as urban renewal and rehabilitation, health care, employment training and opportunities, and welfare, and relief of the poor, law enforcement, quality of education, and anti-discrimination measures"' not shared by the remainder of the district. *Id.* at 1380. Having concluded that the plaintiffs constituted a cognizable minority, the district court noted that while the ghetto residents were 17.81 percent of the county's population, they were less than 6 percent of the county's elected representatives. Single member districts would have resulted in approximately proportional numerical representation for the ghetto. *Id.* at 1385.

128 *See, e.g,* Note, *supra* note 108.

129 Whitcomb v. Chavis, 403 U.S. 124, 149-50 (1971).

130 *Id.* at 152-53.

131 *Id.* at 149.

132 *Id.* at 150 n.30.

133 The election results for the five elections considered by the district court indicated that an individual candidate's fate was linked to his party's fate. A candidate was elected only if his party carried the county. The winning party's margin was often less than 3 percent. For example, in 1964 the Republicans received 48.61 percent of the votes, but lost every seat--thus leaving 49 percent of this county's population "unrepresented."' Thus even though it left the door open as to the possibility of establishing racial dilution, *Whitcomb* seemingly rejected the "political element"' branch of the dilution dictum from *Fortson* and *Burns.* The Court clearly was not disturbed by the fact that the large multi-member district allowed a slim majority of the county's voters to elect all 23 of its legislators. *See* Derfner, *Multi-Member Districts and Black Voters,* 2 Black L.J. 120 (1972). Subsequently in *Gaffney v. Cummings,* 412 U.S. 735 (1973), the Court approved an apportionment plan for Connecticut which was drawn specifically to preserve the statewide strength

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

of the state's two major parties. In approving the plan, however, the Court distinguished between "recognizing party strength"' and minimizing it. *Id.* at 754.

134 Graves v. Barnes, 343 F. Supp. 704 (W.D. Tex. 1972).

135 *Id.* at 725. The court noted this requirement as virtually unknown outside the South. *Id.*

136 *Id.* Thus the election structure was the most disadvantageous to minorities. *See* discussion in Part II, *supra.*

137 *Id.* at 724-25. The county's population was greater than that of fifteen states. *Id.* The other multi-member districts in the plan were much less populous and were to elect 2 to 4 representatives. These other districts were challenged also, but because of time constraints all the parties agreed to concentrate on Dallas and Bexar. *Id.* at 718 n.7. The remaining districts were invalidated in *Graves v. Barnes,* 378 F. Supp. 640 (W.D. Texas 1974), *vacated and remanded,* White v. Regester, 422 U.S. 935 (1975).

138 "There exist innumerable instances, coverning virtually the entire gamut of human relationships, in which the State had adopted and maintained an official policy of racial discrimination against the Negro."' 343 F. Supp. at 725 (citations omitted). In the voting area Texas employed "all white"' primaries (*see Nixon v. Herndon,* 273 U.S. 536 (1926), discussed in Part I, *supra*), the poll tax (struck down in *United States v. Texas,* 252 F. Supp. 234 (W.D. Tex. 1966), *aff'd,* 384 U.S. 155 (1955)), and the most restrictive voter registration procedures in the nation. 343 F. Supp. at 731.

139 The court devoted several pages of the opinion to a documentation of the pervasive state sanctioned discrimination against Mexican-Americans, placing particular emphasis on the problems of cultural incompatibility fostered by a deficient educational system. 343 F. Supp. at 727-32.

140 *Id.* at 726.

141 *Id.* at 733.

142 *Id.* at 731.

143 *Id.* at 726-27.

144 *Id.* at 732.

145 412 U.S. 755 (1973). The Court was unanimous on the dilution issue. Justices Brennan, Douglas and Marshall dissented from the portion of the opinion reversing the lower court's ruling that the Texas plan violated one-man, one-vote standards.

146 412 U.S. at 766.

147 412 U.S. at 769-70.

148 The state's explanation for its rather haphazard combination of single and multi-member districts was less than satisfactory. Although most of the multi-member districts were metropolitan areas, the laregest such area in the state was divided into single member districts. No acceptable reason was given for the distinction. Three of the eleven multi-member districts were entire counties, but in the eight others, "the district lines cut boundaries without rhyme or reason,"' 343 F. Supp. at 718. This lack of justification combined with a documented political hostility toward the minorities involved would have been sufficient to support the inference that the multi-

WESTLAW © 2022 Thomson Reuters. No claim to original U.S. Government Works.

member districts had been adopted to decrease the possibility that minorities would be elected from these counties. *See* Sims v. Baggett, 247 F. Supp. 96 (M.D. Ala. 1965) (the court concluded that the only explanation for a plan combining predominantly black counties with predominantly white ones, in light of the state's racial history, was that the state wished to avoid the election of blacks to the legislature).

149 412 U.S. at 765.

150 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd sub nom.,* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976).

151 *See* J. Dantzler, Election Law, 1978 Annual Survey of American Law--Election LawWWWWW 91 (1979); Note, *Discriminatory Effect of Elections At-Large: The "'Totality of Circumstances"' Doctrine,* 41 Alb. L. Rev. 363 (1977).

152 485 F.2d 1297, 1305 (5th Cir. 1973).

153 The Court in *Zimmer* actually enumerated only two primary factors and one-and-a-half enhancing factors. The primary factors were past racial discrimination and a tenuous policy underlying the choice of at-large elections. The enhancing factors were the majority vote requirement and an anti-single shot provision for the three seats elected from one of the seven residency wards. The court made no mention of racial bloc voting or the lack of access to the slating process and found the absence of proof of unresponsiveness "indecisive."' Nor did the court find the following facts, which differed from those in *White,* sufficient to justify a different result: (1) at issue in *Zimmer* was an at-large election system for the police jury and school board of a sparsely populated rural parish rather than a large multi-member state legislative district; (2) blacks were a majority of the population and a substantial minority of the registered voters; (3) the at-large plan provided for residency sub-districts; and (4) three blacks had been elected under the at-large plan. 485 F.2d at 1307.

154 East Carroll Parish School Bd. v. Marshall, 424 U.S. 636, 638 (1976).

155 *Id.* at 639. *Zimmer* originally was brought by a white resident on the grounds that the parish's wards were malapportioned. Over the objection of the black intervenor, the district court approved an at-large election plan favored by the governing bodies involved. The Court of Appeals reversed on dilution grounds, but the Supreme Court's affirmance was based solely on the grounds that "the District Court abused its discretion in not initially ordering a single member reapportionment plan."' 424 U.S. at 638-39. The Court's preference for single member districts in court-ordered plans was explained in *Chapmans v. Meier,* 420 U.S. 1 (1975), a case involving the constitutionality of a federal court-ordered reapportionment of the North Dakota Legislative Assembly. The Court explained that since the plan originated with the district court, rather than the legislature, it was not entitled to the deference normally afforded legislative devices. Therefore in its role as supervisor of the remedies fashioned by the lower courts, the Supreme Court could recognize the practical weaknesses inherent in multi-member plans. *Id.* at 15. The weaknesses were the same as those mentioned in *Lucas.* In addition the Court found the possible effect of multi-member districts on minority voting strength objectionable.

Except for the probable submergence of the black vote, none of the objections enumerated in *Chapman* were present in *East Carroll Parish.* The parish's 1970 population was only 12,884. Voter confusion was not a likely problem since only 10 representatives were to be elected to each body. Representatives were to be elected from residential sub-districts so voters would be able to point to a specific "area"' representative. Because the plan was an at-large one, the third objectional feature of multi-member districts was not a possibility. Because the possible submergence of the black vote was the only rationale from *Chapman* to apply, one might reasonably assume that this factor alone would be sufficient to invoke the rule.

The following year in *Wallace v. House,* 425 U.S. 947 (1976) (mem.) the Supreme Court reversed the court of appeals' order of a mixed plan for a small Louisiana town whose at-large plan had been held unconstitutional. Thus it seemed that an administrative preference developed in connection with state apportionment plans had become per se rule governing even aldermanic elections in a small town.

However, recently the Court has avoided the administrative preference by finding proposed plans to be "legislative'" rather than "court-ordered,'" and thus entitled to be considered under a "constitutional,'" rather than "'administrative'" standard. *See* Wise v. Lipscomb, 437 U.S. 535 (1978).

156 *Compare* Gilbert v. Stervett, 509 F.2d 1389 (5th Cir. 1975) *and* McGill v. Gadsden County Commission, 535 F.2d 277 (1976) (cases finding no dilution) *with* the cases cited in note 157, *infra.*

157 *See, e.g.,* Turner v. McKeithen, 490 F.2d 191 (1973), Moore v. LeFlove Bd. of Election Com'ns, 502 F.2d 621 (1974), Wallace v. House, 377 F. Supp. 1192 (W.D. La. 1974) *aff'd* 515 F.2d 619 (5th Cir. 1975), *vacated and remanded* 425 U.S. 947 (1976); Pitts v. Busbee, 395 F. Supp. 35 (N.D. Ga. 1975), *vacated on other grounds, sub nom.* Pitts v. Gaters, 536 F.2d 56 (5th Cir. 1976).

158 Bonapfel, *Minority Challenges to At-Large Elections: The Dilution Problem,* 10 Ga. L. Rev. 353, 379 (1976).

159 *See, e.g.,* Nevett v. Sides, 533 F.2d 1361 (5th Cir. 1976) (Nevitt I); David v. Garrison, 553 F.2d 923 (5th Cir. 1977); Hendrix v. Joseph, 559 F.2d 1265 (5th Cir. 1976).

160 *Id.*

161 426 U.S. 229 (1976).

162 554 F.2d 139 (5th Cir. 1977) (en banc).

163 *Id.* at 143-44.

164 *Id.* at 149.

165 *Id.* at 151. The court analogized to the school desegregation case of *Green v. County School Board,* 391 U.S. 430 (1968), in which the Supreme Court imposed a duty on the school board to adopt an affirmative, rather than a neutral, desegregation plan. 554 F.2d 139, 148 n.16.

166 *See* Parnell v. Rapides Parish School Bd., 563 F.2d 180 (5th Cir. 1977); David v. Garrison, 553 F.2d 923 (5th Cir. 1977).

167 571 F.2d 209 (5th Cir. 1978). The other cases were *Bolden v. City of Mobile,* 571 F.2d 238 (5th Cir. 1978); *Blacks United For Lasting Leadership, Inc. v. City of Shreveport,* 571 F.2d 248 (5th Cir. 1978); and *Thomasville Branch of the NAACP v. Thomas County,* 571 F.2d 257 (5th Cir. 1978) (per curiam).

168 571 F.2d at 221-22.

169 Bolden v. City of Mobile, 423 F. Supp. 384 (S.D. Ala. 1976).

170 *Id.* at 388.

171 571 F.2d 238 (5th Cir. 1978).

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

172 City of Mobile v. Bolden, 446 U.S. 55 (1980).

173 Although the Commissioners were elected from numbered posts, residential sub-districts were never connected to the posts. Until 1965 the posts were not connected to specific governmental functions. In 1965, the law was changed to provide for the posts to coincide with the three municipal departments: Public Works and Services; Public Safety; and Finance. *Id.* at 386. After the dilution suit had been filed (and presumably after the law had been administered for ten years), Mobile submitted this 1965 change to the Attorney General for preclearance under section 5. The Attorney General interposed an objection to the change on the ground that to assign specific functions to the post would "'lock in"' the at-large method of election. Bolden v. City of Mobile, 571 F.2d 238, 241 & n.2 (5th Cir. 1978).

174 423 F. Supp. 384, 393.

175 423 F. Supp. at 389. The court noted the following suits. Allen v. City of Mobile, 331 F. Supp. 1134 (S.D. Ala. 1971), *aff'd,* 466 F.2d 122 (5th Cir. 1972), *cert. denied,* 412 U.S. 909 (1973) (to desegregate the police department); Anderson v. Mobile County Comm'n, CA. No. 7388-72-H (S.D. Ala. 1973) (enjoining racial discrimination); Sawyer v. City of Mobiel, 208 F. Supp. 548 (S.D. Ala. 1961) (to desegregate the municipal golf course); Evans v. Mobile City Lines, Inc., C.A. No. 2193-63 (S.D. Ala. 1963) (to desegregate public transportation); Cooke v. City of Mobile, C.A. No. 2634-63 (S.D. Ala. 1963) (to desegregate the city airport).

176 One sympathetic white had served as a city commissioner from 1953 to 1969, but testimony indicated that after a large number of blacks were enfranchised by the Voting Rights Act in 1965, he was defeated because of white backlash provoked by his identification with the black community. 423 F. Supp. at 388. Expert witnesses testified blacks had no reasonable chance of election. *Id.* at 389. Pursuant to court order, the Mobile County state seats in the legislature were elected by single member districts. Blacks had been elected to the legislature from majority black districts, tending to negate the suggestion that black Mobileans simply were politically apathetic. *Id.*

177 This fact was demonstrated in part by numerous discrimination law suits directed against the city; by the underrepresentation of blacks in all areas of city employment, especially higher level policymaking positions; by failure of the city commission to appoint blacks to city boards; by deficiencies in the city's provision of services to the black community; and by failure to give serious attention to matters of special concern to the black community such as police brutality and cross burnings. *Id.* at 389-82. The City's brief to the Supreme Court cited evidence in the record to the effect that *all* commission candidates actually seek black votes; that two of the three commissioners elected in 1973 won with the endorsement of the City's principal black voter organization; and one of the present commissioners was elected by the black swing vote. Brief for Appellant at 7-10. However, the district court's findings to the contrary were "factual"' and were not to be disturbed on appeal unless they were clearly erroneous. Furthermore, the plurality's opinion accepted the facts as found by the district court. 446 U.S. at 73.

178 *See* 423 F. Supp. at 398. Intent, under a tort theory, could be found upon proof that dilution was a natural and foreseeable consequence of the at-large system adopted in 1911, even though it was not needed then because blacks were disfranchised.

179 *Id.*

180 *Id.* at 402.

181 Nevett v. Sides, 571 F.2d 209, 215 (5th Cir. 1978).

182 571 F.2d at 245. The panel also concluded in *Nevett* that "intent"' was critical to the fifteenth amendment claim as well. 571 F.2d at 220.

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

183 571 F.2d at 246. Prior to 1965 the commissioners exercised jointly all executive, legislative, and administrative functions. The court viewed the assignment in 1965 of specific duties to the previously undesignated posts on the eve of increasing black registration as an effort by the legislature to provide additional policy grounds to insulate the at-large plan from attack. *Id.* If this was the reason for the change, the Alabama legislature was unusually farsighted and well-informed. In 1965 no case had yet come close to holding an at-large election system unconstitutional.

184 446 U.S. 55 (1980). Justice Stevens, concurring, rejected "subjective intent"' as a standard but would find unconstitutionality only upon "objective effects"' and a lack of legitimate justification for the plan. *Id.* at 90. Justice Blackmun, concurring in the result, assumed that intent was necessary. He voted for reversal because the remedy--changing the form of government--was an abuse of judicial discretion. *Id.* at 80. Justice White, dissenting, felt that intent was necessary but that it had been proved. *Id.* at 94-103. Justice Marshall, dissenting, argued that intent should not be a requirement in a dilution case. *Id.* at 104-05. Justice Brennan agreed with Justice Marshall. *Id.* at 94.

185 429 U.S. 252 (1977).

186 442 U.S. 256 (1979).

187 446 U.S. at 69 (citation omitted).

188 *Id.* at 72-74.

189 *Id.* at 62.

190 *Id.* at 65 (citation omitted).

191 *Id.*

192 *Id.* at 60-61.

193 *Id.* at 76 (citation omitted).

194 *Id.* at 77-79.

195 See the discussion of *White* and *Whitcomb* in Part III, *supra.* The existence of such an unarticulated premise in *White* is negated by the failure of the trial court and the Supreme Court to rely upon evidence of the lack of a legitimate rationale on the part of Texas for the creation of the multi-member districts involved.

In *Whitcomb,* the plaintiffs admitted that the districting plan had not been designed for a discriminatory purpose, and in *White* the unanimous opinion of the Court did not rely upon a single intentional discrimination case. Moreover, no recent equal protection case requiring intent has relied upon *Whitcomb* or *White. See* Note, *Racial Vote Dilution in Multimember Districts: The Constitutional Standard After Washington v. Davis,* 76 Mich. L. Rev. 694 (1978).

196 446 U.S. at 68-69 (citation omitted).

197 412 U.S. at 765-67.

198 The plurality made that assumption. 446 U.S. at 70. One might argue that the selection or maintenance of at-large elections because of their widespread acceptance as legitimate electoral systems and indeed their acclaim as progressive alternatives to the "rotten borroughs"' produced by ward systems should be entitled to greater deference than the less popular multi-member legislative districts. This decision would be particularly true when the use of such districts was not normal state procedure (as was the case in *White*). However, the plurality did not attribute any weight to the distinction. Justice Stevens, concurring, did. He expressed the concern that to find Mobile's form of government unconstitutional would spawn endless challenges to many forms of municipal government now widely employed. 446 U.S. at 92 n.14, 93 (1980).

199 423 F. Supp. at 388.

200 *Id.* at 388-89.

201 412 U.S. at 766-70.

202 446 U.S. at 73-74.

203 In an amicus curiae brief filed in a dilution case on appeal to the Fifth Circuit, the Justice Department attempted a reconciliation of *White* and *Mobile. White,* reasoned the Department, should be seen as a "remedy"' case, while *Mobile* can best be analyzed as a "violation"' case. Analogizing from the Court's decisions in the school desegregation cases and drawing upon the reasoning of the Fifth Circuit in *Kirksey v. Board of Supervisors,* 554 F.2d 139 (5th Cir.) (en banc), *cert. denied,* 434 U.S. 968 (1977), the Department maintained that when a defendant has violated the constitutional rights of a group of persons, a remedy that restores the group to the position they would have enjoyed but for the violation is appropriate. Thus, proof of a past history of racial discrimination in the voting area is a sufficient violation to compel the jurisdiction to adopt an election system that avoids perpetuating the effects of that discrimination on black voters. Brief of the United States as Amicus Curiae, Lodge v. Buxton, 639 F.2d 1358 (5th Cir. 1981).

204 446 U.S. at 77-78.

205 *Id.* at 115-18.

206 *Id.* n.14.

207 *See* quote from *Fortson v. Dorsey,* in text accompanying note 120, Part III, *supra.*

208 *See* quote from *Reynolds v. Sims,* in text accompanying note 116, Part III, *supra.*

209 Baker v. Carr, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting).

210 Fiss, *Groups and the Equal Protection Clause,* 5 Phil. & Pub. Aff. 107, 148 (1976).

211 The voluntariness of membership, the ease of changing political labels, and the few non-political consequences flowing from a "Republican"' or "'Democrat"' label mitigate against recognizing purely political groups as cognizable minorities. When a person in a group takes on a political label, it is for the purpose of playing politics. People with political labels are expected to discriminate against rival political parties with their ballots.

212 Much of the adult population was educated in inferior, segregated schools, casting them into lower status occupations, and reducing their contacts with influential others. Prolonged disfranchisement deprived blacks of the opportunity to gain the political experience

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

needed to wage sophisticated campaigns, and to engage in the "horse trading"' of politics. Segregated housing patterns have helped to perpetuate segregation of social and religious institutions.

Not all groups whose group identifying characteristic may be viewed unfavorably by non-group members have suffered similar disadvantages. For example, while members of the Gay Alliance may often be the objects of discrimination because they are gay, the discrimination suffered generally has not deprived gays of the education, skills, and contacts needed to participate in politics or to utilize their groups status in the political process. *See* the discussion of gay political power in Houston in *News-week,* Aug. 10, 1981, at 29.

213 The suggestion that if the state is able to establish "responsiveness,"' dilution should not be found will be the least acceptable part of this proposed dilution standard for civil rights advocates. The anticipated objection is two-fold. First, "responsiveness"' is an unworkable concept as an expression of opinion by the voters. Minority voters have already expressed their opinion on the responsiveness of those serving by consistently *not* voting for them. Second, if the legislature is being responsive for any reason other than because of political clout of the group (such as to keep them from winning a dilution suit) then the group is not a genuine participant in the political process. At best it has changed from being a ward of the court to being a ward of the legislature. These are very persuasive objection, but in order to be true to the value of the right being asserted, they must be rejected.

214 The *Zimmer* factor, "a tenuous state policy underlying the perference for multi-member or at-large districts,"' does not really fit. Such a finding is some evidence of a discriminatory intent in the selection of the election system and also negates any strong state interest in the selection which might justify infringement upon a constitutionally protected right.

215 Even at-large elections or multi-member districts are not essential to a finding of dilution. Single member districts all drawn so that blacks need white support to elect a candidate also allows racial bloc voters to exclude minorities. *See* Kirksey v. Board of Supervisors, 554 F.2d 139 (5th Cir.) (en banc), *cert. denied,* 434 U.S. 968 (1977).

216 *See, e.g.,* Evans v. Cornman, 398 U.S. 419 (1970) (residents of a federal enclave); Carrington v. Rash, 380 U.S. 89 (1965) (member of the armed forces).

217 *See, e.g.,* Dunn v. Blumstein, 405 U.S. 330 (1972) (a durational residency requirement); Haper v. Virginia St. Bd. of Elections, 383 U.S. 663 (1966) (poll tax in state elections); Lassiter v. Northhampton County Bd. of Elections, 360 U.S. 45 (1959) (upholding the literacy test as a prerequisite to registration).

218 *See, e.g.,* Phoenix v. Kolodziejski, 399 U.S. 204 (1970) (limiting voters in general obligation bond elections to property taxpayers); Kramer v. Union Free School Dist., 395 U.S. 621 (1969) (limiting voters in school board election to property owners or to parents with children enrolled in the local public schools); Cipriano v. City of Houma, 395 U.S. 701 (1968) (limiting voters in public utility revenue bond election to property tax payers).

219 One interesting case where the franchise clearly was not involved, but where nonetheless the Court decided the right to vote had been infringed is *Williams v. Rhodes,* 393 U.S. 23 (1968). In that case the Court held unconstitutional a law which would have denied George Wallace access to the Ohio 1968 presidential ballot. The Court held that restrictions on who may appear on a state's general election ballot are a burden on "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively."' 393 U.S. at 30.

220 The oft-cited language from *Yick Wo* notwithstanding, the constitutional status of the "right"' has been the subject of much debate. *See,* R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment (1977); Van Alstyne, *The Fourteenth Amendment, The "Right"' to Vote, and The Understanding of the Thirty-Ninth Congress,* 1965 Sup. Ct. Rev. 33. *See generally,* Le Clercq, *The Emerging Federally Secured Right of Political Participation,* 8 Ind. L. Rev. 607 (1975).

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

221 *See* Casper, *Apportionment and the Right To Vote: Standards of Judicial Scrutiny,* 1973 Sup. Ct. Rev. 1, 5.

222 *See, e.g.,* J. Choper, Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court (1980); L. Lusky, By What Right?: A Commentary on the Supreme Court's Power to Revise the Constitution (1975); *Symposium: Judicial Review versus Democracy,* 42 Ohio S. L.J. 1 (1981).

223 Mobile v. Bolden, 446 U.S. 55, 76 (1980).

224 *Id.* at 77 n.25.

225 *Id.* at 77.

226 *Id.* at 65.

227 *Id.*

228 376 U.S. 52 (1964).

229 446 U.S. 156 (1980).

230 *See* 446 U.S. at 94 (Brennan, J., dissenting); *id.* at 94-95 (White, J., dissenting); *id.* at 136-39 (Marshall, J., dissenting).

231 446 U.S. at 73.

232 (1980).

233 United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938).

234 *Id.*

235 *Id.*

236 Ely, *supra* note 232, at 103.

237 *Id.* at 152. It is not clear whether he is suggesting they have power, or only that they appear to have power. He discusses the impact of the black vote on the election of Jimmy Carter as evidence of the ability of blacks to pool their political interest with those of others, but then suggests that protection for blacks (and others) is needed because "the minority in question [[[is] barred from the pluralist's bazaar, and thus keeps finding itself on the wrong end of the legislature's classifications, for reasons that in some sense are discreditable.'" *Id.*

238 *Id.* at 120.

239 *Id.*

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

240 *Id.* at Ch. 6.

241 *Id.* at 101-02.

242 426 U.S. 229 (1976).

243 *Id.* at 248.

244 395 U.S. 621 (1969).

245 *Id.* at 628.

246 446 U.S. at 74.

247 An additional problem is presented by a choice made many years ago, as was the case with the Mobile system, adopted in 1911. Is a law adopted for a discriminatory purpose fifty years ago sanitized if it is currently being maintained for a legitimate one? What if the situation is reversed? Can a law admittedly adopted originally for a discriminatory purpose be saved if it is re-enacted for a legitimate purpose?

248 The past official discrimination essential to the creation of a "'cognizable minority"' was unquestionably "intentional."' The current lack of resources for effective political participation by the group can be traced directly to past intentional discrimination by the state. The creation of the all-white primary, and thus one party politics, was undeniably part of a plan to deprive blacks of the right to vote. The absence of a viable two party system increases the ease with which black voters may be ignored. "'Unresponsiveness"' in many instances will smack of intentional neglect, if not active discrimination. Furthermore, the other discriminatory acts on the part of the state increase the certainty that those considering retention of the election system were well aware of the interactional effect of at-large elections and racial bloc voting on the election of black candidates. While knowledge of impact alone may be insufficient to establish intent, in combination with the other acts it becomes more persuasive: "You have mistreated this group of people in the past. Your present behavior demonstrates continuing hostility to their interest. You must be aware of the inevitable effect of continuing the method of election on the election of the group's candidates. It does not stretch credibility to assume a motive for this action consistent with your past motives."' This line of reasoning is particularly appropriate for *Mobile* where the form of government, which mandated that election be at-large, is one abandoned by most cities as being unworkable. *See* The Municipal Yearbook 1979: "While 27 communities report a commission form today, another 124 have shifted from that form to another."' *Id.* at 105.

249 Nothing here is meant to suggest that when evidence can be adduced to establish a discriminatory motive behind this particular decision, relief should not also be granted. A legislative decision to maintain an election system for the purpose and having the effect of preventing the election of blacks in unconstitutional even if "dilution"' cannot be established.

250 Since proof of dilution establishes that the legislators are not representative of the city as a whole, there should be no reason to give any special consideration to their proposed remedies. Both sides should be required to demonstrate the probability that their proposed remedy will in fact eliminate dilution.

251 See discussion at note 173, *supra.*

252 The district court may have rejected this possibility on the assumption that once a districting plan is held unconstitutional and the court is called upon to fashion a remedy, single member districts are preferred. See note 155, Part III, *supra.* Proposing either of these alternatives might have forced both sides to evaluate their true goals. If actually faced with the prospect of one-third of the city's governing body being "black,"' the city might prefer to change to an expanded governing body where any black elected would have

WESTLAW © 2022 Thomson Reuters. No claim to original U.S. Government Works.

less influence. If, on the other hand, the plaintiffs are really more interested in electing one of their own than in being full-fledged political participants, any proposal which offers less than some certain minority seats may be unacceptable.

253 446 U.S. at 82 (Blackmun, J., concurring).

254 The plurality's unusual treatment of the fifteenth amendment is discussed in Part V, *supra.* See notes 235 & 236 and the accompanying text, *supra.* Only Justice Marshall's opinion distinguishes between the standards of the two amendments. He maintains that regardless of the standard under the fourteenth amendment, the fifteenth does not require discriminatory intent. Whether the plurality views "dilution"' as a proper fifteenth amendment claim if intent is shown is not clear. Justice Blackmun expressed no opinion. The others recognize the claim as proper.

255 Justice White, who is the author of *White,* interprets the case as an intentional discrimination case. Whether he would "find"' intent in the concert of factors (as suggested in Part V), or whether he sees in dilution factors as circumstantial evidence of the illicit motives of those responsible for selecting at-large elections is not clear. If his view is the latter, he does not address the problem of whose intent these factors are evidence. Justice Blackmun leaves open the possibility that "intent"' is not essential: "Assuming that proof of intent is a prerequisite to appellees' prevailing on their constitutional claim of vote dilution . . . . " 446 U.S. at 80 (Blackmun, J., concurring in the result).

256 446 U.S. at 90.

257 Since Justice Stevens rejects the reasoning of the plurality and believes motive to be immaterial, he gives little clue as to what standard he would apply to determine intent. If he concedes that a majority of the Court has concluded intent to be essential, perhaps he would agree with the dissent that proof of the *White-Zimmer* factors allows an inference of discriminatory intent.

258 If the Court literally follows this theory, an election system selected by referendum would be virtually immune from attack, unless it was so irrational as to admit to but one interpretation of the purpose for its selection. Even then it would have to be the offering of that form of government by the legislature, rather than its selection by the voters, that was irrational.

259 446 U.S. at 72 n.17. This expression would seem to include a rejection of Professor Brest's somewhat similar theory that purposeful discrimination can be founded upon proof of "selective racial indifference."' Under his theory, conscious intent to discriminate would not be necessary if the legislature would not have taken the action if the adverse impact would have fallen instead on the members of the dominant group. The intentional discrimination results from a failure on the part of the legislature to accord the same sympathy and care to the minority that it would afford to the majority as a matter of course. *See* Brest, *The Supreme Court 1975 Term--Forward: In Defense of The Anti-discrimination Principle,* 90 Harv. L. Rev. 1 (1976), *discussed in relation to dilution in* Note, *Racial Vote Dilution in Multimember Districts: The Constitutional Standard After Washington v. Davis,* 76 Mich. L. Rev. 694, 716 (1978).

260 The record in *White* easily would have supported a finding of intentional discrimination. Multi-member districts were a departure from normal state procedure. They were utilized almost exclusively in areas where single member districts would almost surely have produced black or Mexican-American districts. They were employed at a time when it appeared that more blatant discriminatory tactics--such as keeping minorities from registering--were going to be difficult to continue. The presence of these strong circumstantial indications of discriminatory intent and the courts', lower and Supreme, failure to base the decision upon them made it easy for subsequent interpreters of *White* to believe that intent was not the gravamen of the complaint.

261 638 F.2d 1239 (5th Cir. 1981).

262 *Id.* at 1240. The court characterized the claim as one of vote dilution. Thus what before *Mobile* was seen as a claim of denied access to the political process has become a claim of inability to elect a candidate of "their own race."D'

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

263 638 F.2d at 1243 (quoting Arlington Heights, 429 U.S. 252 at 267-68 (1977)).

264 In *Mobile* on remand, nearly four days of trial time were devoted to expert testimony directed toward the issue of whether the 1911 statute mandating the commission form of government had a discriminatory purpose, even though blacks had been disfranchised since 1901.

265 638 F.2d at 1244-45.

266 *Id.* at 1245.

267 *Id.* at 1245-46.

268 *Id.* at 1247. A council member testified that the at-large system was proposed to avoid the "hassle of reapportioning to keep so many blacks in this ward and so many whites in that ward and keep the population in balance as to race."' *Id.* A member of the legislative delegation testified to having no discriminatory motives himself in proposing the legislation, but that one council member had indicated the change was wanted to avoid a "'salt and peper council."DD" *Id.* On the eve of the referendum, the local newspaper ran an editorial specifically stating that the purpose of the change was to avoid electing a Negro councilman. *Id.* at 1247-48.

269 *Id.* at 1241.

270 *Id.* at 1249. This answers one of the questions asked in Part V: What happens if the motives for maintaining the system change from "bad"' to "good"'? This court's answer is that the old motives continue to taint the situation so long as the intended effects are still present.

271 639 F.2d 1358 (5th Cir. 1981). The panel in *Lodge* was composed of Circuit Judges Fay, Jones, and Henderson. Henderson filed a dissent.

272 *Id.* at 1373.

273 *Id.* at 1373-74. There is no cite to *Mobile* to support this statement. For reasons stated earlier, the author believes responsiveness is an essential element of the case *so long as* the basis for the claim is infringement of the right to vote. Conceptually it is difficult to explain why any specific intermediate finding should be essential to the ultimate conclusion that the legislature employed an impermissible basis for its decision.

274 *Id.* at 1374. Clearly this court views the value at stake to be that of the right to vote, and not antidiscrimination. Perhaps in its distance from the social and political reality extant in *Mobile,* the Supreme Court simply was unwilling to believe a group representing 35 percent of the electorate could be "fenced out"' of the political process. *See,* the comment of Justice Stevens:

> I also disagree with Mr. Justice Marshall to the extent that he implies that the vote cast in an at-large election by members of a racial minority can never be anything more than 'meaningless ballots.' I have no doubt the analyses of Presidential, senatorial, and other state wide elections would demonstrate that ethnic and racial minorities have often had a critical impact on the choice of candidates and the outcome of elections. There is no reason to believe the same political forces cannot operate in smaller election districts regardless of the depth of conviction or emotion that may separate the partisans of different point of view.

446 U.S. at 86, n.5 (Stevens, J., concurring in judgment).

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

275 639 F.2d at 1375. See the contra view of the author, Part V, *supra.*

276 Although a slight majority of the population, blacks were clearly a "'cognizable minority,"' not only on account of race, but because of their extremely depressed socioeconomic status, caused in part by past and present discrimination. As a group, blacks were discriminated against by the majority in its political behaivor. Evidence of extreme racial bloc voting, plus evidence that blacks had been excluded from participation in the operation of the Democratic party, and even that blacks had recently experienced difficulty in registering to vote was shown at the trial. The anti-black attitude of the majority made person-to-person campaigning, necessary in a rural county, impossible for blacks. Evidence of unresponsiveness was voluminous and touched all areas of governmental responsibility. All of the high vote percentage determing devices were present: majority vote, place system unrelated to residency, plus no viable second party.

277 The alternative source of intent suggested in Part V--finding it in the other dilution factors rather than looking solely to the factor of method of election--is unusually appropriate here. One of the other two cases decided by the same panel failed because unresponsiveness had not been demonstrated. Cross v. Baxter, 639 F.2d 1383 (5th Cir. 1981). The other, *Thomasville Branch of NAACP v. Thomas County,* 639 F.2d 1384 (5th Cir. 1981), was reversed and remanded for reconsideration in light of *Lodge.* The district court had interpreted *Mobile* to mean that proof of the *Zimmer* factors is not adequate to allow an interference of discriminatory maintenance. The Court of Appeals urged the district court on remand to pay particular attention to depressed socio-economic conditions, as well as all the *Zimmer* factors.

278 638 F.2d at 1248.

The defendants argued . . . that there is no discriminatory effect in this case because whites campaign for black votes and were . . . responsive to the needs of the black community. The defendants' argument misses the point. That the governing body may be benevolent is not relevant. The effect necessary for a case to be made is dilution of the votes of the minority. This is generally proven by evidence that a substantial minority is consistently *unable to elect candidates of its choice.*

Id. at n.18 (emphasis added).

279 The court's insistence upon reponsiveness came in answer to the question "what type and how much evidence is required to establish proof of a discriminatory purpose."' 639 F.2d at 1373.

280 That the court was thinking in these terms is suggested by the following statement:

[C]ommon sense tells us that in a case such as this, in which it cannot be asserted that the system was created for discriminatory purposes, it is likely that no plaintiff could ever find direct evidence that the system was maintained for discriminatory purposes. Clearly, the right to relief cannot depend on whether or not public officials have created inculpatory documents.

281 The other significant triggering device for discriminatory changes is the Voting Rights Act of 1965, but those changes should have been "caught"' by the preclearance requirements of section 5. The political subdivisions in *McMillan* were not subject to its provisions, however.

282 There is also a slight problem with the appropriate remedy. Are blacks now entitled to a system that assures the election of a black candidate, or merely to one that is not the product of improper motivation, regardless of its impact?

283 For an in-depth treatment of the perplexing problems produced by motivational analysis *see* Alexander, *Introduction: Motivation and Constitutionality,* 15 San Diego L. Rev. 925 (1978).

284 See part I, *supra.*

285 See part I, *supra.*

286 The effective date for jurisdictions covered by the original Act is November 1, 1964. For those jurisdictions added by the 1975 amendments to the Voting Rights Act, the effective date is November 1, 1972. See the discussion in Part I, note 166, *supra,* and accompanying text.

287 Certain election systems and devices are known to be disfavored by the Attorney General. Rather than run the risk of incurring an objection to preclearance, many jurisdictions no doubt simply avoid these devices entirely.

288 Actually, the Act does not expire. But after August 1982 covered jurisditions may remove themselves from coverage.

289 Allen v. State Bd. of Electors, 393 U.S. 544 (1969). See the discussion in Part I, *supra.*

290 42 U.S.C. § 1973c (1976).

291 The intricacies of the submission process are beyond the scope of this article. The regulations governing the submission process are found at *Procedures For the Administration of Section 5 of the Voting Rights Act of 1965,* 28 C.F.R. § 51 (1980).

292 28 C.F.R. 51.19 (1980). *See, e.g.,* Georgia v. United States, 411 U.S. 526, 538 (1973).

293 *See* City of Richmond, Va. v. United States, 422 U.S. 358 (1975).

294 *See* City of Petersburg, Va. v. United States, 410 U.S. 962 (1973).

295 425 U.S. 130 (1976).

296 *Id.* at 141.

297 *Id.*

298 The plan in *Beer* was submitted by the City of New Orleans, which at the time had a forty-five percent black population. The submitted councilmanic districting plan was drawn so that the election of a black to one of the seven council seats was probable. Because under the plan it replaced election of a black was unlikely, the Court found the new plan to be ameliorative rather than retrogressive: it enhanced blacks' opportunity to elect a candidate of their choice vis-a-vis the plan it replaced. *Id.* at 142. The Court also noted that the new plan did not even approach a violation of previously enunciated constitutional standards set out in *Fortson* through *White. Id.* at 141 n.14. This case should have been an early clue that there were considerable differences in opinion among the members of the Court as to what these constitutional standards are. The lower court relied heavily upon the presence of *White-Zimmer* facts as evidence that blacks would be precluded from political participation by the new plan. Beer v. United States, 374 F. Supp. 363, 387-94 (D.D.C. 1974). Justice Marshall, dissenting, expressed the view that these factors would support a finding of unconstitutionality, even without section 5.

299 The limited relief available under section 5 also produces interesting results when a change in “retrogressive,”' but the system it replaces is unconstitutional. Such a case was considered by the district court in *Wilkes County v. United States,* 450 F Supp. 117 (D.D.C. 1978), *aff'd,* 439 U.S. 999 (1979). There the County sought preclearance of changes from single member districts to at-large

election systems. The court found that the county had not carried its burden of proof and denied preclearance. The effect of the denial of preclearance was to continue in existence the old single member districts which were significantly malapportioned.

Although no further relief is available under section 5, black residents of the malapportioned district can bring a *constitutional* suit in their local district court. Any plan proposed by the county in this suit to remedy malapportionment must first be submitted for section 5 preclearance before the Court can order it implemented. *See* McDaniel v. Sanchez, 101 S. Ct. 2224 (1981).

300 In proving lack of a discriminatory purpose it should not be sufficient merely to show that the change was undertaken for a legitimate purpose--for example, that a reapportionment was undertaken to comply with a state constitutional requirement to reapportion after every census, or to comply with one man/one vote requirements. The state should also show that the actual plan adopted (as opposed to any conceivable plan it could have adopted) was adopted for a legitimate purpose. In the reapportionment hypothetical, the proof might include evidence of the basis for the plan, its underlying goals, the extent to which it complies with one-man-one-vote requirements, and the compactness of the districts. Because of their suspect nature the inclusion of multi-member districts should require additional justification. (Of course, if the new plan includes multi-member districts where the old one did not, this could be an additional "change,'" which could itself be retrogressive.)

301 446 U.S. 156 (1980).

302 *Id.* at 161. The plaintiff, City of Rome, also presented a number of procedural challenges. The Court rejected the city's argument that as a separate political unit in a covered state it should be allowed to "bail out'" under section 4 of the Act independently of the State of Georgia (section 4 provides that covered jurisdictions may remove themselves from the preclearance requirements of section 5 by obtaining a declaratory judgment from the District of Columbia District Court that no test or device has been used in the jurisdiction during the preceding seventeen years for the purpose or effect of denying or abridging the right to vote on account of race or color. 42 U.S.C. 1973b(a) (1976)), *id.* at 167. It also rejected Rome's argument that the Act exceeds Congress' power to enforce the fifteenth amendment by prohibiting discriminatory effects. The Court concluded that under section 2 of the fifteenth amendment Congress may prohibit practices that in and of themselves do not violate section 1 of the amendment so long as the prohibitions are an appropriate method of promoting the amendment's purposes. *Id.* at 173-78.

303 446 U.S. at 159.

304 *Id.* at 160.

305 *Id.* at 183-84.

306 *Id.* at 185 (citation omitted).

307 In fairness to the majority opinion, it should be noted that some support for this equation is found in the legislative history of the 1975 extension of the Voting Rights Act. "[T]he standard [under section 5] can only be fully satisfied by determining on the basis of the facts found . . . to be true whether the ability of minority groups to participate in the political process *and to elect their choices to office* is augmented, diminished or not affected by the change affecting voting . . . . " H.R. Rep. No. 94-196, 94th Cong., 1st Sess. 60 (1975) (emphasis added), cited in 425 U.S. at 140 (with different emphasis). Justice Marshall's opinion did not cite this passage to support its equation.

308 The majority opinion devoted very little space to the substative preclearance issue, and thus there may have been unmentioned factors that led the majority to conclude that the old system would allow single shooting. One explanation comes from the concurring opinion of Mr. Justice Blackmun. The Attorney General apparently did not object to the reduction of the nine wards to three. Thus if a partial preclearance were allowed--*i.e.,* the reduction was acceptable but the posts, which were accompanied by staggered terms, within

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

the three wards were not, then single shooting would be possible--blacks could vote for one instead of three, candidates per ward. 446 U.S. at 189.

309 The government relied upon a single election contest to establish the impact of the majority vote requirement. A black candidate for the school board led a field of four candidates in the first election with 39 percent of the vote, but lost the run-off with 45 percent of the vote. 446 U.S. at 184 n.20. It is of course indisputable that "but for"' the majority vote requirement, the black candidate would have been elected. However, it is also indisputable that over half of the votes he received must have come from white voters, because less than twenty percent of the voters were black. 446 U.S. at 195.

310 If blacks are able to garner white support and to form alliances with other groups, then there is no justification for finding that black candidates are disadvantaged by the election structure any more than are other candidates.

311 446 U.S. at 208 (Rehnquist, J., dissenting).

312 *See* Mathis & Mathis, The Voting Rights Act and Rome (Georgia) City Elections 11-12 (1981).

313 Note also that *Rome* was an unusual section 5 action because the change had been implemented for nine years and thus evidence of its actual impact was available. Typically, this evidence will not be available, and proof that the change will not have a discriminatory impact will be difficult, if not impossible, for the submitting authority.

314 Although the same standard for preclearance supposedly is applied by the Attorney General in passing upon submissions, in actuality this may not be true. Since the Attorney General's decision under section 5 is not subject to judicial review, *Morris v. Gressette,* 432 U.S. 491 (1977), there is no "check"' on the standard he applies. Since the only recourse for a submitting authority whose submission to the Attorney General has been denied preclearance is to obtain a very expensive de novo action in the District of Columbia Court, the Attorney General has a great deal of clout. In its submission, the submitting authority may make a prima facie showing of non-retrogression and lack of discriminatory intent but beyond that has no control over the additional evidence considered by the Attorney General, who is not limited to evidence that would be admissible in court. In fact the submitting authority is not informed as to the information upon which the Attorney General bases his decision, and, therefore, cannot rebut it or evaluate his weighing of the evidence.

315 The Chief Justice was part of the plurality and the majority and thus expressed no separate opinions. Mr. Justice Stevens concurred with both, and did not explain his seemingly inconsistent votes. He did, however, place racial vote dilution cases in a separate category from cases denying individuals' access to the ballot and cases alleging malapportionment. 446 U.S. at 83-84.

316 Justice Marshall, dissenting, argeed that section 2 is coextensive with the fifteenth amendment, but disagreed with the plurality as to the appropriate scope of the amendment. He no doubt would concede that regardless of the constitutional requirement, section 2 could be interpreted differently. *Id.* at 103.

317 Brief of the Appellees at 11-17, Bolden v. Mobile. The Appellants maintained the issue was not before the Court. Reply Brief for Appellants at 2.

318 *See generally* Brown v. Moore, 428 F. Supp. 1123, 1134 (1976). Note, *Racial Vote Dilution in Multi-member Districts: The Constitutional Standard After Washington v. Davis,* 76 Mich. L. Rev. 694 (1978);

319 The fifteenth amendment and section 2 claims were rejected by the Court of Appeals and were not cross-appealed. *See* Reply Brief for Appellants at 2.

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

320 446 U.S. 156, 177 (1980). See the discussion of *Rome,* in part VI B, *supra.* Only Justice Powell, Rehnquist and Stewart dissented from the *Rome* decision. Powell's dissent was based upon his belief that the city should have been allowed to "bail out"' under section 4. Rehnquist, while agreeing that Congress can do more than just enforce the amendment's command, believed that the majority went too far. Congress' power, he reasoned, should be limited to remedial situations--to remedy past constitutional wrongs or to effectively prevent purposeful discrimination by a governmental unit. The majority's decision was not so limited. No finding was made that the legitimate inference of a discriminatory purpose allowed by virtue of the change itself was effectively rebutted. 446 U.S. at 206 (Rehnquist, J., joined by Stewart, J., dissenting).

321 *See* Katzenbach v. Morgan, 384 U.S. 641 (1966) (upholding section 4(e) of the Voting Rights Act, which prohibited application of a state English literacy requirement as a prerequisite to voting for persons who had attended certain non-English schools). *See also* Metropolitan Housing Dev. Corp. v. Arlington Heights, 558 F.2d 1283 (7th Cir. 1977), *cert. denied,* 434 U.S. 1025 (1978) ("'discriminatory effects"' were sufficient to violate the Fair Housing Act); Grigg v. Duke Power Co., 401 U.S. 424 (1971) (employment practices that have a discriminatory effect violate Title VII of the Civil Rights Act of 1964).

322 42 U.S.C. 1973 (1965). The Act was amended in 1975 to extend this prohibition to read "or in contravention of the guarantees set forth in section 1973b(f)(2),"' which prohibits discrimination against language minority groups.

323 42 U.S.C. § 1973b(a) (1976). In addition, section 1973b(e)(2) provides in part: "No person . . . shall be denied the right to vote . . . because of his inability to read, write, understand, or interpret any matter in the English language . . . . "

Section 1973b(f)(2), which was added to the Act in 1975, extends protection to certain language minorities and provides in part: "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any state or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group."' 42 U.S.C. § 1973b(f)(2) (1976).

324 42 U.S.C. § 1973a(b) (1976) (emphasis added).

325 42 U.S.C. § 1973a(c) (1976) (emphasis added). Originally, the Senate bill referred to "discriminatory purpose,"' 111 Cong. Rec. 28360 (1965) while the House version included "effect."' The House version was adopted. 111 Cong. Rec. 28370 (1965).

326 42 U.S.C. § 1973b (1965). Originally, section 4 referred to "denials of the right to vote."' S.1564, 111 Cong. Rec. 28358 (1965). This was changed to "'for the purpose of denying,"' S.1564, 111 Cong. Rec. 28360 (1965), and was finally modified to include "discriminatory effects,"' 111 Cong. Rec. 28365 (1965).

327 42 U.S.C. § 1973c (1975) (emphasis added). The original language of section 5 was "discriminatory effect,"' S.1564, 111 Cong. Rec. 28358 (1965), but it was broadened to include "purpose"' by the Senate Judiciary Committee. 111 Cong. Rec. 28360 (1965).

328 42 U.S.C. § 1973h (1965).

329 42 U.S.C. § 1973h(a) (1965) (emphasis added).

330 Address on Voting Rights to Joint Session of Congress by President Johnson, March 15, 1965, 111 Cong. Rec. 5058 (1965).

331 Senator Mansfield (D. Mont.), a sponsor of the bill, recognized this problem. "The preclearance requirement is merely a common sense method of insuring that literacy tests and similar devices are not replaced by other vehicles of discrimination as soon as the ban on literacy tests takes effect."' The debates are reported in II B. Schwartz, Statutory History of the United States: Civil Rights (1970).

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

332 The legislative history supports this view. See the remarks of Senator Javitts in the text accompanying note 359, *infra,* and the discussion therein.

333 *Hearings on S.1564 Before the Senate Comm. on the Judiciary,* 89th Cong., 1st Sess. 191 (1965). Although the thrust of his remark was directed toward the meaning of "procedure,"' examination of Katzenbach's testimony throughout the hearings demonstrates that he believed the fifteenth amendment to prohibit practices that were discriminatory in either purpose or effect. *See* Brief of the United States, Lodge v. Buxton, at 41. The Justice Department also notes in this brief that this discussion is the "only direct description of the substantive standard of proof under Section 2 that our research has disclosed in the 1965 legislative hearings and debates on the Act."' Brief of the United States at 40.

334 Statement of Attorney General Mitchell, *Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. of the Judiciary,* 91st Cong. 1st & 2d Sess. 189-90 (1969-1970) [hereinafter cited as *Senate Hearings* (1970)].

335 115 Cong. Rec. 38535 (1969).

336 Pub. L. No. 91-285, 84 Stat. 314.

337 *See* comments from the *Senate Hearings* (1970), *supra* note 340: Senator Mathias: "The power being given to the Attorney General . . . doesn't add anything of great substance which isn't already in the Act."' *Id.* at 22. Senator Bayh: "I do not think you are getting any additional power that you do not now have under the 1957 and 1965 Acts and under Section 2, 3, and 12 of the 1965 Voting Rights Act. I think you have these very powers. . . . " *Id.* at 203.

338 Joint Views of Ten Members of the Judiciary Committee Relating to Extension of the Voting Rights Act of 1965, 116 Cong. Rec. 5523, 5527 (1970) (emphasis added). Seven of those ten senators were sponsors of S.1564 which was enacted as the Voting Rights Act of 1965.

339 121 Cong. Rec. 24705 (1975).

340 121 Cong. Rec. 24708 (1975).

341 City of Mobile v. Bolden, 446 U.S. 55, 65 (1980).

342 42 U.S.C. § 1973 (1965). For a discussion on the meaning of "procedure"' see *Hearings on S.1564 Before the Senate Comm. on the Judiciary,* 89th Cong., 1st Sess. 191-92 (1965).

343 393 U.S. 544 (1969). As the earlier discussion of *Allen* indicates, this decision with its liberal interpretation of the "changes"' subject to preclearance gave section 5 the needed clout to prevent the political "'retrogression"' of newly enfranchised minorites. See the discussion in Part I, *supra.*

344 This clarification of the language of section 2 was also discussed in an analysis of the bill submitted by some of its Senate sponsors: "This Section is the same as introduced except that changes have been made to make clear that the rights protected are those of citizens of the United States and to set out with more specificity the breadth of those rights."' Joint Views of Twelve Members of the Judiciary Committee, [1965], U.S. Code, Cong. & Ad. News. 89th Cong., 1st Sess. 2557.

345 393 U.S. at 565 (emphasis added).

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

346 *Id.* at 565-66.

347 Although the major thrust of the Act was to ban the chief agent of disfranchisement, the literacy test, and to avoid the necessity for piecemeal litigation against any new scheme designed to take its place, the Act also contains provisions designed to guard against discriminatory tactics at the polling place, and in the counting of ballots. *See* the observer provisions section 8 of the Voting Rights Act, 42 U.S.C. § 1973f (1976).

348 *Hearings on Extension of the Voting Rights Act of 1965 Before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm.,* 94th Cong., 1st Sess. 124, 125, 149, 159, 225, 464-65, 500-01, 553, 561 (1975) [hereinafter cited as *Senate Hearing* (1975)].

349 *Senate Hearing* (1975), *supra,* note 354, at 598-600.

350 *Senate Hearing* (1975), *supra,* note 354, at 561.

351 *Senate Hearing* (1975), *supra,* note 354. The Act was extended and expanded by the 1975 amendments. Witnesses before the Committee were often asked if portions needed strengthening. For example, the Assistant Attorney General for Civil Rights was asked if, in light of the *Beer v. United States* case then pending, an amendment to the Act was needed to make clear that redistricting was within the scope of section 5. *Id.* at 567.

352 554 F.2d 139 (5th Cir.) (en banc), *cert. denied,* 434 U.S. 968 (1977) discussed in Part III *supra.*

353 111 Cong. Rec. 8295 (1965).

354 The “continuing effects”' should be determined in a manner consistent with the values and interests being furthered by the right to vote. Some will argue that the effects of past denials have not been fully eradicated until proportional representation has been achieved. The rationale for rejecting that argument in proposing a constitutional standard (see Part V, *supra*) is equally applicable here. Placing the means for proportional representation in the hands of minorities should be a remedy for past disfranchisement only when refranchisement has not resulted in the achievement of meaningful political participation.

355 Howard A. Glickstein, Director for the Center for Civil Rights, University of Notre Dame, in *Hearings, supra* note 342, at 215.

APPENDIX

Table A: All Municipalities Having at Least One Black Elected Official by Region, Percent Black, and Population

	POPULATION							
	(THOUSANDS)	GREATER					LESS	
		THAN	20 TO 50	10 TO 20	5 TO 10	1 TO 5	THAN	TOTALS
REGION		50					1	
	PERCENT							
	BLACK							
	LESS THAN 20	18	7	1	0	0	0	26
	20 to 50	5	2	0	0	1	0	8
WEST[1]	GREATER THAN 50	2	0	0	0	0	0	2
	TOTAL	25	9	1	0	1	0	36
	LESS THAN 20	23	15	8	10	11	10	77
	20 to 50	19	12	5	7	13	2	58

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

CENTRAL[2]	GREATER THAN 50	3	5	5	7	7	8	35
	TOTAL	45	32	18	24	31	20	170
	LESS THAN 20	7	13	6	6	2	1	35
	20 to 50	13	11	9	7	8	1	49
NORTHEAST[3]	GREATER THAN 50	5	3	1	2	5	3	19
	TOTAL	25	27	16	15	15	5	103
	LESS THAN 20	4	9	8	6	10	5	42
	20 to 50	18	12	12	19	21	14	96
BORDER[4]	GREATER THAN 50	0	1	2	3	17	27	50
	TOTAL	22	22	22	28	48	46	188
	LESS THAN 20	5	5	7	9	19	2	47
	20 to 50	28	29	37	38	68	18	218
SOUTH[5]	GREATER THAN 50	4	9	10	14	71	58	166
	TOTAL	37	43	54	61	158	78	431
	LESS THAN 20	57	49	30	31	42	18	277
	20 to 50	83	66	63	71	111	35	429
TOTALS[6]	GREATER THAN 50	14	18	18	26	100	97	272
	TOTAL	154	133	111	128	253	149	928

Footnotes

1 Alaska, Arizona, California, Colorado, New Mexico, Oregon, Washington.

2 Illinois, Indiana, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, Ohio, Wisconsin, West Virginia.

3 Connecticut, Delaware, Maryland, Massachusetts, New Jersey, New York, Pennsylvania, Rhode Island.

4 Arkansas, Florida, Oklahoma, Tennessee, Non-VRA portion of North Carolina.

5 The VRA States: Alabama, Georgia, Louisiana, Mississippi, Part of North Carolina, South Carolina, Texas, Virginia.

6 States with no black elected officials are not listed. (All of the missing states have very small black populations.)

Table B: Electing and Non Electing Municipalities 5,000 or Greater Population, At Least 20 Black

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

REGION[1]	ELECTING	NON ELECTING	TOTAL
West	9 (75)	3 (25)	12
Central	60 (78.9)	16 (21.1)	76
Northeast	51 (77.3)	15 (22.7)	66
Border	65 (59.1)	45 (40.9)	110
South	170 (57)	128 (43)	298
TOTALS	335 (63.2)	207 (36.8)	562

Footnotes

1 The Regions are the same as those in Table A.

42 LALR 851

End of Document © 2022 Thomson Reuters. No claim to original U.S. Government Works.