INTRODUCTION

THE VOTING RIGHTS ACT: PROTECTING THE RIGHTS OF RACIAL AND LANGUAGE MINORITIES IN THE ELECTORAL PROCESS

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During the last few decades, the United States has witnessed a remarkable transformation of the voting rights of citizens who are members of racial and ethnic minority groups. The dimensions of the transformation are only now beginning to emerge, thanks in part to a recent surge of scholarly interest in the Voting Rights Act of 1965.[1] The present issue of the *Chicano-Latino Law Review*, which is devoted to an examination of questions bearing on the Act, is but one example of that interest.

From our vantage point today, it is clear that the year 1944 marked the beginning of the modern period in voting rights expansion. It was then that the Supreme Court finally declared in *Smith v. Allwright*[2] that the Texas white primary, contrary to the fiction that Texas had long maintained, was an integral part of the public election apparatus and not simply a private political club for whites.

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1. Voting Rights Act of 1965 (codified at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1992)).

Books or journal symposia devoted largely to the subject include Symposium, *Assessing the Effects of the U.S. Voting Rights Act*, 16 PUBLIUS: J. FEDERALISM (Fall 1986); MINORITY VOTE DILUTION (Chandler Davidson ed., 1984); QUIET REVOLUTION: THE IMPACT OF THE VOTING RIGHTS ACT IN THE SOUTH (Chandler Davidson & Bernard Grofman eds., forthcoming 1994) [hereafter QUIET REVOLUTION]; MARGARET EDDS, FREE AT LAST: WHAT REALLY HAPPENED WHEN CIVIL RIGHTS CAME TO SOUTHERN POLITICS (1987); THE VOTING RIGHTS ACT: CONSEQUENCES AND IMPLICATIONS (Lorn S. Foster ed., 1985); CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE (Bernard Grofman & Chandler Davidson eds., 1992) [hereafter CONTROVERSIES IN MINORITY VOTING]; BERNARD GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY (1992); FRANK R. PARKER, BLACK VOTES COUNT: POLITICAL EMPOWERMENT IN MISSISSIPPI AFTER 1965 (1990); and ABIGAIL THERNSTROM, WHOSE VOTES COUNT? (1987).

2. 321 U.S. 649 (1944).

As such, the Court held that it violated the Fifteenth Amendment, which proscribes a state's denial or abridgement of the right to vote "on account of race, color, or previous condition of servitude."[3]

In 1960, the Warren Court decided *Gomillion v. Lightfoot*,[4] a case originating in the heavily black town of Tuskegee, Alabama. Tuskegee had for years been a source of concern to the legislature as the town's black population grew. It was only a matter of time before the city's African Americans would be able to elect black officeholders—perhaps even a majority of the city council.[5] The legislature passed a law to redraw Tuskegee's city limits to remove almost all of the city's black population from inside its municipal boundaries. The Supreme Court characterized the legislative redistricting of Tuskegee's boundaries as an instance of vote denial that violated the Fifteenth Amendment.

In 1962, the Court moved significantly beyond *Gomillion* in *Baker v. Carr*,[6] holding that legislative reapportionment is justiciable, and in 1964 in *Reynolds v. Sims*,[7] Chief Justice Earl Warren, writing what he would later consider his most important opinion for the Court, held that the radically malapportioned Alabama legislature was unconstitutional, and as such violated the equal protection clause.

The Voting Rights Act

These epochal voting rights cases were a prelude to the Voting Rights Act of 1965, which was enacted little more than a year after *Reynolds*. The Act, designed to enforce the Fifteenth Amendment in the face of widespread resistance to black political participation among southern white officials, was concerned primarily with abolishing the major impediment to black voting rights in the United States at that time, the literacy test, which was still used in seven southern states with the effect of preventing the large majority of blacks in several of them from registering to vote.

The two most important aspects of the Act initially were Sections 4 and 5. Section 4 contained a trigger mechanism suspending for five years the literacy test in all states of the Union that had used the test or a similar device on November 1, 1964, and had either a voter registration rate of less than 50% of the voting-age residents on that date or a voter turnout rate in the 1964 presidential election of less than 50%.[8] Six entire southern states—Alabama, Georgia,

3. U.S. CONST. amend. XV, § 1.
4. 364 U.S. 339 (1960).
5. For an account of the Tuskegee racial situation, see ROBERT J. NORRELL, REAPING THE WHIRLWIND: THE CIVIL RIGHTS MOVEMENT IN TUSKEGEE (1985).
6. 369 U.S. 186 (1962).
7. 377 U.S. 533 (1964).
8. 42 U.S.C. § 1973b.

Louisiana, Mississippi, South Carolina, and Virginia—were entirely covered by Section 4, and a significant number of North Carolina counties were covered as well. The Act was amended in 1970 to suspend all literacy tests in the nation for another five years, and in 1975, literacy tests were permanently abolished as prerequisites for voting throughout the country. The Act's suspension of the test, in combination with provisions in Sections 6, 7, and 8, enabling the Attorney General to send federal registrars and observers to certain southern counties if needed, had the effect of enfranchising large numbers of African Americans almost overnight. In the first ten years after passage, more than one million new minority registrants were added to the voter rolls in the covered states.[9]

Section 5 was another crucial part of the original act. Its preclearance provision required any jurisdiction covered as a result of the Section 4 trigger to submit for approval to the Attorney General or the U.S. District Court for the District of Columbia any proposed change in voting procedures of the state or its political subdivisions.[10] The purpose of the submission was to allow federal authorities, in advance of enactment of the new procedure, to determine if it would restrict the voting rights of blacks. Four features of Section 5 are noteworthy. First, the Attorney General's finding is not subject to judicial review. Second, the venue for the preclearance process is the nation's capital, not a southern locale. Third, the law prohibits a change whose intent *or effect* is discriminatory. Finally, the burden is on the covered jurisdiction to submit every proposed change. As a result of these four aspects, Section 5 constituted an extraordinary federal intervention into the affairs of individual southern states. As the Supreme Court observed in 1966, Section 5 was designed to "shift the advantage of time and inertia from the perpetrators of the evil to its victims."[11]

Following the widespread Chicano revolt throughout the Southwest in the late 1960s and early 1970s, Congress extended coverage of Section 5 in 1975 to include persons of Spanish heritage and those belonging to three other language-minority groups: Asian Americans, American Indians, and Alaskan natives. A jurisdiction was covered if it had a language-minority group of more than 5% of its voting-age population, if fewer than 50% of the jurisdiction's voting-age citizens had voted in the 1972 presidential election, and if the election was conducted only in English.[12] When

9. U.S. COMMISSION ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER 33 (1975).

10. 42 U.S.C. § 1973c.

11. South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966).

12. For an analysis of the 1975 amendments as they related to language minorities, see David H. Hunter, *The 1975 Voting Rights Act and Language Minorities*, 25 CATH. U. L. REV. 250 (1976).

these three standards were met, not only were the jurisdictions required to provide election materials in the appropriate languages, but they were required to conform to Section 5 preclearance provisions when changes in election procedures were proposed. As a result of the 1975 amendments, the states of Texas, Arizona, and Alaska were brought under the purview of Section 5, as were a number of counties across the nation.

Soon after the Act's passage, its constitutionality was established in *South Carolina v. Katzenbach*,[13] and Justice Department enforcement of its provisions protecting the black ballot made it clear to southern white officials that the federal government, in contrast to its performance following Reconstruction, was serious about protecting Fifteenth Amendment rights.[14]

A Supreme Court decision in 1969 had great influence in determining the scope of the Act in succeeding decades. In *Allen v. State Board of Elections*,[15] the Court confronted the issue of whether Section 5 preclearance requirements applied only to proposed election changes that would restrict the right of blacks to vote, or also to changes that would diminish their voting strength, quite apart from their right to cast a ballot. At issue in this case were massive changes in Mississippi's state election code enacted by the state's all-white legislature within months of the Voting Rights Act's passage, the effect of which was to change many of Mississippi's elections from district to at-large plans. Given the likelihood that Mississippi whites would vote overwhelmingly against black candidates, this legislation's intent clearly was to diminish blacks' voting strength once they had secured the franchise. Similar changes in voting law were occurring throughout the South during this period. They gradually came to be called instances of *minority vote dilution*. I have elsewhere defined dilution as a process whereby election laws or practices, either singly or in concert, combine with systematic bloc voting among an identifiable group to diminish the voting strength of at least one other group. Minority vote dilution is a subcategory of this process, in which the voting strength of a racial or ethnic minority group is diminished by the bloc vote of the majority, sometimes to the point of excluding the minority voters from meaningful participation in the political system. The Court, in one of the last opinions written by Justice Warren, observed:

> The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot. . . . Voters

13. 383 U.S. 301 (1966).

14. For a comparison of the federal role in guaranteeing black voting rights during the First and Second Reconstruction, see J. Morgan Kousser, *The Voting Rights Act and the Two Reconstructions*, *in* CONTROVERSIES IN MINORITY VOTING, *supra* note 1, at 135.

15. 393 U.S. 544 (1969).

> who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole. This type of change could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting.[16]

The Court held that the legislative history of the Act made clear that its framers had meant for such stratagems by white officials to be precleared.[17]

Legal Challenges to Minority Vote Dilution

Allen thus gave legal standing to vote dilution claims by blacks in jurisdictions covered by Section 5. More than this, it sanctioned a model of vote discrimination that would be used by plaintiffs challenging dilutionary structures—typically at-large election plans or racially gerrymandered districts—in situations where Section 5 could not be invoked. These situations were numerous. One reason, of course, was that Section 5 coverage was limited to only a few states and their political subdivisions. Moreover, the reach of Section 5 would later be trammeled by the "retrogression test" laid down in 1976 by the Supreme Court in *Beer v. United States*.[18] According to *Beer*, the standard by which to decide if a proposed voting change was permissible under Section 5 was whether it restricted minority rights more than they were restricted by the system that would be modified. Black plaintiffs in *Beer* argued that the standard should be simply whether the proposed change restricted voting rights at all. The Court held otherwise. Consequently, it was entirely legal for a covered jurisdiction to propose, for example, a change in election plan that diluted black votes so long as the plan would not dilute them to a greater degree than the old plan. Because many southern jurisdictions had dilutionary systems before the Act was passed, the retrogression test enabled them to maintain such systems or change them for equally dilutionary ones without violating Section 5.

Thus the preclearance provision was quite restricted as a tool to remedy widespread vote dilution among blacks in the South and elsewhere, as well as among Mexican-Americans, particularly in the Southwest.[19] Minority plaintiffs therefore looked to the Constitution for relief, and began to file challenges to dilutionary structures under the Fifteenth Amendment and the equal protection clause of the Fourteenth Amendment.

The first successful minority vote dilution claim argued on con-

16. *Allen*, 393 U.S. at 569.
17. *Id.* at 566-569.
18. 425 U.S. 130 (1976).
19. On the extent and growth of measures diluting the black vote, see QUIET REVOLUTION, *supra* note 1.

stitutional grounds before the Supreme Court was *White v. Regester*.[20] Ruling on cases originating in Texas as a result of controversies over the outcome of the 1970s round of reapportionment, the Court found that the votes of Hispanics in San Antonio and blacks in Dallas had been diluted in legislative redistricting, and ordered a new plan that resulted in a significant increase in the number of both groups in the state legislature.

The deficiency of *White*, however, was that in spite of its finding of vote dilution, the opinion was unclear as to what criteria were used. Indeed, the Court did not even mention *Whitcomb v. Chavis*,[21] the previous case in which it had considered the issue of minority vote dilution and found for the defendant. *White* instructed judges to consider "the totality of the circumstances" in dilution cases, but it was silent on how much weight the various factors present in San Antonio and Dallas should be given. A subsequent opinion by the Court of Appeals for the Fifth Circuit in *Zimmer v. McKeithen*[22] attempted to give a semblance of order and priority to the various factors mentioned in *White*. In light of later events, it is important to note that there was nothing in neither *White* nor *Zimmer* to suggest that plaintiffs were required to demonstrate defendants' intent to discriminate against minority voters.

The so-called *White-Zimmer* standards prevailed throughout the remainder of the 1970s, during which time several dilution suits were filed and won in the southern states. In addition, during the 1970s the Justice Department made use of Section 5 at the state legislative level to prevent the introduction of dilutionary changes such as at-large elections, majority runoff requirements, and rules to prevent bullet voting, a tactic minority groups have long used to elect candidates of their choice in at-large settings.

The situation changed suddenly in 1980 when the Supreme Court decided *City of Mobile v. Bolden*.[23] A sharply divided Court held that the Fifteenth Amendment did not apply to vote dilution and that the Fourteenth Amendment was applicable only when defendants had intentionally created or maintained an election system for discriminatory purposes. The Court also held that Section 2 provided no greater protection than the Fourteenth and Fifteenth Amendments. A showing of discriminatory result alone was no longer sufficient; in other words, intent was a necessary ingredient in a successful minority vote dilution claim.

20. 412 U.S. 755 (1973).
21. 403 U.S. 124 (1971).
22. 485 F.2d 1297 (5th Cir. 1973).
23. 466 U.S. 55 (1980).

The Amendment of Section 2

Bolden sparked an effort by civil rights forces to convince Congress to amend Section 2 in 1982, when the temporary provisions of the Act were scheduled to be considered for renewal. Until that point, Section 2, a permanent feature of the Act which did little more than restate the Fifteenth Amendment, had not been a salient part of the Act. As amended, however, it became very important. The key passage contained language from the *White-Zimmer* standards governing vote dilution, and it explicitly made illegal vote dilution that was discriminatory in either intent or result. The "results" test of amended Section 2 became the center of controversy during the congressional debate over renewal of the Act; it is a tribute to civil rights leadership that the proposed amendment was enacted, especially inasmuch as the proposal had early on encountered opposition from the Reagan administration and prominent conservative senators such as J. Strom Thurmond and Orrin Hatch.

As Section 2 now reads, the voting rights of members of a protected class are violated if it can be shown, "based on the totality of the circumstances", that such members:

> have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.[24]

Soon after the amendment was enacted the Supreme Court in *Rogers v. Lodge*[25] announced an intent standard in Fourteenth and Fifteenth Amendment minority vote dilution cases less stringent than in *Bolden*, so much less, in fact, that proof of demonstrating minority vote dilution under the revised standard was not that much different from what it had been under the *White-Zimmer* standards.

It remained for the Supreme Court to interpret the amendment, which it did in *Thornburg v. Gingles*,[26] a case originating in North Carolina's 1980s round of legislative reapportionment. The Court introduced what is now called the three-pronged "results" test for multimember vote dilution schemes. For plaintiffs to prevail, the Court reasoned, the minority group must be "sufficiently large and geographically compact" to compose a majority in at least one single-member district; it must be "politically cohesive"; and

24. 42 U.S.C. § 1973.
25. 458 U.S. 613 (1982).
26. 478 U.S. 30 (1986).

the majority group must also be cohesive enough "to enable it . . . usually to defeat the minority's preferred candidate."[27] In a case arising from the 1990s round of redistricting, the Supreme Court held that these three criteria for proving dilution in at-large or multimember settings also apply in the reapportionment of single-member district plans.[28]

While the *Gingles* test has been criticized for ignoring the plight of a minority group that is not sufficiently concentrated or numerous to form a majority in a district, but which may nonetheless make up a substantial population whose votes are typically overwhelmed by those of the majority favoring a different candidate,[29] it was generally welcomed in the voting rights community for two reasons. First, it underlined the crucial importance of racially polarized voting in a vote dilution claim. In the Court's interpretation, polarization was essential to minority vote dilution.[30] Second, it simplified and made judicially manageable the plaintiffs' burden of proof, focusing on the question of whether a minority group's voting strength is diminished by the election system; it dispensed with the requirement to demonstrate governmental unresponsiveness toward minority groups, a requirement that had come to assume some importance in cases tried under the *White-Zimmer* standards. *Gingles* thus opened the floodgates of vote dilution litigation under Section 2.

The Impact of the Voting Rights Act

The evidence to date strongly supports the often voiced claim that the Voting Rights Act is the single most successful civil rights act in American history, in terms of the intent of Congress in framing and amending it. Its immediate impact was on black registration rates. In Alabama, Georgia, Louisiana, Mississippi, and South Carolina, the five states of the Deep South where the literacy test was still in effect in 1965, the black registration rate—22.5% in 1964—jumped sharply following passage of the Act, and has gradu-

27. 478 U.S. at 50-51.

28. Growe v. Emison, No. 91-1420, 1993 U.S. Lexis 1780 (February 23, 1993). In Voinovich v. Quilter, No. 91-1618, 1993 U.S. Lexis 1939 (March 2, 1993), the Court also held that states in reapportioning legislatures can create majority-minority districts even when they are not remedies for minority vote dilution, so long as the creation of these districts does not violate *Gingles* standards. *Voinovich* dismayed some Democrats, who perceive the creation of such districts by the Republican-dominated redistricting board in Ohio as designed to diminish the proportion of Democratic seats in the legislature while increasing the number of blacks.

29. Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173 (1989).

30. 478 U.S. at 51. *See also* Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833 (1992).

ally approached that of whites, reaching 65.2% in 1990,[31] by one estimate.

The connection between the Act and the increase in officeholding among African Americans, Hispanics and other language minorities is difficult to establish precisely, in part because some of the legally mandated changes in election systems resulting in increased minority officeholding were the outcome of constitutional rather than statutory challenges to at-large plans. However, it should be noted that the conceptual groundwork for these Fourteenth Amendment cases was laid by the Supreme Court in *Allen*, which held that Section 5 preclearance provisions applied to vote dilution.

Laughlin McDonald, a prominent voting rights scholar and lawyer, observed in 1989 that the Voting Rights Act was one of the most obvious factors accounting for the increase in black officeholding from "fewer than one hundred black elected officials in the southern states originally targeted by the Voting Rights Act" before 1965 to 2,908 in January 1987, and for the increase in Latino and Native American elected officials to 3,360 and 852, respectively, in the same year.[32] A systematic study of over 1,000 cities with a minority population of at least 10% in the eight southern states covered by the Act reveals that during a period of roughly fifteen years, black officeholding in cities that changed from at-large to district or mixed election plans increased by nearly 15 percentage points in cities 10 to 29.9% black and by nearly 30 points in cities 30 to 49.9% black. In contrast, in cities that retained at-large plans throughout the period, black officeholding increased by only six percentage points in cities 10 to 29.9% black and by only 15 points in cities 30 to 49.9% black. A large number of the changes in election structure in these cities, moreover, were the result of constitutional or Section 2 challenges to at-large plans. Between 1982 and 1989, for example, over 150 cities were challenged under Section 2 in the eight states, and the vast majority of them adopted election plans favored by the minority plaintiffs. Many other jurisdictions changed "voluntarily" although many, if not most, of these did so in anticipation of probable Section 2 litigation.[33]

While the data have not yet been systematically gathered for school boards, county government, and the like, there is evidence that Section 2 has had a strong influence in changing the method of

31. Chandler Davidson, *The Voting Rights Act: A Brief History*, in CONTROVERSIES IN MINORITY VOTING, *supra* note 1, at 43.

32. Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249, 1252 (1989).

33. Bernard Grofman & Chandler Davidson, *The Effect of Municipal Election Structure on Black Representation in Eight Southern States*, *in* QUIET REVOLUTION, *supra* note 1, at 432.

election for these bodies as well.[34] There is also evidence that the Justice Department's enforcement of Section 5 during decennial redistricting has led to a sharp increase in black officeholding in the legislatures of the eight states from the 1970s to the 1990s.[35]

A major point of controversy regarding the effects of abolishing at-large elections remains, however, so far as the voting rights of Mexican-Americans in the Southwest are concerned. There is little dispute among informed observers that in many cities in the Southwest where Anglos tend to vote as a bloc against Mexican-American candidates, at-large elections still disadvantage Mexican-American voters—and may in many instances disadvantage them even more in the future as their proportion of the population in some jurisdictions grows. However, there is lively debate over whether single-member districts are a useful remedy. Because Mexican-Americans are typically not as residentially segregated as blacks, it is more difficult to create single-member districts with enough Mexican-Americans to overcome the bloc vote of Anglos. In addition, the lower turnout of Mexican-Americans, relative to blacks, as a proportion of their total population in a jurisdiction (because of a smaller voting-age population, a higher proportion of noncitizens, and often, the recency of arrival and consequent lack of political socialization), adds to the burden of creating districts in which Latino candidates have a reasonable chance for election.

There is plenty of evidence from cross-sectional studies that these factors make it more difficult for single-member districts to remedy underrepresentation for Latinos than for blacks.[36] Nonetheless, two studies using longitudinal data—observing the percentage of Mexican-Americans on city councils before and after switching from at-large to district or mixed elections—conclude that single-member districts can be effective remedies for Latino vote dilution in jurisdictions with sufficient compactness.[37] Neither study, however, contained a control group of unchanged cities to

34. On the impact of the Voting Rights Act on black officeholding at the county level in three southern states, see Laughlin McDonald et al., *Georgia, in* QUIET REVOLUTION, *supra* note 1, at 122; William R. Keech & Michael P. Sistrom, *North Carolina, in* QUIET REVOLUTION, *supra* note 1, at 239; and Orville Vernon Burton et al., *South Carolina, in* QUIET REVOLUTION *supra* note 1, at 281.

35. Lisa Handley & Bernard Grofman, *The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations, in* QUIET REVOLUTION, *supra* note 1, at 481.

36. Among the best cross-sectional studies that question the usefulness of district remedies for Mexican-Americans are Susan Welch, *The Impact of At-Large Elections on the Representation of Blacks and Hispanics*, 52 J. POL. 1050 (1990); and Jeffrey S. Zax, *Election Methods and Black and Hispanic City Council Membership*, 71 SOC. SCI. Q. 339 (1990).

37. Chandler Davidson & George Korbel, *At-Large Elections and Minority-Group Representation: A Re-Examination of Historical and Contemporary Evidence*, 43 J. POL. 982 (1981); Jerry L. Polinard et al., *The Impact of District Elections on the Mexican American Community: The Electoral Perspective*, 72 SOC. SCI. Q. 608 (1991).

provide a baseline for measuring the influence of district remedies per se. Fortunately, the above-mentioned longitudinal study of the eight-state south, which includes separate data for Mexican-Americans in Texas, does utilize such a control group. It finds that a switch from at-large to district elections between 1974 and 1989 made a big difference in Tejano city council representation as compared to at-large cities that did not change their election structures.[38] To be sure, many if not most of the cities changing their election structures were precisely those in which the group's geographical compactness and size favored single-member district remedies, and thus were not typical of all cities with Latino concentrations. The point, however, is that many atypical cities exist, and where they do, the district remedy recommends itself.

Where districts do not seem to provide a remedy for minority vote dilution, there are other election schemes that may—for example, semi-proportional representation plans that can operate in an at-large setting while presenting minority voters with a chance to elect candidates in spite of Anglo bloc voting.[39]

Consequently, it appears likely that Section 2 will be used increasingly for attacking vote dilution in states not covered by Section 5, and particularly in southwestern states with significant language-minority populations. The 1980s witnessed the filing of several voting rights suits by Latinos in California, for example, the most notable of which successfully challenged the at-large election of supervisors in Los Angeles County.[40]

THE ARTICLES IN THIS ISSUE

Despite the gains achieved as a result of the Voting Rights Act, and the simplification of its application as a result of *Gingles*, numerous controversies regarding its interpretation have yet to be settled. The contributors to this issue of the *Review* have chosen to analyze some of the more important ones.

Bernard Grofman focuses on four problems sometimes arising in "multi-ethnic" locales, jurisdictions where the political representation of more than one covered ethnic minority group is in ques-

38. Robert Brischetto et al., *Texas, in* QUIET REVOLUTION, *supra* note 1, at 334. Some of the cities in this study contained appreciable numbers of both Mexican-Americans and blacks, who under certain circumstances tended to vote for each other's candidates.

39. For a discussion of such schemes within the context of minority vote dilution, see Edward Still, *Voluntary Constituencies: Modified At-Large Voting as a Remedy for Minority Vote Dilution in Judicial Elections*, 9 YALE L. & POL'Y REV. 354 (1992); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077 (1991); and Richard H. Pildes, *Gimme Five*, THE NEW REPUBLIC, March 1, 1993, at 16-17.

40. Garza v. Los Angeles County Bd. of Supervisors, 918 F.2d 763 (9th Cir. 1990), *cert. denied* 498 U.S. 1028 (1991).

tion. He begins by asking when, according to the first prong of the *Gingles* results test, is a group large and compact enough to have a valid vote dilution claim. Rather than adopt a "bright-line" test such as requiring plaintiffs to show that at least one district could contain an absolute majority of voting-age citizens, Grofman proposes a "functional" approach in which the court would examine a number of demographic factors to determine whether minority voters in a district could have a reasonable chance of electing their preferred candidate even if they did not constitute the district's majority.

Second, Grofman addresses the issue of how to measure political cohesion for two minority groups when the question is whether they should be treated as a single group for purposes of meeting the *Gingles* size threshold test. He suggests answers that rely on various kinds of voting data or, where these are not available, on evidence of the groups' common experiences of discrimination, as testified to by lay witnesses.

Third, Grofman asks how to resolve conflicts over the voting rights claims of different groups within a jurisdiction. He cautions that the prevalence of such conflicts is often exaggerated, and then presents some common-sense methods for defusing them when they exist.

Fourth, Grofman discusses when to use alternatives to single-member district remedies such as limited and cumulative voting. While there are no hard and fast rules, he points to situations where these alternatives will probably be useful and to others where they will not be as useful.

In his case study of recent New York City elections, James W. Loewen examines the voting patterns of Latinos, African Americans, and Anglos. Using three standard methods of estimating group voting patterns from election returns, Loewen finds that in five major city elections between 1985 and 1989, each group tended to vote strongly for candidates of its own ethnicity in races where such candidates opposed those of different ethnicities, which is another way of saying that a high degree of racially polarized voting existed in these contests. Given the common tendency to use *bloc voting* as a euphemism for minority bloc voting, it is noteworthy that Anglos were most likely to support candidates of their own group. Moreover, blacks and Latinos, while less unified than Anglos, did not give a majority of their votes to candidates of the other minority group. In light of these patterns, it is not surprising that the 1990s round of redistricting for New York's city council, closely monitored by the Department of Justice, led to a sharp increase in the equity ratio of black and Latino council members, that is, the ratio of the percentage of minority members on the council com-

pared to the percentage of minority people in the city's voting-age population.

Aide Cristina Cabeza asks what population should be taken as the basis for reapportionment—all persons or some subset of them, such as all voters or all citizens? As Cabeza shows, this controversy long antedates the issue of minority vote dilution as it is presently understood. Rooted in eighteenth-century debates at the constitutional convention, the controversy resurfaced in the nineteenth century during arguments over the Fourteenth Amendment and again in the second and third decades of the twentieth century, when policies limiting immigration were particularly salient. In recent decades, the reapportionment decisions beginning with *Baker v. Carr* have raised the issue once again. Cabeza marshals the evidence to conclude that the only proper basis for representation and hence apportionment is the entire population, whatever might be the particular composition of age groups, voters, citizens, and other demographic categories.

Cal G. Gonzales' paper confronts the problem of measuring a minority group's "ability to influence" an election outcome in light of amended Section 2 as interpreted in *Gingles*. The issue is whether the first prong of the *Gingles* test, which has usually been interpreted as a bright-line size threshold test requiring that a minority group be large and compact enough to compose a majority in a single-member district, is sufficient to protect the voting rights of minorities as outlined in Section 2. Or should the courts also recognize the possibility of "influence" districts which are not majority-minority but may still, depending on the specific facts, give the minority group within the district a fair chance to elect candidates of its choice? This is a variant of the first question raised by Grofman's article. Gonzales reviews the case law from *Gingles* forward concerning the "ability to influence," with an eye to formulating a definition of an "influence" district that provides the full extent of protection to minority voting rights that Section 2 accords, but that is nonetheless judicially manageable.

Donald T. Deyo addresses the problem of inaccurate enumeration data presented by the U.S. Bureau of the Census on the basis of its decennial count. The importance of census data is well known as a basis for apportionment, for establishing levels of federal funding to the states, and for determining key socioeconomic indicators such as the unemployment rate. Political and representational problems arise when the census systematically undercounts identifiable groups. An undercount of blacks, for example, can lead to the dilution of the black vote in the redistricting process. Plaintiffs can follow at least four legal routes, Deyo argues, in trying to compel the use of adjusted population figures that compensate for known

census undercounts. He assesses plaintiffs' prospects for success and concludes that Section 2 of the Voting Rights Act is probably the most promising avenue, followed by the Freedom of Information Act. A more doubtful route is the Fourteenth Amendment. The least promising alternative of all, he argues, is litigation under the Administrative Procedure Act.

The essays in this issue of the *Review*, in short, focus on several important questions now before the courts having to do with the implementation of the Voting Rights Act. In so doing, they contribute to a burgeoning literature designed to understand and influence the voting rights revolution that has been underway over the past half century.