A Voting Rights Trilogy

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IF voting is the essential prerequisite to a well-functioning democratic society, then Boston's experience in denying minority citizens this fundamental right demonstrates its failure to achieve a true democracy. Persuading minorities to register to vote and other obstacles must be overcome before a franchise on equal terms with white citizens becomes a reality. Over the last year and a half, minority citizens have faced barriers limiting their right to register to vote pursuant to state law, have had their political strength diluted, rather than enhanced, through a change from at-large elections to a system of district representation, and were denied the right to vote at the polls during the 14 September, 1982, primary election. Each of these elements of the political process resulted in litigation in the courts.[1]

The First Critical Step: Voter Registration

The year 1981 saw a coalition of Boston's black, Hispanic, and other minorities, as well as progressive whites, band together in an effort to change the rules of the political process. The coalition, known as the Campaign for District Representation, worked to pass a referendum which ended the at-large electoral system for the Boston City Council and Boston School Committee.[2]

An earlier effort in 1977 to end at-large elections in favor of district-based elections failed by fewer than 4,000 votes. As a result, the Campaign for District Representation set about a major task of increasing voter registration, focused in minority neighborhoods.

In 1959 Massachusetts enacted a statute to facilitate voter registration. Ten or more registered voters may petition city or town registrars or election commissioners to hold a voter registration session at

> . . . any factory, mill, school, college or university, hospital, nursing or rest home, or any other place where there are persons who are entitled to be registered gathered by reason of employment *or other principal activity* within their city or town. . . [emphasis supplied][3]

The statute mandates that the registration session be approved and held if the petition complies with the requirements of timeliness[4] and if permission from an owner of private property is given or, in the case of a public place—e.g., building, park, etc.—the custodian of the public property is duly notified that a voter registration session will take place.[5]

The statute is silent as to who may conduct the voter registration session and the types of sites that are considered to be places of other "principal activity."[6] However, the practice in the City of Boston has been to deputize several of those persons submitting the petition as temporary assistant registrars, provide them with a brief orientation to the procedures, provide them with the necessary materials, and send them out to conduct the voter-registration session.[7] Places of "principal activity" are not statutorily defined, and the City of Boston had not developed objective standards for defining sites of "principal activity." As a result, approval or disapproval of voter registration sites depended on the whim of the Board of Elections or political decisions made elsewhere.

In the summer of 1981, one of the major tasks of the Campaign for District Representation (and the individual groups working in that coalition) was to register as many voters as possible in minority neighborhoods. In early September 1981, approximately eleven petitions

were submitted[8] and all were routinely approved. Arrangements were made for the training of prospective temporary assistant registrars. As the campaign's voter-registration activities intensified, an additional fifty-four petitions were submitted to the Board of Elections.[9] Between the date the initial eleven petitions had been submitted and routinely approved, and the date action was taken (or ignored) on the additional fifty-four petitions, the City of Boston conducted its preliminary election for City Council and School Committee. [10] Those candidates for City Council who were identified as most supportive of the current mayor, Kevin White (a.k.a the "Kevin 7"), did not fare well in the preliminary election, with only three candidates placing in the top eighteen.[11] Shortly after the preliminary election results were counted, the pending fifty-four petitions encountered "technical problems." When finally pressed, the Board of Elections ruled that the sites were not sites of "principal activity."[12]

Time for registering new voters was growing short[13] and the coalition was forced to seek injunctive relief in court. In *Campaign for District Representation, et al.* v. *Kevin H. White, et al.*,[14] the court found the failure to articulate reasons for denial of the registration sites improper and ordered most of the petitioned sites (still remaining before the statutory deadline) be approved. The court also ordered that the defendants promulgate standards for approval or rejection of voter registration sites petitioned for pursuant to the statute.

During the course of the next year, plaintiffs negotiated regulations to be followed by the Boston Board of Elections in implementing the statue. These regulations also have been given to the Secretary of the Commonwealth for his consideration for use statewide. The package of regulations was finally agreed to by the parties in late December 1982 and was submitted to and approved by the court in January, 1983, thus terminating the litigation by way of consent order.

The regulations amplify the statutory requirements. They require approval or specific reasons for disapproval of the petition within seven days of its receipt by the Board of Elections, give specific guidelines as to what are sound and unsound reasons for denial, provide for the provision of temporary assistant registrars when the City is unable to conduct the voter registration session itself, provide for their training, provide for registration materials, posters in different languages, and, importantly, define sites of "principal activity."[15] The regulations take effect on 15 April, 1983.

Step Two: Securing a Representative Government

The second major task of the Campaign for District Representation Coalition was to plan for the drawing of a district map in the (likely) event that the November 1981 referendum was approved by the voters.[16] Work on drawing a district map which would reflect racial minorities' proportion to the population began simultaneously with its voter registration drive.

A Massachusetts statute (drafted and passed prior to the 1977 referendum on district representation) dictated that if the district representation referendum were approved, the City would be divided into nine equally populous districts, with one representative each for the City Council and School Committee elected from each district and a number of at-large representatives based on the overall population.[17] Another Massachusetts statute requires that each district "be compact and shall contain, as nearly as may be, an equal number of inhabitants, shall be composed of contiguous existing precincts, and shall be drawn with a view toward preserving the integrity of existing neighborhoods."[18] The same statutory section provides that these newly drawn district lines continue in effect until the City next redraws its ward lines pursuant to a state law, passed in 1975, that requires each ward to have an equal number of inhabitants and based on the latest state decennial census. The purpose of the 1975 statute is wholly different from the 1977 statute implementing district representation.[19]

If other interest groups had not yet begun to draw district maps prior to the November referendum, everyone got into the act once the referendum was passed. Approximately nineteen maps were submitted to the City Council by various groups, individuals, and City Councillors themselves. All maps submitted, regardless of political interest, were drawn using the 1975 state decennial population of 637,986 as a base rather than the latest 1980 federal census, which had determined Boston's population to be 562,994.

Which population figures were required to be used by the City Council in drawing the nine district lines is in dispute that resulted in a federal court challenge, *Latino Political Action*

Committee, et al, v. City of Boston, being filed in early September 1982.[20] In the nine districts finally drawn by the City Council based on the 1975 state decennial census, the average population or "norm" is 70,887, there being a variance between the most and least populous district of approximately five percent (an otherwise acceptable figure). However, if the 1980 federal census is used, the average population or "norm" is 62,555. When the norm based on the 1980 federal census is superimposed on the district lines drawn by the City Council, the variance between the most and least populous districts is 23.2 percent, a clear violation of the Supreme Court's "one-person, one-vote" doctrine.[21]

The minority coalition in *Latino PAC* makes another serious constitutional claim. The district lines drawn by the City Council conveniently include an overwhelming percentage of minorities (predominantly black) in two districts, virtually guaranteeing the election of two blacks each to the City Council and to the School Committee. By concentrating such a high percentage of minorities in only two of the nine districts, their presence, and hence political strength, in other districts, is again diminished or diluted. This practice of diluting minority strength in other districts by concentrating their voting strength in as few as possible is called "packing" and is unconstitutional. Conversely, the Latino community claimed that its population was divided and diluted, so that it had no opportunity to flex its political muscle to elect a Latino candidate, and, that the district lines could have and should have been drawn to include a district with a substantial Latino population.[22]

The Latino PAC, Black Political Task Force, Boston's People's Organization, and others recognized that a coalition of minority political strength was necessary to undo the damage done by the City. From March to August 1982 they worked together to draw a district map based on the 1980 census that would comply in all ways with the aforestated statutory requirements, while at the same time taking into account minority populations and creating three districts from which minorities could have an opportunity to run successfully (one of these districts would accommodate a Latino candidate). Rather than two black districts with more than 95 percent minorities, these two districts would be approximately 65–70 percent black, with political strength elsewhere. The third district would be approximately 16 percent Latino, encompassing as many Latino citizens as geographically possible, and would be multiracial.[23] Minorities, who comprise about one third of the City of Boston's population (based on the 1980 federal census), would thus have a real opportunity (but no guarantees) to win one third of the district seats.

The City of Boston's defense is that it was required to use the state decennial census,[24] that it relied on the use of that census in good faith (denying that its use has the purpose or effect of diluting the voting strength of minorities in the City of Boston), and that the 1980 federal census "severely undercounts the population of Boston and to a disproportionate extent undercounts blacks, hispanics, other racial and ethnic minorities, persons whose principal language is other than English. . . ."[25]

It is likely that there will be a court ruling early in 1983, in time for the 1983 local election procedures to begin under a new district plan.[26]

Step Three: Trying Unsuccessfully to Exercise the Franchise

The third part of the trilogy involved the disenfranchisement of thousands of qualified voters (a disproportionate percentage of whom are minorities) in the September 1982 primary election. When voters went to the polls to vote, many were surprised to learn that they had been taken off the rolls of registered voters by the City officials. Others who were permitted to vote were "directed" and "helped" to vote for only certain candidates. Many others could not vote because polling places did not open in time (if at all) or voting machines did not work and they had to go to work or elsewhere, without time to return to vote.

The City of Boston has been responsible for conducting elections for many years now, and it seems odd that it was "accidental" that so many "mistakes" could have occurred in so many places on just one election day. That election day many complaints were received by the Secretary of the Commonwealth from citizens who were denied the right to vote. A preliminary analysis shows that a disproportionate number of those complaints came from polling places located in predominatly minority neighborhoods. In *Karen Horner, et al.* v. *Kevin H. White, et al.*, an injunction was sought to ensure that necessary steps were taken so that polling places would be open on time on

election day in November, that voting machines were in good repair prior to election day, that all election officers were sufficiently trained to handle problems that would arise, that a sufficient number of phone lines were established to call election officials in City Hall to resolve discrepancies, that up-to-date voting lists were available (including a list of persons taken off the voting rolls), etc.; in other works, that the Board of Elections did what it is supposed to do to carry out elections properly. Although in a letter to the Secretary of the Commonwealth the Board of Elections promised to enact these changes, plaintiffs did not believe that it would comply unless ordered to do so by a court. In addition, plaintiffs asked in their complaint that the Secretary of the Commmonwealth be appointed Special Master to monitor the November 1982 general election as well as future elections until such time as his monitoring was no longer necessary.

While not granting the preminimary injunction, the court indicated that if the promises of the City officials were not implemented, plaintiffs could return to court prior to the election. While some problems surely occured on election day, they paled by comparison to the problems that overwhelmed the City officials on primary day. Plaintiffs are pursuing their case so that the reforms that were initiated by the City, and others, are made permanent.

Conclusion

Racial and ethnic minorities seeking to participate in the democratic process have known for a long time that access to the system requires more than increased education awareness or technical knowledge of "how the system works." As they have found in the area of public education, public housing, and public employment, racism pervades the process and, as in those areas, resort to the courts, as well as political actions, is a prerequisite to equal opportunity to exercise their franchise. The courts will have to continue to intervene to exercise public officials' abdicated responsibility.

NOTES

1. Minorities in Boston have had no choice but to resort to the courts because those with political power have continued to deny them access to equal opportunity, based on racial discrimination. The federal court has had to run the Boston Public Schools : *Morgan* v. *Hennigan*, 379 F. Supp. 410 (D. Mass 1974), *aff'd*, 509 F. 2d 580 (1st Cir. 1975), *cert. denied*, 421 U.S. 963 (liability); *Morgan* v. *Kerrigan*, 410 F. Supp. 216 (D. Mass 1975), *aff'd*. 530 F. 2d 401 (1st Cir. 1975), *cert. denied sub nom. White* v. *Morgan*, 426 U.S. 935 (1976) (remedy). The Federal court had to order the Boston Police and Fire Departments to hire minorities: *Castro* v. *Beecher*, 334 F. Supp. 930 (D. Mass 1971), *aff'd*, 459 F. 2d 725 (1st Cir. 1972) (Police), *Boston Chapter NAACP Inc.* v. *Beecher*, 371 F. Supp. 507 (D. Mass 1974), *aff'd*, 504 F. 2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975) (Fire). Minorities had to seek federal court intervention to have equal employment opportunities in the Boston Public Works Department, *Harris* v. *White*, Civil Action No. 75-501-N (Consent Decree D. Mass. 5 Dec. 1980), and minorities are currently seeking court intervention to ensure equal opportunities in programs funded through the Community Development Block Grant (CDBG) and Urban Development Action Grant (UDAG) programs pursuant to the Housing and Community Development Act of 1974, as amended in 1977, *NAACP Boston Chapter* v. *Samuel R. Pierce, et al.* Civil Action No. 78-850-S, 607 F. 2d 514 (1st Cir. 1979). The federal court has also been requested to intervene to protect minorities from being displaced in the construction of the Copley Place complex located in one of Boston's only integrated neighborhoods, the South End, *Munoz-Mendoza* v. *Samuel R. Pierce, et. al.* Civil Action No. 80-2589-C, 511 F. Supp. 120 (D. Mass 1982).

The state courts intervened and placed the Boston Housing Authority in receivership due, in part, to racial discrimination against Boston's minority population: *Perez* v. *Boston Housing Authority*, 400 N.E. 2d 1231 (Supreme Judicial Court 1980).

2. Under the at-large electoral system nine city councillors and five members of the school committee are elected, based on the most votes city-wide. Through well-financed campaigns in selected white neighborhoods, bullet voting (voting for only one candidate), and other devices, and the lack of voter registration and participation by the minority communities, whites were able to maintain almost absolute control of the political process. Thomas I. Atkins, former President of the NAACP, Boston Chapter, and current General Counsel of the NAACP national organization, was the first black to break the racial barrier by being elected to the City Council in an at-large election, serving from 1967 to 1971. Later, another black, Bruce Bolling, was elected to the City Council in 1981. The first black elected to the Boston School Committee, John D. O'Bryant, was elected in 1977 and won re-election in 1979 and 1981. Another black, Jean McGuire, also won election to the Boston School Committee in 1981. *Black Voters* v. *McDonough*, 421 F. Supp. 165 (D. Mass 1976), *aff'd*, 565 F. 2d 1 (1st Cir. 1977).

3. M.G.L. c. 51, § 42B, as amended by St. 1981, c. 216.

4. The petition must be filed ". . .not less than forty days" prior to a "biennial state primary and election or the presidential preference primary or any municipal preliminary election, primary, or election. . ." Registrations can be held up to twenty days before the election. M.G.L. c. 51, § 26.

5. A voter-registration session must last for a minimum of two hours.

6. There is no legislative history that explains the intention of the Massachusetts General Court in enacting the legislation in 1959, but the amendments since then have broadened, rather than narrowed, its scope.

7. The City of Boston Board of Elections simply did not have sufficient personnel to respond to all of the petitions, as they are required to do by statute. M.G.L. c. 51, § 42B.

8. Most of the first eleven registration sites were located in racially integrated neighborhoods.

9. At least forty-five of the fifty-four petitions were for sites located in minority, or predominantly minority, neighborhoods.

10. For election to the City Council, if more than eighteen candidates qualify through the nominating petition requirements (2,000 signatures of registered voters), a preliminary election is held six weeks prior to the general election in order to narrow the field to the top eighteen, of which nine are elected in the general election. The procedure is the same for School Committee, except that the preliminary election narrows the field to ten, of whom five are elected in the general election.

11. The three members of the "Kevin 7" who finished in the top eighteen placed seventh, sixteenth, and eighteenth respectively in the preliminary election, and only won one seat in the general election, finishing ninth.

12. Two of the most important sites to the petitioners, which had routinely been approved in prior years, were Dudley and Egleston MBTA stations (both located in the heart of the minority community of Roxbury), through which thousands of "potential registered voters" pass each day to and from work, shopping, etc. After the preliminary election, these sites were disapproved as not being sites of "principal activity."

13. See Note 4 on page 3, supra.

14. Civil Action No. 50890, Suffolk Superior Court, filed 5 October, 1981.

15. In addition to the statutorily defined sites, supermarkets, shopping centers, health centers, libraries, housing projects, and welfare offices are deemed to be sites of "principal activity." In addition, upon a showing that a substantial number of potential registrants will be gathered, registration petitions for public buildings, parks, playgrounds, stores, and public transportation stops will be approved. (Petitioners will obviously want to hold a registration session at Dudley Station during rush hour, rather than 3 a.m.!)

16. The referendum was approved 40,401–33,823 or 54.4%–45.6%.

17. M.G.L. c. 43 §129. One at-large representative would be elected for every 120,000 residents in excess of 150,000. As will be seen, *infra*, p. 9–12, the use of the 1975 state decennial census would result in the election of four at-large representatives to the City Council while the more current 1980 federal census would have resulted in only three at-large representatives. Politically, an even number of each body (9 + 3) could have significant ramifications.

18. M.G.L. c 43 §131 (St. 1977, c. 549, §3).

19. M.G.L. c. 54 §1. (St. 1975, c. 10, §5). The 1977 statute modifies the earlier statute by requiring the City Council to "divide the city into a number of wards equal to the number of . . . districts," M.G.L. c. 43 §131, when complying with the 1975 requirements to form equally populous political subdivisions every ten years based on the latest state decennial census. Plaintiffs maintain that state law does not mandate the use of the most recent state decennial census for drawing district lines, but only requires its use for drawing wards in 1975 and every ten years thereafter. (The City's logic that the most recent state decennial census is required to be used would have the City relying on the 1975 state decennial census in 1985 since that year's census would not be available until 1986.)

Drawing district lines following the November 1981 referendum required the use, plaintiffs maintain, of the most recent census according to federal law; in this instance it required the use of the 1980 federal census. Curiously, the Boston Redevelopment Authority had provided the City Council, as per its request, a breakdown of Boston's population by ward, precinct, and race, according to the 1980 federal census prior to the City Council's adoption of the district map based on the 1975 state decennial census. The City Council also had legal advice that it could use the 1980 census for the redistricting process. More curiously, if the City was required under the 1975 statue to use the state decennial census, there would have been no need to amend the statute, as was done in the waning hours of the December 1982 lame-duck legislative session, in essence mandating the use of the state decennial census "[N]otwithstanding the provisions" of the 1975 state statute on the subject. To eliminate the problem of having to use the outdated 1975 census in 1985, the new amendments require that the redrawing of districts take place in 1986 when the 1985 state decennial census is compiled. Governor King signed the bill on 31 December, 1982.

20. Civil Action No. 82-2633-C. In *Latino PAC* a coalition of minority groups, including Latino Political Action Committee, the Black Political Task Force, the Boston People's Organization, and others, got together to challenge the district lines finally drawn by the City Council and approved by the Mayor in early March 1982.

21. The one-person, one-vote doctrine, enunciated in *Baker v. Carr*, 369 U.S 186 (1962), *Wesberry v. Sanders*, 376 U.S. 1 (1964), *Reynolds v. Sims*, 377 U.S. 533 (1964) and their progeny, require that one person's vote be weighted equally with that of another. Therefore, a person's vote weighs more in a less populous district since each of the nine district representatives has one equal vote on issues before them, and it took fewer persons to elect that representative in the less populous district.

22. It is equally unconstitutional to dilute a group's voting strength by dividing it into many geographic districts so as to render it strong in none. This is called "cracking," and the Latino community claims this is what happened to them when the district lines were drawn.

23. The third minority district would include the South End, Lower Roxbury, and Mission Hill neighborhoods.

The two minority districts approved by the City Council are District 4 (Franklin Field, Codman Square, and Mattapan) and District 7 (Roxbury [Grove Hall], and most of Dorchester's Upham's Corner).

24. Where federal and state laws conflict, federal law prevails under the Supremacy Clause of the United States Constitution. See Note 19, *supra* p. 9.

25. See Answer of City of Boston Defendants to Complaint in *Latino PAC, et al*, v. *City of Boston, et al.*, Civil Action No. 82-2633-C at page 8. The City defendants further claimed that they were challenging the 1980 federal census in court in *Commonwealth of Massachusetts, et al.* v. *Klutznick, et al.*, Civil Action No. 80-2232-Z. Federal case law requires in apportionment cases the use of the most recent accurate population enumeration and presumes the federal census to be valid. The burden is on (a) the challenger of the most recent census (i.e.: the party who wants to use an older census rather than a recent one, especially where the recent one is the federal census) or (b) the party seeking to use a census other than the federal census where that census is more recent than the federal census, to overcome the presumption of the validity of the federal census. The Massachusetts litigation is combined with other state challenges in *Re: 1980 Decennial Census Adjustment Litigation*, 506 F. Supp. 648 (Jud. Pan. Mult. Lit. 1981). While the challenges to the 1980 census have not been concluded, it seems unlikely that any

will be successful in light of the Supreme Court decision in *Baldridge* v. *Shapiro*, 455 U.S. 345 (1982), in which the Court held that raw data reported by or on behalf of individuals pursuant to the federal census need not be disclosed either under the Freedom of Information Act or through discovery in the course of litigation.

It is ironic that while the City feared that the use of the 1980 federal census would undercount racial and ethnic minorities (one of the stated reasons for using the 1975 state decennial census), its use of the 1975 state census resulted in a sweeping challenge by the very people deemed to need protection. Racial and ethnic minorities accounted for 18 percent of the City's population in the 1970 federal census and 30 percent of the population under the 1980 federal census. (The 1975 state decennial census did not provide a percentage breakdown by race, but the percentage of minorities was significantly less than 30 percent). When these facts are known, coupled with shifting population patterns and the "packing" of minorities into two all-black districts with no voting strength elesewhere (and "cracking" of the Latin population—with no voting strength anywhere), it is not difficult to understand why the minority challenge was brought to court.

26. The most likely scenario would be for the Court to invalidate the current district plan on the basis of its violating the one-person, one-vote rule due to the unlawful variance between the most and least populous districts based on the 1980 federal census and ordering the City Council to draw a new map based on the 1980 federal census with guidelines on avoiding the dilution of minority voting strength either through "packing," "cracking," or other unlawful means. If the plaintiffs and City of Boston defendants can agree on a new political map, the case can be resolved quickly. If no agreement is reached, plaintiffs will pursue their claims of dilution (based on "one-person, one-vote" or "packing" and/or "cracking" theories). It is hoped that a court order will be in place by the end of June 1983 when statements about candidacy for the City Council and School Committee may first be filed with the Boston Election Commission.

27. Civil Action No. 57835, Suffolk Superior Court, 20 October, 1982.